Indonesian Journal of International Law

Volume 8
Number 3 *Progressive Development of International Law - Part III*

Article 3

4-30-2011

Prospects of Reform of the WTO Dispute Settlement Mechanism

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In a context of economic globalization, the WTO emerged within the multilateral trading system as an international organization settling intergovernmental trade disputes. The WTO dispute settlement mechanism is rather an enhanced adaptation of its predecessor as it developed into an institutionalized and semi-judicialized system. the evaluation of the dispute settlement mechanism would contribute to a better understanding of the WTO as an international organization and its influence on the development of the international economic law. In general, three different movements occurred throughout the life of the dispute settlement mechanism, thus distinguishing its practice under the GATT and the WTO correspondingly: the emergence of a semi-judicial institution; the enhancement of the access to justice by developing countries; and the reinforcement of the implementation phase. With these three movements in sight, this article intends to investigate whether the WTO dispute settlement mechanism can still satisfy the needs of predictability and safety as defined by Article 3 of the DSU.

Keywords: WTO, dispute settlement mechanism, multilateral trading system

I. Introduction

In a context of economic globalization, the WTO emerged within the multilateral trading system as an international organization settling intergovernmental trade disputes. Following the footsteps of a fifty years GATT tradition, the WTO dispute settlement mechanism is rather an enhanced adaptation of its predecessor as it developed into an institutionalized and semi-judicialized system. Since its inception, the WTO dispute settlement mechanism was regarded as one of the most effective systems to exist in public international law. Despite this general contentment, many diplomats think that, given the many imperfections of the mechanism, it is in need of reform in order to boost its predictability. With several unresolved issues

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doubt that the dispute settlement mechanism benefited from this revision. As Jeffrey Waincymer explains, it led to the birth of a real institution with "a number of specific organs that are involved in the dispute settlement function of the WTO[11]".

With the conception of a two-tier adjudicative mechanism[12], the Uruguay Round negotiators assigned different functions to the panels and the Appellate Body based on a distinction between points of fact and points of law[13]. Article 11 of the DSU provides that each panel plays the role of a "judicial body of first instance[14]" with an exclusive task of making enquiries about the facts of the matter[15]. As for the Appellate Body, it is obliged to entrust the factual findings of the panels[16] and subsequently to limit its review to legal aspects of reports[17]. The Appellate Body confirmed this position in its jurisprudence noting that its mandate is restricted to legal questions[18]. Yet, with this distribution of roles, the Appellate Body could not investigate facts, nor could it send the case back to the original panel for additional examination[19]. This led to a constraint imposed on the Appellate Body and a 'design flaw[20]' that failed to include a remand option in the DSU.

To fill the void, the Appellate Body developed a method of completing the panel's analysis based on its factual findings. As such, facts were no

[11] Waincymer, *supra* note 3, 78.

[12] Alan Yanovich and Tania Voon, 'Completing the Analysis in WTO Appeals: The Practice and its Limitation' (2006) 9(4) *Journal of International Economic Law* 935.

[13] Tania Voon and Alan Yanovich, 'The Facts Aside: The Limitation of WTO Appeals to Issues of Law' (2006) 40(2) *Journal of World Trade* 240; Yanovich and Voon, *supra* note 11, 936.

[14] Pornchai Danvivathana, 'Is it Beneficial to WTO Members to Reform the Panel System?' in Dencho Georgiev and Kim Van der Borght (eds.), *Reform and Development of the WTO Dispute Settlement System* (2006), 97.

[15] Yanovich and Voon, *supra* note 11, 936.

[16] Voon and Yanovich, *supra* note 12, 240ff.

[17] Konstantinos Diamantopoulos (ed.), *An Anatomy of the World Trade Organization* (1997) 63.

[18] Legal Affairs Division, World Trade Organization, *WTO Analytical Index: Guide to WTO Law and Practice* (2007) 1228-1234. For more details, see Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, AB-1997-2,22; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, AB-1997-3, para. 239; Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4, para. 132; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, AB-1998-5, para. 261; Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, AB-1998-7, para. 161; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, AB-2000-10, paras. 150 and 151.

[19] Joost Pauwelyn, 'Appeal Without Remand: A Design Flaw in WTO Dispute Settlement and How to Fix it' (Issue Paper No.1, International Centre for Trade and Sustainable Development, 2007) 1; Yanovich and Voon, *supra* note 11, 936.

