Resolution of international trade disputes in the WTO and other Fora

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Abstract

Purpose – The purpose of this paper is to assess the success of the world trade organisation (WTO) dispute settlement system and its transferability to other fora.

Design/methodology/approach – The paper compares the design and case law of trade and investment law, and seeks lessons for the settlement of trade and investment disputes in other fora.

Findings – It concludes that despite its shortcomings, the WTO Appellate Body provides vital stability regarding legal interpretations, something notably absent from other fora.

Originality/value – The paper offers the perspective of a former Member and Chairman of the WTO Appellate Body on the success of the dispute settlement system.

Keywords WTO, Appellate body, Dispute settlement, Investment law, Trade law

Paper type Research paper

1. Introduction

The world trade organisation (WTO) dispute settlement system (DSS) is considered a success story from several points of view as a functioning system to settle international economic disputes between States by third-party impartial and law-based adjudication. This success is evidenced first of all by the great number of disputes that are brought to the system[1], an evidence of the confidence that members of the WTO have in the usefulness and the efficiency of the system: both as to process and outcomes to redress breaches to the rules and reinstate the mutual balance of expected trade benefits.

This includes the capability of the system to manage these disputes in the reasonable rather short time frames, that has been set in the interest of the security of trade flows unimpeded by illegal and unexpected obstacles[2]. More specifically, a noteworthy feature of the system's operation is that both large trading nations and small economies, as well as industrialised and developing countries have had recourse to it[3]; and that by and large, the rule of law has prevailed irrespective of the imbalance in economic power of the actors, justifying the dictum that the multi-lateral trading system has evolved from a "power-oriented" system (the GATT) to a rule-based system (the WTO).

In this respect, the two-stage mechanism, *ad hoc* panels and appellate review by a permanent body [the Appellate Body (AB)], formally "quasi-judicial" but in substance having the features of an international court, has ensured well-reasoned interpretation (leading to general acceptance of the outcomes), consistency in application, predictability of the operation of the system and of the import of its rules for the benefit of all WTO members (and behind them for the business and trading community) well beyond the solution of specific disputes (Sacerdoti *et al.*, 2006).

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At the same time, one should refrain from an over-idealistic view of the system, which has its failures: delays (often substantial) in panel proceedings, lagging in compliance, some major instances of non-compliance and of protracted trade retaliations leading to a lose-lose situation (Weiss, 2000). The positive aspects of the WTO DSS are not due just to the careful design of the DSS, with its balance of first compulsory negotiation, then compulsory and binding direct adjudication with third parties involvement, then peer pressure and multi-lateral surveillance to reach compliance and ultimately through controlled trade retaliation. The successful operation of the DSS is also due to it being part of a multi-lateral "closed" system, within an international organisation (the WTO) administering a defined network of different trade agreements (GATT, GATS, etc.), linked by a balance of mutual economic benefits and legal reciprocity.

This success has raised the query whether the WTO model may be exported to different trade environments, such as bilateral and regional agreements and areas (RTAs), and even beyond, specifically to the settlement of investment disputes. Investment disputes have also exploded in number and importance. In sharp contrast with the multi-lateral trading system, both the underlying legal basis and the settlement mechanisms are fragmented in investment law, besides being inspired by different principles, such as direct private investors-host States arbitration (ISDS), redress through monetary compensation instead of withdrawal of the incompatible measure and implementation at the domestic rather than at the international level.

Another difference and reason for reflection is that while the WTO DSS is praised, ISDS is the object of growing criticism which might lead to its demise, to substantial limitation or to progressive judicialisation inspired precisely by the WTO model[4]. These criticisms are addressed both procedure wise because of alleged imbalance in favour of foreign investors who are *de facto* always the claimants, and content wise because of the supposed insensitivity of investment tribunals towards the protection of general interest of host States (Sacerdoti, 2014; Sarooshi, 2014).

2. Background; from the GATT to the Uruguay round (WTO) reform: partial judicialisation of the dispute settlement system

The overhaul of the GATT at the conclusion in April 1994 in Marrakech after years of protracted multi-lateral negotiations (1986-1993) that gave birth to the WTO and its interconnected network of agreements, included in a "single undertaking", gave birth to an innovative, hybrid system of dispute settlement mechanism compared with those existing in other international organisations and fora. Its main features must be briefly recalled here to evaluate whether they may be a model for other international trade disputes systems[5].

