

Facilitating initiation of WTO Disputes through Private Sector

By

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Although the WTO is essentially an international organization in which private individuals do not play any direct role, they are the main beneficiaries of the global trading system. A growing number of WTO provisions such as those concerning public procurement, intellectual property rights or food safety have an immediate impact not only on legal relations between the WTO Members and their citizens but also between individuals themselves.

The WTO system, by providing rules addressed to both States and private parties represents the most sophisticated legal framework ever conceived to govern global trade. However, despite the progressive judicialization of the dispute procedure, private parties have no direct access to the WTO's dispute settlement process in order to complain about government practices that allegedly infringe on a WTO agreement, nor can they rely on rights granted by WTO law before domestic courts. This is despite the fact that they may often be the ones (as exporters or importers) most directly and adversely affected by the measures allegedly violating the WTO Agreements. The same is true of other non-governmental organizations (NGOs) with a general interest in a matter under dispute. They, too, cannot initiate WTO dispute settlement proceedings. May be one of the reasons why private parties are not allowed direct access to the dispute settlement system is that the Members do not want the organization to lose its intergovernmental nature.

However, private operators conduct trade and increasingly it is through improved conditions for these private operators that Members benefit from WTO disciplines. Therefore, governments do not act in isolation and the private sector can, and often do, exert influence or even pressure on the government of a WTO Member with respect to the triggering of a dispute. Though, in the absence of a proper institutional and legal mechanism for airing their concerns to the government, the private sector is very often confounded with the issue of the forum or the manner in which it is to be approached. This calls for providing an enabling environment to the private sector to bring cases forward.

Establishing of proper means in this regard is indispensable for the industries and businesses confronting target export markets so that they can

counter measures taken by government of importing countries. As such, instruments can be adopted to ensure that different business interests are adequately represented and are able to bring to the notice of the government their grievances to seek redress through dispute settlement under the multilateral trading system.

In Pakistan, apart from the domestic legal mechanism for initiation of certain trade remedial actions at the national level to counter dumping, subsidies or surge of imports, no other device exists for seriously approaching governmental institutions for taking up remedial issues pertaining to violation of WTO Agreements. As there is an increasing pressure for a more direct involvement of private parties in the dispute settlement system, several WTO Members have formally adopted internal legislations under which private parties can petition their governments to bring a WTO dispute. Both the US, through its Trade Act of 1974, and the EC through its Trade Barriers Regulation have created trade remedy mechanisms that allow private parties to complain to their trade authorities about illegal practices of third countries. Pakistan needs to come up with similar laws so as to facilitate and build up the confidence of its private sector to approach the Government for taking matters to WTO for dispute settlement.

Beginning with the example of US legislation as a model for Pakistan, the primary objective of Section 301 of its Trade Act of 1974 is to provide a leverage to enforce US rights under trade agreements, resolve trade disputes and open foreign markets to US goods and services. It is also aimed at producing equitable conditions for US investment abroad and improving foreign protection of intellectual property rights.

Interestingly, private parties can submit a petition to the US Trade Representative (USTR) requesting an initiation of a section 301 investigation of foreign government acts, policies or practices that violate, or deny US rights or benefits under trade agreements or are unjustifiable, unreasonable, discriminatory and burden or restrict the country's commerce. As a consequence, Section 301 retains the principal statutory authority under which the United States may impose trade sanctions on foreign countries.

Procedurally, section 301 investigations may be commenced either by an interested party that files a petition with USTR requesting an investigation of a particular practice of a foreign country or USTR self-initiates an investigation. However, where USTR initiates an investigation based on a petition, it must provide an opportunity for the public to comment on the issues, and hold a public hearing if requested by the petitioner or an interested person. The term "interested persons", under the said US Trade Act, includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by actions taken by foreign governments.

Upon initiation of an investigation, USTR requests consultations with the foreign government and where such an investigation involves an alleged violation of WTO Agreements, USTR follows the consultation and dispute settlement provisions set out in those Agreements.

