

COTTON AND THE LDCS IN THE WTO: NEGOTIATIONS AND LITIGATION, TWO SIDES OF THE SAME COIN¹

Nicolas Imboden and Anne-Sophie Nivet-Claeys

I. Introduction

In just a few years time, the cotton issue has become a textbook case at the WTO. Whether an example of concerted action of media mobilisation by small developing countries, or an example of the contradiction between the words and practices of the developed countries, the cotton “problem” has generated a considerable amount of debate, enquiries and work. This article will set out the essential aspects of the case.

First of all, negotiations and dispute settlement are not contradictory. Secondly, experience has shown that least-developed countries (LDCs) with no economic power over a product that has no weight in world trade can nevertheless place “their” product on the multilateral negotiations agenda. This was possible thanks to a systemic approach on the one hand, and in this precise case, to the irrefutable demonstration of the link between trade and development, on the other. Thirdly, the mobilisation of public opinion and the media is essential. This becomes difficult to maintain, however, when the anticipated sprint turns into a marathon. Fourthly, it is necessary to create an institutionalised and permanent negotiating capacity, and to set up coordination mechanisms enabling a proactive rather than a reactive approach. Fifthly, a commitment of this nature requires considerable financial resources, which the bilateral European donors have succeeded in mobilising.

On 16 May 2003, four West and Central African (WCA) States, among the poorest in the world, made a ten page submission to the WTO explaining how the price-related subsidies applied by certain cotton producing Western States were damaging their competitiveness and consequently their export incomes, and, on a more global scale, their development. Benin, Burkina Faso, Chad and Mali (C4, for Cotton-4) demand that trade-distorting subsidies be reduced, or even eliminated, by placing their initiative in the centre of a larger battle, i.e. the fight against poverty. Until such time as these subsidies are eliminated, they also request temporary assistance and emergency measures to safeguard their sector. Publicised by the visit of President Blaise Compaoré of Burkina Faso to the WTO in June 2003, and pursuing an appeal made in 2001 by the West African cotton producers against the subsidies, this submission marks the beginning of the cotton saga at the WTO. A rather dark tale for the moment, since in 2008 nothing

¹ Original in French; translated by Warwick Wilkins, revised by Nicole Antonietti

substantial has yet been decided for the white gold of West and Central Africa despite the great strides made.

An introduction of the cotton issue is necessary for understanding why the C4 countries opted for negotiations rather than for litigation. The fact that the Brazilians actually chose the legal approach clearly shows that neither method is “more or less effective”, but rather that the choices reflect variable determining criteria that depend both on different actors and objectives. It will then be necessary to examine how the battle for white gold has contributed to strengthening the role of developing countries, and especially LDCs, within the multilateral system and within the institution itself.

II. The Cotton Case

Some Emblematic Figures²

In absolute terms, African cotton is competitive. Harvested by hand, of good quality, non-irrigated and requiring fewer inputs than Western cotton, African cotton enjoys a recognised comparative advantage. For once handiwork can compete with machines, but this advantage melts away like snow in the sun when faced with American and European subsidised cotton. In the C4 countries, cotton represents more than 6% of the gross national product, 60% of agricultural export earnings and more than 30% of the total export income. Cotton production involves some 20 million people in West and Central Africa (producers and their families). There are 25,000 cotton growers in the United States and 100,000 in Europe (90,000 in Greece and 10,000 in Spain). WCA production varies between 2 and 4% of global production, while that of the European Union (EU) and the United States (US) fluctuates around 2% and 20 % respectively. Furthermore, the US is the leading world exporter of cotton (more than 40%). In 2003, American subsidies exceeded 3.3 billion dollars and European grants amounted to about a billion. This amounts to roughly 4 to 4.5 billion dollars, i.e. the GDP of each of the co-sponsors of the Sectoral Initiative in Favour of Cotton. Studies have also shown that there was a strong correlation between the fall in the price of cotton on the world market during the period 1997-2003 (fall of about 50%) and the use of massive subsidies. Suppressing these subsidies would have a noticeably beneficial effect on the price of this product. The increase in prices is not an end in itself, but does of course enable improved export earnings for the countries where cotton represents the main source of revenue, and constitutes therefore a lever for development and in the fight against poverty. In the present economic climate of rising prices, it is clear that subsidies have less impact, because part of them is directly linked to the price. Nevertheless, it is necessary to ensure that they cannot be reintroduced in the event of a new fall in world prices.