No "International Trade Court", as might have been expected, was established to settle the numerous disputes that were anticipated under the several agreements concluded; many of them regulating for the first time entirely new matters, such as services (GATS), sanitary measures (SPS), intellectual property rights in international trade (TRIPS) and technical barriers (TBT). Rather, the panel system was retained, as well as the preliminary obligation of negotiations (consultations), but with two major changes, among many aimed at making the process more formal, predictable and rule-based both as to procedure and grounds. First, the panels reports, though formally remaining recommendations to the WTO Members who must approve them in the Dispute Settlement Body (DSB), have been rendered *de facto* binding because consensus

is required only to not adopt them (an instance that has never materialised), thus leading to their "automatic" adoption. In other words, panel reports cannot be blocked by the losing party (reversed consensus).

Second, a permanent AB made by qualified professionals (basically lawyers)was established to which panel reports can be appealed to review the legal findings to ensure respect of the complex WTO Agreements, based on legal reasoning, due process and consistency of interpretation. Also, the reports of the AB are subject to automatic adoption by the DSB and cannot be blocked.

The outcome is the "judicialization" of the DSS and a massive recourse to its procedures, without litigation being considered as an unfriendly act[6]. Reports are routinely adopted by the DSB, which is the whole membership of the organisation. Through adoption by the DSB, the WTO and its members become thus involved in the authorship of any decision, as if it was a decision of the organisation rather than a judgement binding only for the parties.

Moreover and crucially, the DSS includes a follow-up implementation phase, monitored collectively by the WTO members (not by the Organisation itself) to ensure compliance in a reasonable period. If this does not happen within an agreed reasonable period, then the rules provide for the "semi-automatic" imposition by the winning party of equivalent trade countermeasures (sanctions) to rebalance the trade advantages and to induce, ultimately, compliance and, thus, the respect of the agreed rules in general. The application of countermeasures is monitored through constant multi-lateral surveillance (peer pressure) by the DSB. To ensure effectiveness and avoid abuses, this process includes recourse for various instance of impartial adjudication of key aspects. "Compliance" panel procedure can be initiated in case of dispute on the adequacy of the compliance measures (Article 21.5 DSU); arbitral determination of the reasonable time to comply if the litigating parties cannot find an agreement (Article 21.3 DSU); and binding arbitration on the equivalent countermeasures that the winning party may put in place in case of non-compliance (Article 22.6 DSU)[7].

A basic feature of the GATT, which has been retained, is that the DSS is open only to member States, although specific interests of producers and traders are directly involved. The members retain full control of the system, although procedural openings by initiative of the AB have led to the admission of *Amici* briefs, public viewing of hearings (upon consent of the parties in dispute) and dissemination of information on the proceedings and the outcomes.

3. Is the panel system a form of arbitration?

It is commonly considered that the panels are a kind of *ad hoc* arbitral tribunals, of the "institutionalized" type, as they are closely inserted in the WTO secretariat which performs all necessary support and administrative functions. In fact, the panel system has the main features which characterise arbitration: a voluntary mechanism to settle disputes between parties which have previously accepted to be bound by the result; proceedings based on a pre-established procedural framework that ensures due process; adjudicators chosen by the parties, directly or indirectly, competent and independent, who must adjudicate impartially applying a predefined body of law[8].

Legally and in practice, the panel system has specific additional features that distinguish it substantially from the format of both international commercial or investment arbitration and from traditional international arbitration between States,

such as that governed by the Permanent Court of Arbitration Rules (PCA). These peculiar divergent features involve: *qualification and selection* of panellists; *procedure*, *close insertion in the organisation (role of the secretariat)*; intervention of *third parties*, besides the issuance of "reports"; and no arbitral decisions binding *per se*, as highlighted above.

The selection process is run as well known by the secretariat, in accordance with Article 8.6 DSU.

While performing an arbitral *ad hoc* function, panels appear more and more, from the structural aspect, as an internal organ of an international organisation, almost a permanent one though composed variably for the need of the specific dispute. Also, the right of any WTO Member to participate in panel and AB proceedings as third parties, although with less rights than the litigants, without any need to show a specific interest in the outcome of the dispute, points to the systemic function of the DSS within and for the WTO, to whose functioning and outcome all members have an interest[9].

Looking at these features, one can measure the difference with the practice of *ad hoc* inter-State arbitration generally, international trade, investment and commercial arbitration, even those operating under the rules of a permanent institution. In all these models, the control of the parties, individually and jointly, is much more evident from selection of arbitrators to rules of procedure. The support of any other secretariat is in comparison reduced as is their role. The fact is that all these instances do not perform a function within and for the benefit of an organisation, such as the WTO, as is the case in Geneva. To the contrary, the sole function of the secretariats, such as ICSID, PCA, ICC, is to serve the parties in settling their dispute based on the rules that the institution provides.