Where USTR makes an affirmative determination that a foreign act, policy or practice is actionable under section 301, it can suspend, withdraw or prevent the application of trade agreement concessions or impose duties or other import restrictions on goods or impose fees or restrict the terms and conditions or deny issuance of authorizations to provide services.

Now taking European Community's (EC) Trade Barriers Regulation as a similar example. The objective of their internal legislation, establishes a procedure enabling economic operators and the Member States to request the Community institutions to respond to any trade barriers put in place by third countries. This is in view to eliminating the resulting injury or adverse trade effects in accordance with the WTO Agreements. Council Regulation (EC) No. 3286/94 of 22 December 1994 lays down the procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights, in particular those established under the auspices of the WTO.

This regulation covers the trade barriers that impede Community exports to third country markets and is applied not only to goods but also to certain services, particularly cross-border services. It refers to trade barrier as any trade practice adopted by a third country but prohibited by international trade rules which gives a party affected by the practice a right to seek elimination of the effect of the practice in question. These international trade rules are essentially those of the WTO or those set out in bilateral agreements with third countries to which the Community is a party. Moreover, it defines injury as any material injury, which an obstacle to trade threatens to cause to a Community industry on the market of the Community.

The term "Community industry" is defined in the regulation as all Community producers or providers of products or services, which are the subject of an obstacle to trade or all those producers, or providers whose combined output constitutes a major proportion of total Community production of the products or services in question.

Complaints under the regulation can be lodged by or on behalf of a Community industry that has suffered material injury as a result of trade barriers. However, the complaint must contain sufficient evidence of the existence of the trade barriers and of the injury or adverse trade effects resulting from them. In examining the said injury or adverse trade effects, certain factors are taken into account such as the volume of Community imports or exports concerned, the prices of the Community industry's

competitors, the rate of increase of exports to the market where the competition with Community products is taking place, the export capacity in the country of origin or export, and so on.

These, commercial policy measures are adopted by EC where it is found, that action is necessary in the interests of the Community in order to ensure the exercise of its rights. The appropriate measures are determined on the basis of the regulation and these may include suspension or withdrawal of any concession resulting from commercial policy negotiations, or the raising of existing customs duties or the introduction of any other charge on imports or the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

Pakistan, in line with the pattern provided by the above models, too needs to legislate a commercial policy instrument that provides a mechanism of initiating complaints by the industries affected by violations of WTO Agreements by foreign countries. This must be done in view of enforcing Pakistan's rights under trade agreements, resolving trade disputes and opening foreign markets to Pakistani goods and services. This would, however, require a specialized governmental independent body with a role far greater than the present National Tariff Commission and would be expected to deal with all issues right from receiving of complaints from interested parties, conducting investigations and even taking matters to the WTO dispute settlement with the assistance of Pakistan's Permanent Mission to WTO in Geneva. Besides, the ground work that would be expected to be done by this body in continuous consultations and input provided by the private sector, it would have to establish a panel of experts, particularly international trade lawyers, to determine whether the case brought forward by the private sector is fit for pursuing up to the WTO level or even initiating an investigation regarding it.

One serious issue that Pakistan at the moment faces is the information problem. An option to deal with the information problem is to create mechanisms through which data on trade and investment barriers is collected and analyzed by the same body as proposed above. Such an approach would reduce the burden on individual enterprises to have expertise on WTO matters, reduce the cost of collecting, aggregating and analyzing information and also assist Pakistan's Mission in Geneva for future WTO negotiations. Data could be collected through periodic surveys of a representative cross section of companies or firms that are actively involved in importing and exporting, multinationals, trade and industry associations, and consumer organizations. The information that will be compiled would be used to assess the status quo on export markets, as well as policies maintained by the government that have an effect on imports, and help identify potential WTO cases to be taken up for dispute settlement.

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