Not only have the Africans not obtained what they have been demanding since 2003, but the state of the sector has worsened in recent years. The period

²See, for example, the International Cotton Advisory Committee (2007), “The Importance of Cotton in Africa: African cotton in perspective”, Presentation to the WTO Director-General’s Consultative Framework High Level Session on 15 and 16 March 2007, WTO, Geneva.
See also Evangelista R. (2007) “The Cotton Problem in West Africa”, presentation on behalf of the DAGRIS organisation at Lausanne University on 17-18 April 2007.

2004-2007 has experienced declines in production generating serious problems for the sector in the C4 countries. The harvest of seed cotton has gone from 2.7 million tons in 2004 down to 1.2 million tonnes in 2007³, which brought production levels back to those of fifteen years earlier. Since cotton is not a monoculture in West Africa, the fall in cotton production in 2007 also led to a decline of rotationally produced cereals in the amount of about 500,000 tons in zones with recent structurally surplus cotton (because fewer inputs were available). This “collateral damage” is even worse in this period of dramatic rises in the price of agricultural raw materials, of price fluctuations leading to great uncertainty and of a rising world food crisis.

The price of cotton on the world market has increased in recent months but the low quantities produced in 2007 have limited the profit that African countries could derive from this new situation. Furthermore, the rise in cotton prices is partly erased by the very low level of the dollar in relation to the euro, the currency on which the Central African franc (CFA) is secured. The steep rise in oil prices also puts a strain on competitiveness by increasing the cost of transport and of inputs. Cotton companies are in a disastrous state. It is true that the rise in prices (and therefore of producer purchasing prices) theoretically enable the cotton companies to balance their accounts, but with production reduced by a half, ginning runs at 50% and the production cost per kilo increases. Even if, in the short term, subsidies do not constitute the most harmful factor, the emergency proclaimed in 2003 is now true more than ever, and the struggle against subsidies is likely to be a long-term issue (i.e. the guarantee there will be no return to subsidies once prices fall).

Cotton in the Doha Negotiations

The Sectoral Initiative in Favour of Cotton, launched in 2003, sought, and still seeks, to denounce an unfair situation in which developed countries heavily subsidise their cotton production by a direct price support, competing worldwide with producing countries, some of whom are among the poorest in the world and do not make use of subsidies. Market conditions, therefore, are not satisfied, and the African countries of the C4 are using their sectoral initiative to ask for the rules of international trade to be respected and to become fairer, and finally, for some transitory support measures to be implemented for the sector until the abolishment of the subsidies. In 2001, the word “cotton” did not appear in the Doha Declaration that launched the new Round of negotiations. Following the Cancun Ministerial Conference in 2003, cotton became a completely separate item on the agenda of the Doha Development Programme and in the negotiations. The cotton issue very quickly became a test case for the development dimension that members were ready to give to this Round. Cotton also embodied the strengthening of the role and place of the LDCs within the multilateral trading system, and more prosaically, the Institution itself. Unfortunately, the prospect of a rapid result has faded away. What is more, the difficulty in reaching a convincing result is an illustration of the high stakes linked to this issue in the developed countries which use distorting subsidies and are more inclined to satisfy domestic requirements than international commitments.

³ French Development Agency, (2008), “The Cotton Sector Situation 2007/2008”, unpublished.