4. The AB: its systemic role and as a model

The existence of the AB reduces, in any case, the risk that panels may issue "wrong decisions" without being checked and corrected. This was, indeed, the principal reason for which appeal was envisaged (van den Bossche and Zdouc, 2013); it is also the reason for parties to appeal most reports or parts thereof, whenever they consider a decision to be wrong, aiming at its reversal.

In time, however, the AB has acquired a predominant systemic role, as it is through the cumulative effect of its continuous and consistent case law that the WTO carries out the functions entrusted to its DSS, as spelled out in Article 3.2 DSU, namely to be "a central element in providing security and predictability to the multi-lateral trading system", serving "to preserve the rights and obligations of members under the covered agreements". AB reports holdings have in practice "erga omnes" effects as precedents within the WTO in respect of the complex of its multi-lateral agreements, setting precedents for disputes and guidelines for the domestic and international practice of WTO Members[10]. Most of the regional arrangements and associations, including those dealing with trade (such as NAFTA), have purportedly been endowed neither with an institutional structure nor with a standing tribunal, competent to issue binding judgements in case of disputes between Members. The AB appears to be unique also as a second-stage review body in an internal DSS of an international organisation.

5. Other adjudication and arbitration mechanisms at the WTO

One must not forget that recourse to other forms of third party adjudication is provided in a number of instances in the implementation phase at the WTO[11]: first, Article 21.3 DSU (arbitration on the reasonable period of time to implement an adopted report); second, where there is disagreement as to the existence or consistency with a WTO agreement of measures taken to comply with the recommendations and rulings of the DSB, Article 21.5 DSU provides for recourse to the original panel, with possibility of appeal to the AB.

Third, compulsory arbitration (by the original panel without appeal)is mandated by Article 22.6 in case of challenge by the other party of the equivalence of authorised suspension of concessions in case of non-compliance so as to prevent "overshooting". Resort to these mechanisms have been rather frequent, a practice that confirms the success of the whole DSS and its centrality as a key element of the functioning of the multi-lateral rule-based trade system of the WTO[12]. All these instances of third-party adjudication to induce compliance with is ultimately in the hands of the States involved is an additional example of innovation that the WTO dispute settlement system has introduced which may serve as a model for settling effectively trade and investment disputes in other fora.

6. Settling disputes in bilateral and regional trade agreements

The system appears to work currently to the satisfaction of the WTO Members, in particular those who are the major users. The latter are the most frequent litigants, who happen to be also the largest trading nations, with the highest economic interest at stake concerning the respect of the rules and the smooth functioning of the DSS. Criticism that had been voiced for several years by certain US quarters against the functioning of the system – such as the supposed judicial activism of the AB turning into "judicial law making" or "filling gaps" in the WTO agreements – have quieted down.

Appetite to change the DSS are weak (the review of the DSU which was supposed to be concluded in a few years after its entry into force has been dragging without results ever since). The system has overcome some shortcomings in its design also, thanks to the practices adopted by the parties themselves (in relation to compliance proceedings and the application of withdrawal of concessions) and by the AB (*amici curiae*, public hearings with the consent of the parties).

It is with this backdrop that other DSSs in bilateral and regional trade agreements or associations should be looked at. They do not present, however, an homogeneous set-up as natural, as they are inspired by a variety of principles, objectives and feature different levels of acceptance of limitation of competence of the member States in favour of a common institution. Leaving aside the European Union, one can say that the institutional setting of almost all such arrangements is scant and weak. The weakness of the DSSs reflects the limited role of the governing bodies of these entities, which are mostly meant to facilitate cooperation among the participants but are not endowed with supervisory and control powers in respect of the implementation of the liberalisation and other commitments by the members. They are predominantly joint organs of the member States (like the NAFTA Trade Commission) rather than of the organisation.

