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The BRICS, South Africa and dispute settlement in the WTO

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1. Dispute settlement: an introduction

WTO dispute settlement is essentially an international quasi-judicial process for trade matters – a trade court. Officially, the WTO legal text that governs the settlement of disputes is the 'Understanding of the Rules and Procedures Governing the Settlement of Disputes'(1), colloquially referred to as the dispute settlement understanding, or DSU for short(2).

Dispute settlement is a central feature in the multilateral trading system. Over the past 15 years the WTO Dispute Settlement has proven to be one of the most effective instruments available in any multilateral forum to defuse disagreements between countries as to their respective rights and obligations under the WTO's rather unique acquis of international law. The WTO's 10 year anniversary strategic review under the auspices of former Director General Peter Sutherland found the dispute settlement system to be a 'unique contribution' to the stability of the global economy, a construct 'to be admired' and 'a significant step forward' in the rules based system of international trade diplomacy(3). Matters before the WTO are between Member countries. Private parties do not have standing in the WTO generally, or under the dispute settlement system: industries thus rely on a government to initiate WTO action. This is an important aspect to keep in mind. Unless the government takes up the matter on behalf of industry, the dispute settlement mechanism is effectively unavailable to industry.

Without a means of settling disputes, the international trading system would be less

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effective because the legal rules could not be enforced when contravened. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable.

The WTO system is based on clearly defined procedures, with time lines for conducting disputes. It is notable that the underlying aim of the procedure is not intended to obtain judgments, but rather to settle disputes amicably through bilateral consultations between the involved parties where this is possible. So far, this aim has been rather successfully met. Out of the 439 complaints (request for consultations) filed to date, only 206 proceeded to the panel phase (litigation phase)[4]. A good number of the matters have thus been settled 'out of court' as it were, or remained within a protracted consultation phase between the parties.

2. Dispute settlement in the WTO

A complaining party initiates a WTO dispute through a request for consultations. There is a beauty in this procedure in that that there is no obligation on a complainant to proceed with participation in any form in a dispute beyond the consultation phase, whether the matter is settled or not during the consultations. Consultations thus assist to better acquaint a country with the issues underlying the dispute in order to make an informed decision whether to subsequently initiate the dispute or join as a third party, should the primary complainant consider it necessary to move to that point. Joining the consultations can be a valuable fact finding opportunity. As noted previously, more than half of all disputes ever notified to the WTO have been settled through the consultations mechanisms and did not proceed to the panel phase. This again points to the value of these consultations, and the importance of participating in them.

The complainant will proceed to trigger the court/litigation phase if the consultations do not prove successful. A so-called 'panel' makes the initial ruling, similar to a court of first instance in South Africa. The WTO Members then accept or reject the panel's ruling through the Dispute Settlement Body (DSB), which is effectively the WTO's plenary body, the General Council sitting in an alternative role. As a Member of the WTO, South Africa is represented on the DSB. A secondary process is available to appeal points of law and legal interpretation, similar to the function of the supreme or appellate division in South Africa.

A dispute arises when one country adopts a trade policy measure or takes some action that one or several WTO Members considers either to be 'breaking the law' i.e. under any of the WTO Agreements, or alternatively is considered to be nullifying or impairing the fine balance of right and obligations between the Members under the said Agreements.. These are the primary parties to the dispute, a defendant and one or several complainants. Another subsidiary group of Members can also form: these are third countries (third parties) to the dispute. Third Parties can declare that they have an interest in the case and enjoy some not insubstantial rights without having to assume the full burden of participation as a primary party. They may join neutrally or indicate their partiality to either of the primary parties.

Historically there was a procedure for settling disputes under the WTO's forerunner, the General Agreement on Tariffs and Trade (GATT). This early dispute settlement mechanism had an essential flaw in that the losing party could block rulings. This has been remedied under the WTO procedures. The WTO DSU also introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the process. The agreement emphasizes that prompt settlement is

essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling (i.e. the Panel phase), it should ordinarily not take more than one year, extended to fifteen months if the case is appealed.