The July 2004 Package and the Hong Kong Declaration of December 2005 confirmed the special status of the cotton issue within the negotiations. The successive submissions of the C4 enjoyed virtually unanimous support among members, with even the Europeans lending their support. In fact, only the Americans continued to deem the proposal unacceptable, whilst being unable, for internal political reasons, to formulate a counter-proposal acceptable for discussion, i.e. fulfilling the Hong Kong criteria of treating cotton in an “ambitious, rapid and specific manner”. The modalities text of July 2007 produced by Chairperson Falconer gave more than its full due to the C4 proposal, arguing that it was the only proposal on the table that conformed to the Hong Kong mandate. The way seemed, therefore, relatively clear for the pursuit of negotiations. Unfortunately, with no prospective deadline for concluding negotiations, there has been a decline in the interest and in the mobilisation of the media. In addition, governments and producers have themselves been less involved in the issue, since nothing has really moved. This impression of diminishing interest is now reinforced by the presence of factors other than the subsidies, which are contributing to weakening the WCA cotton sectors (rise in oil prices leading to an added cost for inputs, weakness of the dollar compared to the euro, the implementation or absence of internal reforms etc.). The “subsidies problem” has therefore become less visible and less obvious though it remains just as legitimate as in the past. By definition, in a period of high prices, subsidies linked to prices have no effect, because the level for triggering these is not reached. However, this is no reason for not removing them in order to guarantee their non-utilisation in the future.

It is sometimes said that the devil is in the details, and this is equally true for cotton. When one gets into technical discussions and numbers, things become complicated. The support of the European Union has dissolved and the positions of the Commission have hardened noticeably. The United States still refuses to negotiate as long as there is no general agreement on agriculture. This is mainly because the American cotton lobby (the National Cotton Council, which represents the interests of the whole sector and not only the cotton growers) is so powerful that the American authorities are unable to provide a counter-proposal. The more the negotiations go forward, the tenser the debates become, particularly because internal pressure becomes more definite. The problem for the C4 is that it is difficult to negotiate when the main partners adopt as an insurmountable limit that which they effectively need for responding to their own support programme. At the present time, one is forced to observe that the “human face of Doha”⁴, i.e. cotton, runs the risk of drowning in internal political considerations that are nevertheless themselves partly negotiable by each of the major participants within their own camps.

Cotton in Court

Brazil’s initial complaint was lodged on 6 February 2003. The product concerned was upland cotton⁵ (and other products affected by export guarantee credits) and the measures concerned were internal agricultural support, export

⁴ Expression used by the Ambassador of Bangladesh at the WTO, March 2008, Summit of the Least- Developed Countries, Maseru, Lesotho.

⁵ The term “upland cotton” denotes raw upland cotton as well as the primary forms transformed into upland cotton such as upland cotton fibres and seeds.

credits and other measures suspected of containing internal and export subsidies. In September 2004, the Dispute Settlement Body (DSB) upheld Brazil's complaint. Chad and Benin appeared as third parties in the procedure. The United States appealed against this decision, and in March 2005, the Appellate Body confirmed the decision reached in the first instance. In its conclusion, the Appellate Body recommended that "the Dispute Settlement Body request the United States to bring its measures — found in this report and the Panel Report as modified by the present report to be inconsistent with the Agreement on Agriculture and the SCM⁶ Agreement — into conformity with its obligations under those Agreements"⁷. Noting in September 2006 that the United States had not adopted implementation measures on certain points and that other measures fell short of compliance, Brazil requested the convening of a Compliance Panel to record US failures to comply with the decisions of the Dispute Settlement Body and the Appellate Body. The Panel was finally accepted in October 2006, having initially been blocked by the US. Chad appeared again as the third party. In late 2007, the Compliance Panel ruled in favour of Brazil, which was then allowed to exercise retaliation. On 11 February 2008, the United States appealed against the decision of the Compliance Panel⁸. The Appellate Body should have delivered its report within 60 days (11 April)⁹ but eventually communicated its conclusions to members on 2 June. It was again noted that the US were acting "inconsistently" with the rules of the WTO and had "failed to comply" with the recommendations and previous decisions of the DSB¹⁰. This tactic of systematically appealing would seem to indicate that the US is more intent on gaining time than winning the case.