[20] Pauwelyn, *supra* note 18.

longer rigorously excluded on appeal. In general, the Appellate Body has been cautious when completing the panel's analysis[21]. This method necessitates the authentication that certain criteria exist effectively in each matter: the existence of undisputed facts in the panel report; the establishment of a connection between the legal issues to be addressed and the ones reviewed by the panel; and the respect of due process throughout the appeal[22].

Even though the Appellate Body resorted when possible to the completion of analysis, its record of performance has been insufficient. Often, it refused to complete the analysis in the absence of a certain criterion, thus leaving disputes unsettled. In this situation, disputants were forced as a consequence to go through another prolonged procedure of WTO dispute settlement[23]. Many scholars maintain persistently that this problem 'highlights the importance of WTO Members finding a long-term solution to disputes where the Appellate Body cannot complete the analysis[24]'. Among the possible reform ideas, two proposals of the European Communities and Jordan call for the establishment of a remand option allowing the Appellate Body to send the dispute back to the panel for additional examination[25]. These two proposals were supported by scholars arguing that a remand option would preserve the general balance of the institution with the Appellate Body playing its traditional role of "reviewer of legal issues[26]". Nonetheless, the viability of this solution is uncertain due to the possible delays in the dispute settlement procedure[27].

III. The Imperative of Access to Justice and Developing Countries

The inception of the World Trade Organization was largely characterized by the enlargement of its membership. While the GATT was often described as a private club of elite, the WTO opened its doors to many developing countries expressing interest in joining this new organization. As a result, the quasi-majority of the WTO members nowadays are devel-

[21] For more information on statistics, see Yanovich and Voon, *supra* note 11, 936ff. Apparently, from 1995 until 2006, the Appellate Body completed the analysis in 11 from the 77 cases it reviewed.

[22] Yanovich and Voon, *supra* note 11, 933.

[23] Yanovich and Voon, *supra* note 11, 947.

[24] Yanovich and Voon, *supra* note 11, 948.

[25] John Lockhart and Tania Voon, 'Reviewing Appellate Review in the WTO Dispute Settlement System' (2005) 6 *Melbourne Journal of International Law* 483.

[26] Yanovich and Voon, *supra* note 11, 950.

[27] See *Special Session of the Dispute Settlement Body – Minutes of Meeting Held in the Centre William Rappard on 28-30 January 2003*, WTO Document TN/DS/M/8 (2003) [6].

oping countries. This numerical reality reflects a positive achievement of the WTO. In fact, the WTO provides, via its dispute settlement mechanism, a platform to settle trade disputes for a large number of members. Thus, it ensures the respect of their right of access to justice and contributes to the imposition of the rule of law on all intergovernmental trade relations among its members.

Coupled with the principle of Special and Differential Treatment, the right of access to justice creates a positive environment for developing countries encouraging them to utilize to the WTO dispute settlement mechanism. The application of this principle can be recognized in different stages of the procedure, specifically during the consultations[28] and the preparation of submissions[29]. It can be maintained that the introduction of the Special and Differential Treatment principle in the context of dispute settlement is to ensure a protection of the developing countries against stronger industrialized players of the multilateral trading system.

Yet, if the general principle of ensuring access to justice seems noble, its application is not always satisfactory. There is no doubt that the DSU puts forward an improved dispute settlement mechanism. However, it assumes that all Members are on a similar level of advancement in terms of financial capacity and legal resources. In reality, this assumption could not be further from the truth in the case of many developing and least-developed countries. These members are usually considered to be 'less frequent users of the dispute settlement procedures than industrialised countries[30]'. Even more dramatically, scholars think that 'as far as proactive involvement in the dispute settlement process is concerned, developing countries stand at the periphery[31]'. With the Doha Round adopting a general agenda of development, the current negotiations on the reform of the WTO dispute settlement mechanism are rich in proposals to increase the participation of the developing countries. For instance, the LDC Group proposed in its communication dated 19 September 2002 that consultations should be held on the soil of the least-developed countries given their lack of the necessary diplomatic representations in the headquarters of the WTO in Geneva. According to the LDC Group, this would help the least-developed coun-

[28] Article 4.10 of the DSU provides that ' [d]uring consultations Members should give special attention to the particular problems and interests of developing country Members'.