It is notable, but not seen in practice, that at any stage of the proceedings the parties can step away from the judicial process, resembling a court or tribunal in nature, and settle the dispute by themselves. In other words consultation and mediation remain theoretically available options throughout.

In the event that the losing party does not comply with the ruling of the DSB, which will have been a standard requirement to bring the iterant behaviour into line with WTO obligations, the aggrieved party can request that the original panel be revived to examine the extent to which the loser has complied with the ruling (i.e. the compliance panel phase). If the loser fails or refuses to bring its national policies into conformity with the ruling then the aggrieved party may be entitled to compensation. It is important to note that no compensation in cash takes place. The aggrieved party could be authorized to retaliate against the iterant party by denying them trade concessions of a like quantum to that determined to be attributable to the continued maintenance of the illegal measure. In the US - Foreign Sales Corporation (FSC) case[(5)], which involved tax credits on US wheat exports, the quantum of retaliation awarded to the EU was US$ 4 billion annually. Progression to this stage is certainly not the norm in the system with merely a handful of cases having reached this stage

3. South Africa and WTO dispute settlement

South Africa and African countries generally have not taken to using the DSU to enforce their rights in the WTO. It is speculated that African countries have difficulties participating in the institutional structures of the WTO generally and in the dispute settlement mechanism specifically. The constraints faced by African countries include human resource and financial constraints, which often lead to an inability to defend their interests, and a fear of backlash from the world's larger trading powers, including advanced developing countries. These constraints are particularly notable in the multilateral trading system, which is becoming more complex. It is not only the complexity of the substantive international trade law, but also the complexity of the litigation process that makes WTO dispute settlement proceedings a daunting task for many African countries. In view of this, no African country has ever requested consultations against another WTO Member. This includes South Africa.

A serious and credible threat facing South Africa in respect of its WTO rights and obligations is the possibility of a WTO Member initiating a dispute and for South Africa to have to enforce its rights, from the back foot as it where. There is no legislation or even informal policy that dictates how disputes to enforce South Africa's WTO rights and obligations are brought or defended. In assessing this risk it is somewhat alarming that South Africa has however had three requests for consultations made against it between 1995 and 2008. The countries involved in these cases were India, Turkey and Indonesia. None of these matters proceeded to the establishment of a panel. In June 2012 a request for consultations was received by South Africa from Brazil. This is then the fourth consultation request that has been received by South Africa in the WTO era - this dispute is ongoing at the time of writing. There are thus two BRICS countries that have cited

complaints against South Africa, being India and Brazil.

The first matter was raised by India. In April 1999, India requested consultations with South Africa in respect of a recommendation for the imposition of definitive anti-dumping duties by South Africa on the importation of pharmaceutical products from India. India contended that South Africa had contravened the WTO rules by not making its administrative investigation with due care to comply with its WTO obligations. One of the bizarre aspects of this request for consultations was that because India has elected to be a developing country in the WTO and South Africa historically elected to be a developed country, India contended that the South African authorities had a duty to avail India of special and differential treatment and take India's special situation as a developing country into account.

The second and most recent matter was brought by Brazil. In June 2012, Brazil requested consultations with South Africa with regard to the preliminary determination and the imposition of provisional anti-dumping duties by South Africa on frozen chicken meat originating in Brazil and imported to South Africa. As in the instance of India, Brazil is essentially contending that South Africa was less than diligent in conducting a WTO compliant anti-dumping investigation.

China and South Africa have not been involved in any WTO disputes. South Africa after 1994 has actively pursued deeply cordial relations with China, in part due to China's support of the liberation struggle during the Apartheid era, and of late due to the emergence of China as South Africa's largest trading partner in 2010. China eclipsing the European Union, who held that position since the WTO was founded.

Another reason why there is less scope for tension between China and South Africa is that the countries concluded a Record of Understanding in 2006 whereby South Africa undertook to treat China as a "market economy" for purposes of trade remedy investigations. The implication of this understanding is that South Africa will not be able to use so-called surrogate countries in remedy investigations. China acceded to the WTO in November 2001. Having a 6-year shorter membership of the WTO than Brazil, India and South Africa indicates that China has actually been very active in its DSU participation, both as a complainant (8 times), but even more so as a defendant (21 times). China has made a point of joining disputes as a 3rd party with a view to using this less burdensome form of participation as a dispute settlement training ground, setting an example for other developing countries.