III. Negotiations versus Dispute Settlement: Convergence rather than Divergence

The aim of this article is not to carry out a comparative study of the advantages and disadvantages of negotiations and legal procedures, nor to oppose them systematically. It is more appropriate to speak of the convergence and divergence of the approaches and their results rather than of their advantages and disadvantages, because the advantages of one approach often represent the disadvantages of the other...

For the African countries, the issue of choosing between negotiations and litigation was the very first consideration. In the case of cotton, however, the situation was rather special insofar as the African countries did not, themselves, really have the option of initiating a dispute settlement procedure. Had they used the same arguments as Brazil, the two cases would have been combined, which would only have served to slow down proceedings and been prejudicial to the African countries. Negotiations, on the other hand, allowed the C4 countries to develop their own arguments within a framework that was perfectly suited to the logic of the C4 approach, based upon the undeniable link between trade and development.

⁶ Agreement on Subsidies and Compensatory Measures

⁷ WTO Document, WT/DS267/AB/R, page 332.

⁸ WTO Document WT/DS267/33, 19 February 2008.

⁹ WTO Document WT/DS267/34, 25 April 2008.

¹⁰ WTO Document WT/DS267/AB/RW, pp. 198-201, 2 June 2008.

With negotiations, a problem is approached using a cooperation logic. It is settled, if not permanently, at least for a relatively long period, until a new Round of negotiations is concluded. Within the dispute settlement framework, one (or several) members choose to challenge another member. Subsidies are challenged because they are in flagrant contradiction with the international commitments made by the countries applying them¹¹. Although both negotiations and litigation aim to have an impact on the current situation – an impact based upon results that lead to changes in the existing state of affairs – the approach is different: multilateral trade negotiations seek to change the existing rules in order to build a global system based upon new principles (changes for the future); legal procedures, on the other hand, seek the application of the rules already in force but not respected by some members of the World Trade Organization (a particular country is challenged, but jurisprudence is subsequently available for those who wish in turn to do the same. The African countries decided to have the rules changed. In essence, they wanted rules to be applicable to all concerned, had no other arguments than those of the Brazilians, and wished to take advantage of the room for discussion that was temporarily available within the framework of a round of negotiations. They have, besides, never excluded a possible recourse to dispute settlement should they fail to obtain satisfaction via negotiations. Finally, the potential economic results for the African countries promised to be greater through negotiations. Several studies¹² have indeed shown that, thanks to Doha, significant changes in the “subsidising” countries could increase the earnings of cotton exporting countries by roughly twice the amount that the US would, in any case, have to relinquish (in the absence of the Doha Development Programme) in order to bring their support programmes in line with WTO obligations.

What distinguishes the cotton issue is the coincidence between a round of trade negotiations and the initiation of a long legal procedure. Whereas trade negotiations are codified according to a specific calendar, legal procedures may be initiated at any time and do not rely upon the existence of a negotiations round. Inevitably, this state of affairs had a reciprocal impact on both approaches. On one hand, the simultaneous nature of the two processes reinforced the “publicity” surrounding the cotton issue, while a legal conviction also served to support the legitimacy of the political approach in the negotiations. On the other hand, the coexistence of the two approaches made it possible for the US to try to “sell” the same thing twice over: to agree to something as a concession in negotiations that they are in any case obliged to implement following the dispute settlement, but have still not carried out. This was particularly the case for the export subsidies, which the United States have not yet completely eliminated despite several legal rulings, and which are set down in the negotiations as a concession with an implementation date extending beyond that imposed upon the US.

For a country such as an LDC, attempting a lawsuit in a dispute settlement also represents a considerable expense should they request legal support which, in any case, is essential. However, to set oneself up as a third party and receive advice as part of this approach is now free of charge for LDCs. Negotiations are

¹¹ Refer to Sumner, D. A. (2005), “Boxed in - Conflicts between US farm Policies and WTO obligations”, *Trade Policy analysis*, Cato Institute, n° 32, December, p. 25.