Even where the member States have periodically expressed their intent to reinforce the institutional setting (such as in the Mercosur and ASEAN), deeds have not followed the declarations. In other arrangements, such as NAFTA, different specialised DSSs have been set up for different kind of disputes[13]. Thus, in NAFTA, ISDSS at Chapter 11 is patterned after the traditional *ad hoc* arbitration mechanism of BITs. Binational panels in Chapter 19 provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases. Five-member arbitral panels to resolve any dispute between the Parties that have not been resolved by consultations or by the NAFTA Free-Trade Commission (comprise the Trade Ministers of the three countries) can be convened under Chapter 20. Interestingly enough, the Chapter-20 panel system can be easily blocked by one party due to institutional weaknesses[14], which shows a preference for direct negotiations and agreements, where political considerations prevail[15]. Dispute settlement mechanisms are in any case always provided, adding the risk of conflicts between the WTO and any regional DSS (Marceau, 1997; Weiler, 2000; Bartels and Ortino, 2006; Hillmann, 2009; Ruiz Fabri, 2003).

This can be said also, even more so, in respect to bilateral Free Trade Agreements and other similar "Partnerships" where by definition the carrying out of the blueprint – such as progressive reciprocal liberalisation is carried out by the competent governmental authorities of the parties themselves at a variety of levels[16].

This explains why even where panellists' rosters are provided (such as the FTAs of the EU) to resolve disputes concerning the application and interpretation of the treaty, they are rarely, if ever, utilised. In last resort, the Parties are the sole masters of the treaty; disputing parties coincide with the treaty parties, which is of course not the case in a multi-lateral organisation, such as the WTO, so that it is up to them to agree to any solution, even if at variance with the treaty.

In any case, it is worthwhile noting that the WTO model of DSS has been closely followed by the EU and Korea – and subsequently by other, such as with Peru and Colombia and with Central American countries – to devise the DSS in their FTA of 2010, without however any appeal mechanism[17]. The relevant articles provide that where parties fail to resolve a dispute through consultations, an arbitration panel of three members shall be established, drawn from a pre-established list of five EU, five Korean members and five of other nationalities[18]. After having issued an "interim report" (just as under Article 15 DSU), the arbitration panel ruling must be issued as a rule within 120 days after its establishment. "Each Party shall take any measure necessary to comply in good faith with the arbitration panel ruling, and the Parties shall endeavour to agree on the period of time to comply with the ruling" (Article 14.8). In case of disagreement, it is for the panel to determine within 20 days the length of the period. If there is disagreement between the parties on the consistency of the measure taken with that party's obligation, then it is again for the panel to review the measure and to rule. If this is unsuccessful and there is no agreement on temporary compensation, then the claimant may suspend temporarily equivalent concessions, the equivalence to be again determined by the panel in case of disagreement (Article 10-11). There is even a provision on Interpretation by the arbitration panel (Article 14.16) that directs panels to interpret the provisions at issue of the FTA "in accordance with customary rules of interpretation of public

international law, including those codified in the Vienna Convention on the Law of Treaties" and to "adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body" when an obligation under the FTA is identical to an obligation under the WTO Agreement[19].

7. What lessons for the settlement of trade and investment disputes in other fora

The WTO systems may thus be a model for making the DSS of FTAs more efficient, especially in case of agreements with many parties, such as the TTP under negotiation. As to investors' State mechanisms (ISDS), WTO may be also a model, considering that FTAs tend to include currently also an investment chapter, as is the case of the NAFTA. On the other hand, the fact that ISDS involves private investors as claimants against States, and not inter-State dispute as is the case at the WTO, brings a structural difference in this system, which should be reflected in any change to ISDS.

The WTO model should in any case be looked at with regard to dispute settlement mechanisms in the drafting of regional FTAs covering also investments. The choice here is between an inter-governmental panel system (possibly based on a pre-established list) as is common for the trade chapters, and recourse to freely selected arbitrators as is currently the case for investment disputes.

The current discussions as to whether the "party-appointed arbitrator" traditional model is appropriate in ISDS suggests that the WTO method of selecting panellists might offer some ideas for improving. It implies however a strong and efficient secretariat, and also, this system has been the object of criticism, especially as to the weight of the staff in the actual making of the decisions.

The WTO offers also a model, at least for reflection and importing some of its features, as to the possible participation of BITs and FTAs Contracting Parties in disputes as third parties, as to *amici curiae* and as to transparency, such as opening hearings to the public. The two last elements cannot be considered to be satisfactorily regulated within the WTO DSS, but current openings have been reached after a difficult and, at moments, painful process[20]. Cross-fertilisation is possible with the experience of other fora engaged in the same direction[21].