Within the BRICS configuration Russia apparently could be seen to have a lesser participation record than South Africa. However this is not an accurate observation as Russia's, accession to the WTO was only approved by the WTO in December 2011 and Russia ratified this accession domestically in August 2012. It is for this reason that Russia does not have a WTO dispute settlement record. This said, many Russian lawyers have been trained in international trade law during the nearly 20-year period during which the Russian accession negotiations took place. Due to the sheer magnitude of the Russian economy and its standing in the international community, being a permanent member of the United Nations Security Council, it is likely that Russia will engage in dispute settlement proceedings rather rapidly. It is noted that Russia faces approximately 100 market access barriers imposed by other WTO Members in the steel and chemical sectors alone. This is likely to be an area where it may take matters before dispute settlement panels[6].

In relation to taking offensive action, recall that South Africa has never brought a WTO dispute as a complainant. South Africa has however been a complainant and exercised third party participation rights in one case. During 2007 South Africa, for the first time since the establishment of the WTO, participated as a Third Party in a WTO dispute on agricultural subsidies. Unfortunately for South Africa, the main complainants (being Brazil and Canada) later suspended the case against the United States. While South Africa prepared its case (3rd party submission) for this dispute the work was never 'tested'. The positive side to this dispute was that South African practitioners gained invaluable experience - capacity building featured strongly in the joint government and industry preparations for the case. South Africa had broadly the same views on the case as Brazil. While there was an initial engagement between Brazilian and South African officials from the respective Geneva missions, no official cooperation or BRICS solidarity was ever cemented.

4. BRICS and WTO dispute settlement

4.1 Relative participation

'BRICS' is an acronym that describes an association of emerging and fast growing economies, Brazil, Russia, India, China and South Africa. The original configuration was 'BRICs' and was coined by the investment company Goldman Sachs in 2001. The four BRICs countries formed a political association shortly thereafter. South Africa was included into the BRIC group in 2010 and the term expanded to BRICS. Much commentary has surrounded the suitability of South Africa - from the perspective of its economic size and influence relative to the other members. For current purposes it is interesting to note that all five BRICS are now Member countries of the WTO. One could thus assess South Africa's BRIC-like status relative to how the other BRICS members function in the WTO, and how South Africa compares with the other four countries in its use of the WTO's dispute settlement system.

If an examination is made of the top 15 countries[7] using WTO dispute settlement, it comes as no surprise that the first two positions are taken by the United States and the European Union. What is notable for current purposes is that three of the five BRICS countries appear in the top 15 section. Brazil is at number 4, India is at number 6 and China is at number 12. South Africa is glaringly missing from this list. Judged on WTO dispute settlement participation South Africa is somewhat of an anomaly being very unlike the other BRICS countries. This picture set out in table 1[8].

Table 1: Largest Users of the WTO DSU by number of cases

Member	Complainant	Respondent	Third party
United States	97	113	86
European Union	84	70	104
Canada	33	16	71
Brazil	25	14	64
Mexico	21	14	55
India	19	20	67
Argentina	15	17	31
Korea	15	14	58
Japan	14	15	106
Thailand	13	3	48
Chile	10	13	26
China	8	21	78
Guatemala	8	2	20
Australia	7	10	59

[Figures counted from January 1995 to December 2011] (Source: Torres 2012)

If one narrows the figures from Table 1 and adds South Africa, then a fairly clear BRICS related picture emerges. This is illustrated in Table 2.

