Improving WTO Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts and Tribunals

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The choice of subject for this book was occasioned by the abortive Seattle Ministerial Conference of the WTO (World Trade Organization) of December 1999, which was to have launched a new Round of Multilateral Trade Negotiations, the so called Millennium Round, including "a full review of dispute settlement rules and procedures under the WRO… four years after its entry into force". The main reason for Seattle's failure was a seemingly irreconcilable clash of negotiating objectives pursued by developed industrialized countries, including those of the European community and by developing countries, including Least Developed Countries. In addition, a wide variety of non-governmental organizations including environmental groups, trade unions and developments, proved to be vehement in defining the WTO as "the enemy" rather than as a vehicle for pursuing civil society interests.

The pro-active idea for the book was inspired by the high level of ongoing discussions and analysis which continued in various circles in the wake of the serious setback of the Seattle Ministerial conference. There was a real need for ideas to be expressed and to provoke continuous debate and discussion. In

general, there was scarcely any serious disagreement on the need to further strengthen the international trading system administered by the WTO and, as an integral part of the same, the institutional and procedural rules governing the resolution of disputes which arise from the system.

This selection of essays is based on the idea that a substantial reform of the WTO system of dispute settlement may benefit from the insights and lessons to be from the practice of other international courts, especially the European Court of Justice (ECJ) and the International Court of Justice (ICJ). The discussion on how to improve WTO Dispute Settlement Procedures is an intrinsic part of the ongoing debate on how best to find, interpret and apply the rule of law in multilateral trade relations. Searchingly analytical papers from eminent specialists, academics and legal practitioners examine various procedural aspects of the GATT/WTO system of dispute settlement. Equal focus is Brought to bear upon comparable dispute settlement procedures used by the ICJ and by the ECJ.

The editor Friedl Weiss summoned together not only a group of practicing lawyers and QC's, but also a dynamic and harmonious group of distinguished academics and other well know and recognized litigants and members of the WTO, European Commission an other International Law Centres. Contributors include Dr. Bernhard Jansen, K.P.E. Lasok QC, Allan Rosas, John A. Usher, Richard Plender QC, LLD, Daniel Bethlehem, James Cameron & Stephen J. Orava, Theofanis Christoforou, Jacquelyn MacLennan, Sir Arthur Watts KCMG, QC, Peter Van Den Bossche, Ernst-Ulrich Petersmann, Marco Bronckers & Natalie McNelis, Melchior Wathelet, Robert E. Hudec and Christine Gray. These people can feel satisfied that student, legal contributors, academic teachers and students of the Law of International Organizations, of European Community Law and of International Economic and Trade Law, respect and appreciate their work.

Similarly, legal practitioners seeking to establish themselves in the rapidly expanding field of international trade law can benefit from a solid understanding of the issues and problems relevant to each area of the WTO dispute resolution system. This last comment is especially relevant here in Chile, as legal trade practitioners grapple to come to terms with dispute resolution arising under

free trade agreements. In Article 1.3 of the Free Trade Agreement by and between Chile and United States, the parties affirm their existing rights and obligations with respect to each other under the WTO Agreement. This book is indispensable reading in order to appreciate and understand the important issues relevant to the dispute resolution process.

It is a very ambitious work composed of twenty chapters that, using a similar methodology, discuss some fundamental subject matters and compare how they have been treated both in GATT and the WTO, the ECJ, the ICJ and in the appeal process. In an original manner, some authors also refer to the practice of the Courts of Luxembourg.

The matters studied range from the historical background to basic concepts, alternative dispute resolution processes and the joinder of parties and rights of third parties intervention in the proceedings, a subject matter that each ay is more complicated due to the increase in members of the OMC and the increasing number of cases litigated.

In addition to the aforementioned subject matters, there are several studies about written and oral submissions, evidence, standard and burden of proof, the hearings, participation of experts and the scope of remedies.

In reviewing this work, due to the wide-ranging topics covered and in-depth analysis given to each topic, it is difficult to offer criticism on all parts of the dispute resolution system. I therefore turn to offer some more specific comments upon some of the issues examined in this work and lessons to be learnt by WTO from the practice and experience of the ECJ and the ICJ, in the light of themes readily apparent in international law.