¹² On this topic see particularly the works of Anderson, K., Valenzuela, E., and Martin, W. For a brief overview, see Anderson, K. and Valenzuela E., (2006). “WTO’s Doha cotton initiative: How will it affect developing countries?” The World Bank Group, *Trade Note* n° 27, March 30.

also expensive for small missions with human resources that are often limited but involve wide-ranging assignments, especially in the case of an extension without a tangible result. Although developing countries, and especially the poorest, concentrate their work and resources on agricultural negotiations, the need to follow debates in other areas increases the needs of the smaller missions. The capacity to negotiate with which a “beginner” country equips itself during a negotiations round serves many other purposes other than straightforward negotiation. The benefits of an investment of this nature may well, therefore, prove to exceed the costs.

In negotiations, the results apply to all. In litigation, only the parties involved are concerned by the decisions. The result varies according to the position that the country adopts in the legal procedure itself, i.e. as a plaintiff or simply as a third party, as well as the ability if need be of the litigant country to effectively apply retaliatory measures. To a certain extent, cotton was a straightforward case for Brazil since it could not only prove the damage caused by the subsidies but could also apply retaliatory measures insofar as its exchanges with the US are structured around other products than cotton. The African C4 countries, on the other hand, had no other real option than that of being a third party, their only exchange value being precisely cotton. On the American side, it is clear that the US are playing with the procedure by employing every possible legal measure in order to gain time, which constitutes a blatant disadvantage for the African countries awaiting a result. The failure, however, to comply with WTO rules exposes the US to both retaliatory measures and other proceedings that some members may introduce, based upon the judicial precedents set in the case of cotton. The opponents to provisions adopted by another member may be encouraged to multiply complaints, based upon the logic and reasoning of an initial action judged admissible.

Is one course more political than the other? By definition, negotiations are political whereas dispute settlement is not. The latter is supposed to remain outside all political consideration. Nevertheless, insofar as the cotton question opposes a developed country to some of the poorest nations in the world, the question inevitably becomes political because of the existence of a power relationship. Furthermore, some countries which depend on big powers (especially in terms of development aid, budgetary support, etc.) have reason to believe that their bilateral relations will influence their trading ties more extensively. The American National Cotton Council, furthermore, never misses an opportunity to “vaunt” the American aid allocated to cotton and other areas, implying thereby that the African countries should be quite satisfied, and act as if this could exempt the US from respecting WTO rules.

IV. Cotton, the LDCs and the WTO: a Fleeting Symbol or a Ground-Breaking Change?

Small countries have very few options in the fierce international trade battle. Some issues which are crucial to small countries, such as agricultural subsidies, are not open to choice and can only be addressed within a multilateral framework. This framework can be of great advantage to these countries, provided the goalposts are not moved. The advantage of the multilateral over the bilateral or

regional is that, since the LDCs often have little to offer in negotiations, they are of no interest to the big countries in a face-to-face situation. Conversely, when they form a coalition around a common interest, they can become a significant negotiating force and even if they are unable to make them yield they can at least shake up the big players who often adopt a casual approach or act with impunity within the system. The action of the West and Central African countries is “an example of politically weak countries taking concrete advantage of the principles of liberal economics applied by multilateral institutions in order to challenge the protectionist policies of industrialised countries”¹³. Although GATT was a rather closed club of developed countries negotiating among themselves – and free for LDCs to adopt or discard the Agreements – the creation of the WTO completely upset the status quo and gave developing countries an undeniable place within the system. The C4 attacked the powerful nations with the very weapons that had previously been their own preserve. The birth of the WTO and particularly the launching of the Doha Round marked a real change of paradigm in international economic relations and the multilateral trading system. From being a “club of wealthy countries” negotiating among themselves, the system has opened up to developing countries at all levels, from emerging nations to the very poorest, providing them with a real voice in the system and access to means for asserting their economic rights – negotiation and legal redress – which had previously been denied to them.

The cotton issue really questions the very credibility of the system. If the large developed countries are authorised to disobey the rules, how can developing countries then be required to abide by them?