Table 2: Relative Participation of BRICS Countries in WTO Dispute Settlement

BRICS: WTO Disputes	Complainant	Defendant	3rd Party	Total	BRICS %
Brazil	25	14	64	103	32%
China	8	21	78	107	33%
India	19	20	67	106	33%
South Africa	0	4	2	6	2%
Totals	52	59	211	322	100%

(Russia n/a due to 2012 accession) (Souce: Torres 2012 & own calculations)

Of the 322 DSU matters applicable to BRICS countries, participation is fairly evenly split almost exactly by thirds between Brazil, India and China. South Africa features on only 6 out of a total of 322 cases, representing merely 2% of overall BRICS participation in WTO disputes. Clearly South Africa is substantively atypical of a BRICS member country when assessed in relation to WTO dispute settlement participation. One suspects that South Africa is paying in welfare

losses by not applying this critical spanner in its trade defence tool box.

4.2 The Brazilian system

Brazil has successfully used dispute settlement to support its negotiating positions. This required a major effort in terms of training and institutional reform to meet these arising challenges. In order to maximize the benefits of participation in the DSM, it is necessary to develop internal mechanisms that enable the private sector to inform the government of the trade barriers it encounters, with a view to assessing whether WTO proceedings are advisable.

Brazil is well regarded as a developing country that has not only participated extensively but has participated with a high-level of acumen and success. To do this Brazil has invested considerable resources and restructured its institutions. Brazil has a semi-formalised mechanism for enabling the private sector to inform the Government of measures obstructing trade. The mechanism is based on the interaction between three bodies: the Chamber of Foreign Trade (CAMEX), the Private Sector Consultative Council (Conex) and the General Dispute Settlement Unit in the Ministry of Foreign Affairs (CGC-MRE).

CAMEX is an inter-ministry advisory body which formulates Brazil's trade policy. The interface between CAMEX and the private sector is conducted through the 20 representatives of Conex actively participating in the work of CAMEX. Any exporters faced with a trade barrier can draw these to the attention of the CGC-MRE. If the latter considers that a claim before the WTO could be successful, it will submit the matter to CAMEX. Once the positions of the various public and private actors have been heard at CAMEX, it will decide whether the possibly WTO-inconsistent measures are to be referred to the CGC–MRE which will initiate proceedings in the WTO. If Brazil decides to bring the case before the WTO, the private sector remains fully involved and provides effective support to the Government in developing legal arguments, providing factual evidence and partly funding the dispute.

4.3 Cost effective participation

The WTO system has recognized that developing countries need high level assistance in order to participate more effectively in trade disputes. To this end, the Advisory Centre on WTO Law (ACWL), was established in 2001 to provide legal support to developing countries in their WTO activities, mainly, but not limited to, dispute settlement. The ACWL provides dispute settlement services at rates much lower than those of private law firms, and it also applies a cost ceiling. To qualify for these services, developing countries must be members of the ACWL and pay a single contribution calculated on the basis of their share of world trade. ACWL services are invoiced by the hour, at a rate which varies in accordance with the member's category. It is however noticeable that there are niche law practices emerging in BRICS countries who are able to litigate WTO disputes at more reasonable rates than their counterparts from developed countries.

Currently India is the only BRICS country that is an ACWL member. Brazil was formerly a member and saw itself as ‘graduating’ to a level of maturity where it could move into the arena of using its own capacity together with private council. South Africa would be a natural candidate for ACWL membership.

5. Recommendations for improved South African participation

5.1 Structural

In taking some lessons from South Africa's participation as a third party and the experiences of the other BRICS countries it is clear that South Africa needs to engage far more actively in WTO dispute settlement if it wishes to take on the mantra of a typical 'brick in the wall'. This is critical for the country if it is to defend its trade interests generally and against other BRICS member countries, who do not appear shy to cite South Africa, BRICS association or not.

It is clear that South Africa would need to apply a range of skills in order to make effective stepped-up interventions under the DSU.

It is recommended that South African cases be prepared as a joint public sector private sector partnership. The overarching principle should be to firstly treat the disputes on the merits but to initially do so with the added strategic objective of using the participation as a training platform with the view to creating an enduring capacity base that can be used in other WTO disputes. This said, South Africa is partly on the back foot and needs to put up a defence at short notice. This is because our capacity is low, due to a lack of prior participation in WTO dispute settlement. This should make private sector support an added attraction for the government.