[29] Article 12.10 of the DSU provides that '... in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation'.

[30] Thomas Zimmermann, *Negotiating the Review of the WTO Dispute Settlement Understanding* (2006) 183.

[31] Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (2005) 95.

tries overcome the 'extreme human resource constraint' they usually suffer from[32]. A similar proposal to amend Article 4 of the DSU was advanced by Haiti in its communication dated 17 January 2003[33].

It is unanimous among scholars that developing countries face two major impediments: one being the absence of national legal experts in WTO law; and the other being their inability to cope with the legal costs of WTO litigation. On one side, it is easily conceivable that developing countries with a very limited number of WTO legal experts would have to solicit the services of an overseas private law firm. On the other side, seeking the best legal representation in the WTO dispute settlement mechanism comes at a very high cost. Developing countries would have to suffer from the burden of excessive billing. This obstacle was clearly recognized by Amrita Narlikar who asserts that 'even for a relatively small case, a law firm cited a fee of £200,000 for representing a developing country until the panel stage. In high-profile cases, such as the Kodak versus Fiji of Japan-Photographic film case, lawyers charged each of their clients a sum of over $10 million. It is difficult, if not impossible, for developing countries to produce comparable financial resources[34]'.

As such, it is understandable that developing countries would be reluctant to launch a complaint within the WTO dispute settlement mechanism. To overcome this difficulty, an Advisory Centre on WTO Law was established in 2001 in order to assist developing countries defend their rights in WTO disputes. The role of this centre consists in providing free legal advice and training for developing and least-developed countries[35]. Over the years, this centre improved the participation of developing countries as statistical records of the World Bank revealed in 2010 'a more extensive pursuit of the DSU legal process for any given case, and initiation of disputes over smaller values of lost trade[36]'.

IV. The Reinforcement of the Implementation Phase

[32] See the Proposal by the LDC Group, WTO Document TN/DS/W/17 (2002) [3].

[33] See the Communication from Haiti, WTO Document TN/DS/W/37 (2003) [I].

[34] Narlikar, *supra* note 30, 96.

[35] For more information on the Advisory Centre on WTO Law, see Kim Van der Borght, 'The Advisory Center on WTO Law: Advancing Fairness and Equality' (1999) *Journal of International Economic Law* 723.

[36] Chad Bown and Rachel McCulloh, *Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law,* Policy Research Working Paper 5168 (2010).

Many scholars argue that the establishment of a multilateral surveillance mechanism is the basis for the strengthening of the WTO. Amira Narlikar suggests that '... the WTO has acquired teeth; its rules can be enforced with an automacity and with consequences that were quite alien to the GATT[37]'. In this sense, the reinforcement of the implementation phase of the dispute settlement mechanism was a major step to separate the power-oriented GATT from the rule-oriented WTO. During the GATT era, the United States often resorted to unilateral sanctions to settle disputes because of its predominant view that the implementation powers of the GATT led to poor results[38]. For that reason, the United States adopted certain laws to sanction problematic trade measures. Section 301 of the Trade Act of 1974 permitted national companies to present a private petition to the United States Trade Representative (USTR) including a request for investigation and action against any trade measure possibly 'unjustifiable, unreasonable, or discriminatory and [that] burdens or restricts United States commerce...[39]'. As a result, the President of the United States was invested in the power of retaliation or threatening to retaliate 'regardless of the action's consistency with the GATT or other international agreements[40]'. The European Communities and Japan were quick to condemn this form of 'aggressive unilateralism'[41] and considered adopting similar national legislations in order to employ trade sanctions more effectively[42].

Recognizing the possible risks of this course of action, negotiators drafted the DSU with the aim of overcoming the United States' unilateralism. Robert Hudec notes that '[i]nstead of debating rather abstractly how much GATT dispute settlement should be strengthened, negotiators were now asking how much strengthening it would take to persuade the Congress to put these unilateral remedies back on the shelf and return to primary reliance on GATT law[43]'. They coordinated the time-frames of the

[37] Narlikar, *supra* note 30, 85.

[38] The views of the United States can be found in the U.S. International Trade Commission report issued in 1985. See U.S. International Trade Commission, Pub. No. 1793, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements, Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-212 Under Section 332(G) of the Tariff Act of 1930 (1985).

[39] See S. Rep. No. 1298, 93d Cong., 2d Sess. 163-67 (1974).