Over and above the matter of subsidies, the cotton question has had a significant impact on the role of the LDCs at the WTO. The influence of these countries is strengthened when coalitions of interests are built around a concrete issue, whether this is a product or a specific measure. The C4 managed to obtain the support of developing countries as a whole (groups or individual countries) including that of developed countries defending compliance with the rules of the multilateral system. When assembled in a coalition, countries, and particularly developing countries, can increase their impact on the decision-making process, share out the work and the meetings more efficiently (especially insofar as these countries often suffer from a lack of human and technical resources), submit concrete proposals and exert pressure on other partners in the negotiations in order to rally their support¹⁴. Countries can thus support each other in the meetings, for reports and for sharing the workload, responsibilities and political pressure. The weight of the burden is lessened when shared, especially when there are few other things to offer in exchange.

Only time will tell whether cotton has been a mere anecdote in the history of the WTO or whether it has contributed to a genuine use of the system by all its members, including the poorest. It seems to us that, even in the absence of an

¹³ Heinish, E. L. (2006) “West Africa versus the United States on cotton subsidies: how, why and what next?”, *Journal of Modern African Studies*, 44, 2, p. 251.

¹⁴ On the issue of coalitions, see in particular Patel, Mayur, (2007), “New faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO”, Global Trade Governance Project, *GEG Working Paper 2007/33*, University College Oxford, Department of Politics and International Relations.

ambitious result for cotton, we have gone beyond the anecdotal stage; cotton has demonstrated that a coherent approach, built upon the link between trade and development, together with political, media and technical support, can be taken seriously by members as a whole. Establishing sustainable negotiation capabilities is an essential part of this initiative. There are, however, fears that a Doha failure might call into question the confidence that developing countries had acquired in the system over recent years, thanks in particular to the cotton case.

V. Conclusion

Even if cotton became the symbol of the Doha Round at Cancun, no one should take it for granted that this will lead to a meaningful result for cotton. It is true that there will be no Doha without cotton. It is also true that there will be no cotton without Doha, but two dangers remain. The first is obvious and lies in the possible failure of the Doha Round. In that case, there will be nothing for cotton in the negotiations, but nothing elsewhere either, since very little can be expected in terms of safety nets and emergency measures, as donors have made crystal clear in this matter. Furthermore, the Director-General of the WTO has an obligation to provide the means but not the results... The second danger is more difficult to imagine but no less likely: a Doha result without a meaningful result for cotton. Appearances could of course be saved by an illusory result. But if the reductions adopted for cotton end up by having no impact on prices and production and, especially, if they represent no substantial effort on the part of the great "subsidy providers", how, honestly, can one refer to an ambitious result?

At a time when hopes turn towards finally concluding the negotiations, it must be recognised that the C4 countries have succeeded in getting cotton onto the agenda of the Doha Round; they have gathered a very broad coalition of WTO players around them and have gained public sympathy and support... and yet, in the end, they will in any case stand alone. Their fundamental problem is that they have nothing to offer in exchange. And since the LDCs are, moreover, exempted from any obligation in the negotiations, it is difficult for them to win in a purely mercantile context without their having anything to offer in exchange... That is why cotton will serve as a good indicator of the success or failure of a Round with great ambitions, particularly with regard to developing countries. Beyond the Doha Round, the talk will be of the success or failure of the system itself.

From the start and thanks to its numerous European donors, IDEAS Centre has always supported the C4 in the pursuit of negotiations, has never opposed the legal approach to multilateral trade negotiations and has backed the actions of some C4 States involved as third parties in various complaints lodged by Brazil against the United States in the case of upland cotton. As we have tried to show, litigation and negotiations are complementary in nature. Furthermore, should negotiations fail to deliver a satisfactory result, the African countries have not excluded the initiation of a dispute settlement procedure against the United States. With the onset of a new Round of negotiations, negotiation appeared to the C4 countries to be the approach most likely to deliver the best "long-term" result. The problem for these countries is that the negotiations are taking a long time to reach a conclusion and they do not share the luxury enjoyed by the great powers, i.e. time. As Keynes used to say "in the long term we will all be dead"...