Notes

1. As of July 2014, 482 requests for consultations had been introduced, 258 panels had been established, 85 disputes had been mutually agreed (besides 19 complaints withdrawn) and 206 panel reports had been issued and adopted by the Dispute Settlement Body (DSB), as well as 122 AB reports, see WTO *Annual Report* 2014 and *AB Report* for 2014.
2. In principle, panel have to issue their report within six months from their establishment [Article 12.8 of the Dispute Settlement Understanding (DSU)], although this deadline is systematically extended due to the factual complexity of most cases, while the AB manages almost in every case to conclude its legal review within the 90-day period set by Article 17.5 DSU.
3. For the breakdown by individual countries and groups of Members, see WTO; AB Report for 2013, Chart 3.

4. This is exactly the approach followed by the EU Commission in its proposal of an international investment tribunal in the TTIP with the USA in September 2015, responding to a resolution of the European Parliament to this effect. See the proposal at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf
5. For a complete historical perspective, Marceau (2015).
6. See Article 3.10 DSU.
7. On this stage, usually neglected by lawyers, see Brown and Pauwelyn (2010).
8. A peculiar feature to ensure independence is that no panellist can be a national of the disputing or even of the third parties (Article 8.3), unless the parties to the dispute agree otherwise. This requirement restricts notably the available pool of possible panellists.
9. See Article10 DSU. Only Members who have participated as third parties at the panel stage may participate also to appellate proceedings (Article 17.4).
10. According to Article 3.2, the DSS serves also "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". This provision has been the "steering compass" for the AB to navigate the stars of the sometimes confused and contradictory provisions of the several WTO agreements. By the same token, the AB has terminated the "clinical isolation" of the GATT trade system from international law. In this way, the AB has been able through its interpretation of the WTO agreements under the Vienna Convention on the Law of Treaties (VCLT) to contribute to international jurisprudence at large alongside other international courts and tribunals. See Sacerdoti (2011).
11. Moreover, Article 5 DSU allows Good Offices, Conciliation and Mediation, while Article 25 allows "expeditious arbitration within the WTO as an alternative means of dispute settlement [that] can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties".
12. Resort to binding arbitration to settle disputes concerning market access has been adopted beyond the DSU within the WTO. Specifically, the "banana waiver", granted to the European Communities by the Ministerial Conference at Doha in 2001 in favour of the ACP countries in accordance with Article IX 3 of the WTO Agreement, provided for two arbitrations in case of dispute concerning the maintenance of the previous "total market access for MFN banana suppliers" to the EC. In fact, both arbitrations have taken place in 2005-2006, although they failed to resolve the dispute.
13. For an overview, see www.nafta-sec-alena.org, *Overview of the Dispute Settlement Provisions*.
14. Mexico started at the WTO the case on *Tax Measures on Soft Drinks*, concluded by an AB issued on 6 March 2006 (AB/DS208/AB/R, adopted 24 March 2006), claiming that it had enacted restrictive measures on soft drinks sweeteners from the USA due to the impossibility to resolve the dispute under Chapter 20 of NAFTA, as there were no means to overcome the failure of the USA to appoint its panellists.
15. It is interesting to note that in concluding a specific bilateral agreement on the trade of softwood lumber in 2006, Canada and the USA have preferred to have recourse to the private international commercial arbitration model at the London Court of International Arbitration (LCIA) to solve any dispute, a mechanism to which they have resorted twice, see 102 AJIL 192 (2008) for a report.

16. For a review of the DSS set forth in different regional economic agreements in Latin America, Africa and Asia, see Lacarte and Granados (2004; Lester and Mercurio, 2009).
17. For the text, see EU OJ L. 127 of 14 May 2011, specifically Article 14.4-14.20 on Dispute Settlement Procedures, Annex 14-B on Rules of Procedure for Arbitration and 14-C on Code of Conduct for Members of Arbitration Panels and Mediators.
18. Several former AB members are included in the lists (including the present writer); no panel has ever been convened.
19. Art. 14.19 on "Relation with the WTO obligations" regulates recourse to the DSS of the FTA and WTO with regard to a particular matter (not concurrent but successive) and a type of "non bis in idem" should dispute settlement proceedings be started by one party in either forum regarding the same measure. See generally Lebullenger (2014).
20. Both developments having been due to the AB in the exercise of its procedural powers, against the opposition, at least initially of most of the WTO members, jealous of the interstate and confidential features of the DSS.
21. See the reform of the ICSID Rules of Procedure for Arbitration Proceedings in 2006 concerning Rule 37 (2), introducing the possibility of "Submissions by Non-disputing Parties", and the 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The latter are applicable in principle to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors concluded on or after 1 April 2014. See generally Sarooshi (2014).

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