The formation of 'Dispute Task Teams' is recommended. Typically a Task Team could comprise of a government grouping representing the Department of Trade and Industry (dti); and then, as appropriate to the case at hand, the International Trade Administration Commission (ITAC), the Department of Agriculture, Forestry and Fisheries (DAFF) and the Department of International Relations and Cooperation (DIRCO). In addition one should follow the Brazilian experience and include a private sector contingent constituted of representatives from the affected industries and their trade lawyers.

Since WTO process is an intergovernmental forum, government participation is a sine qua non. The dti is the line ministry dealing with the WTO and is likely to lead ex officio in presenting a South African case. We also note that while the dti is the line ministry responsible for trade matters, it should be recognized that there are potentially wider political considerations in South Africa's international relations that would likely justify some key involvement by DIRCO. It is noted that all of South Africa's citations from other countries to date have been on alleged anti-dumping violations - ITAC should be included as being responsible for the disputed remedy investigation cases.

From an industry perspective it is noted that the concerned sector should be well organized. It is suggested that a working committee be established under the auspices of the relevant industry trade association, which would then feed into the combined national Dispute Task Team.

Within the Dispute Task Team a core drafting team should be established consisting of lawyers and other technical experts (as appropriate). As the name suggests, the core drafting team shall be tasked with drafting and preparing all legal documents required for the case, including the submissions. This is where detailed drafting work is performed. The result of the work of the core drafting team should feed back into the Dispute Task Team. The Task Team should be kept abreast throughout the drafting process of progress. It is suggested that the government rapidly engage with the Advisory Centre on WTO Law (ACWL) and join this body. This function would be critical to obtaining an oversight 'second look' at the work of the core drafting team.

5.2 South African government policy benefits

The South African government has an opportunity in signalling its support for the economy in a meaningful way in bringing and defending trade disputes. A WTO dispute clearly addresses injustice in that the offending party is not adhering to obligations undertaken under international trade law for which other countries (like South Africa) potentially pay twice, firstly through the concessions given in return for the undertakings by the defaulter and secondly through the negation of such concessions through non compliance. It would be morally difficult for the government to avoid defending a dispute vigorously when requested to do so by the industry suffering losses due to unfair actions of other countries or their industries when judged against their international legal obligations.

In the recently adopted Trade Policy Strategy Framework the government in fact recognises the importance of participation in WTO dispute settlement proceedings and to build the necessary capacity within South Africa. Moreover, the dti is in the process of drafting a policy document for greater participation in WTO dispute settlement. The process is progressing at NEDLAC where business has been making inputs through Business Unity South Africa (BUSA).

There is clear value for both the South African government and local industry in raising and defending trade disputes. The government will be able to credibly use the DSU as an integral part of its trade policy and negotiations strategy. For industry, it could mean possibly regaining lost market shares and related profitability and send a signal to other markets that South Africa is prepared to defend its industries from unfair external competition. In doing so South Africa will move a step further in cloaking itself in the mantle of the dispute settlement profile of the other member states in the BRICS association and in so doing grow into its rightful profile within the BRICS configuration.

6. List of primary references

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Footnotes

1. Annex 2 to the Marrakesh Agreement Establishing World Trade Organization: Understanding of the Rules and Procedures Governing the Settlement of Disputes; hereinafter referred to as: 'the DSU' for ease of reference.

2. A more detailed reading as to the functioning of WTO dispute settlement may be referenced to: UNCTAD: 'Course on Dispute Settlement 3.2 Panels / 3.3 Appellate Review' United Nations, New York & Geneva 2003.

3. Report by the Consultative Board to the Director General Supachai Panitchpakdi: 'The Future of the WTO Addressing Institutional Challenges in the New Millennium' WTO, Geneva 2004, at page 49.

4. As cited by the WTO at 31 December 2011.

5. WTO Document series: WT/DS108.

6. Press statement by Deutche Bank Moscow to the RT (Russia Today) satellite network on 22 August 2012.

7. WTO membership stands at 157 countries in August 2012 after the accession ratification of Vanuatu.

8. Note that that Russia only officially joined the WTO in 2012 and is thus not relevant to the comparison.

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