[40] Julia Christine Bliss, 'GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects' (1987) 31 *Stanford Journal of International Law* 44.

[41] For more information on the United States trade policy during this period, see Jagdish Bhagwati and Hugh Patrick (eds.), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* (1990); Kendall Stiles, 'Negotiating Institutional Reform: The Uruguay Round, the GATT, and the WTO' (1996) *Global Governance 2* 136.

[42] Stiles, *supra* note 40, 135.

[43] Robert Hudec, 'Dispute Settlement', in Jeffery Schott (ed.), *Completing the Uruguay Round:*

WTO dispute settlement mechanism with the schedule of the Section 301. This approach weakened the recourse of the United States to Section 301 from the early years of the WTO. With no doubt, it also transformed the reports adopted by the DSB into legally binding decisions. Once a report is adopted, the losing party is forced to comply with the recommendations of the DSB by modifying the offending measure in accordance with the GATT/WTO Agreements[44]. Article 21.1 of the DSU provides that '[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members'. Nevertheless, if no action is undertaken during a reasonable period of time, the complainant can negotiate a satisfactory compensation with the losing party. If not, the complainant can seek the approval of the DSB to suspend the application to the losing party of concessions or any other obligations under the covered agreements[45]. Clearly, any compensation or suspension of concessions would be a temporary measure that should not replace the full implementation of recommendations[46].

Despite this progress, negotiators could not predict the approaching compliance problems and the famous trade wars, such as the Banana and Beef disputes, which would put at risk the WTO. In a curious development, the Banana trade war ended with the signing on 15 December 2009 of a political agreement[47] following an arbitration initiated at the Doha Round[48]. Pascal Lamy, the director general of the WTO, considered that '[t]his has been one of the most technically complex, politically sensitive and commercially meaningful legal disputes ever brought to the WTO... After lengthy consultations, legal examinations, negotiations, and gentle prodding by an "honest broker", a solution has been found. This proves there is no trade issue which lies beyond the reach of WTO members when they exhibit good will and a spirit of compromise[49]'.

In the same way, the WTO dispute settlement mechanism was criticized for being inequitable to developing countries. As a matter of fact, even if a developing country was successful in its complaint, its ability to

A Results-Oriented Approach to the GATT Trade Negotiations (1990), 187.

[44] Article 19.1 of the DSU.

[45] Article 22.2 of the DSU.

[46] Article 22.1 of the DSU.

[47] For more information on the Geneva Agreement on Trade in Bananas, see WTO Document WT/L/784 (2009).

[48] For more information on the two arbitrations under the Doha Waiver, see WTO Document WT/L/616 (2005) and WTO Document WT/L/625 (2005).

[49] See WTO 2009 Press Release, *Lamy Hails Accord Ending Long Running Banana Dispute,* WTO Document PRESS/591 dated 15 November 2009.

retaliate is attenuated by its limited economic power. It is doubtful that a developing country trying to enforce a ruling against the United States or the European Communities could achieve compliance effectively. In other words, any action undertaken by a developing country, whether compensation or retaliation, would minimally affect developed countries. As Anna Lanoszka explains, this is due to the fact that '[t]he system of international economic transactions has been persistently asymmetrical as it consists of highly industrialized states as well as many poorer countries .... The dominant position of the rich developed countries cannot be simply assumed away, even when it comes to the rules-based WTO guided by the principles of non-discrimination[50]'. It is apparent that the WTO dispute settlement system is far from achieving a 'level playing field for all trading nations[51]'. Given this reality, the developing countries are proposing currently a mass-retaliation technique. The African Group proposed specifically in its communication dated 9 September 2002 that '... in the resort to the suspension of concessions, all WTO Members shall be authorised to collectively suspend concessions to a developed Member that adopts measures in breach of WTO obligations against a developing Member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits[52]'.

In conclusion, history has shown that the reform of the dispute settlement mechanism is an on-going project as an ultimate necessity for the survival of the multilateral trading system. So far, the dispute settlement mechanism has overcome significant challenges. Yet, the question remains today to determine if the mechanism will overcome the bottle-necked political negotiations of the Doha Round.

[50] Lanoszka, *supra* note 9, 49.0

[51] Ibid.

[52] See the Proposal by the African Group, WTO Document TN/DS/W/15 (2002) [6].