Firstly, and paramount nature for the pursuance of a co-operative society, what can be done to resolve conflict in an amicable or alternative or prior to litigation? As part of the changing nature of international law and order, alternative dispute resolution (ADR) is being increasingly recognized as an important alternative to adversarial arbitration or court litigation, whose higher cost, longer duration and lesser predictability are viewed as less advantageous than ADR. ADR is considered particularly beneficial for trade relationships, where the parties need to continue working together in the future.

Furthermore, the interdependence and complexities of environmental problems also render rule-making and rule-enforcement difficult. The much stronger duty to cooperate and avoid environmental harm (heeding the precautionary principal) explains why relatively few environmental disputes have been referred to WTO, the ICJ or the ECJ.

Pursuant to the "Understanding on Rules an Procedures Governing the Settlement of Disputes between members of the WTO" (the DSU), disputing parties have some choice as to the means of disputes resolution. Under the DSU the first step in the event of a dispute are consultations between the parties, with the possibility to request the establishment of a panel if no satisfactory solution is found within 60 days. Pursuant to Article 5 of the DSU the parties also have the option of submitting a dispute to political methods, such as good offices, conciliation and mediation. Pieter-Jan Kuijper, Jansen and Lasok conclude that the following summary lesson may be drawn from the EC procedure for the WTO procedure at the pre-panel stage: allowing more than 60 days for consultation, especially when the case is difficult; establishing a record of the consultations by a neutral third person or party to provide a stimulus for settlement; and improving the quality of the request for consultations and the request for establishment of a panel. Pieter-Jan Kuijper goes further to discuss how easily these measure can be implemented. As regards the first measure he makes it clear that political link between the length of the dispute resolution procedure and the duration of the US 301 Procedure would make the desired reform very difficult to achieve. The later two recommendations can be implement by the members themselves on a voluntary basis and by doing so the members will be contributing better practice and policies for the future: in essence, the development of "soft" or customary law. In summary, a stronger obligation to provide the information required by the complaining member state is required.

Secondly, a degree of decentralization may be noted in international society, where the individual or group is nowadays more readily taken into account. The WTO focuses on an integrated system where gradually the individual or group, such as a non-governmental party, is being given more freedom to express their view. However, it is not designed as a public process

and is not designed to allow private parties to establish their claims or defend their interests. Article 13 DSU allows panels to "seek information and technical advice from any individual or body, which it deems appropriate". The Appellate Body has provided guidance on this point, inviting the submission of amicus curiae briefs, while placing itself in control of the decision whether to accept or reject them. The experience of the EC considers that the involvement of institution of "civil society" is desirable and that the DSU Should be amended to reflect this value and to regulate and control their submission. This work also clearly identifies that there is room for improvement to prevent any repetition of the recent Banana arbitration decision, which eliminated the rights of co-complainants, third parties and WTO members in general from procedures involving a determination of compliance with WTO rules.

Finally, this last point raises and important point to discuss, being the enforceability of the decision made by the WTO. The member states have consented to the rules of the WTO, which is known as the primary norm. The secondary norm is the power to sanction and responsibility for breach. Robert Hudec makes a solid analysis of the origin of the GATT/WTO decision-making rules and procedure and in doing so, concludes that the WTO regulations were reluctantly adopted by member states in the face of the infamous "Section 301" law in the United States, rather the adoption of "the lesser of two evils". This is important to note, as one can expect states to look at ways to cut back on its rigor whenever it can. The new WTO procedure made legal rulings legally binding automatically upon the approval by the plenary body acting for the full membership and made retaliation available in the event a member state did not comply. Once a remedy has been issued and adopted, the new dispute settlement procedure establishes what amounts to a two-part remedy designed to secure compliance – the provision of a fixed deadline for compliance and a surveillance mechanism and a provision for automatically authorizing retaliation if compliance is not forthcoming. These remedies are entirely forward looking; there is no compensation for economic harm done by legal violations. The other downfall of this system is that orders are framed in very general terms , even though the DSU refers to the possibility of more "specific

suggestions" that are non-binding. Christine Gray argues that there are lessons to be learnt from the ICJ experience. The most notable feature of the ICJ case law is that the overwhelming majority of its judgments are declaratory judgments. The actual award of damages has been rare. Given the likelihood of protracted disputes over implementation such as have taken place in the Bananas and Beef Hormones cases in the WTO, Gray argues there is a very strong case for the Appellate Court to go further at the first stage when it determines there has been a breach of relevant principles and to give guidance to the parties as to the proper implementation of TWO obligations. Much academic and useful debate is provoked by the raising of such issues.

This work, filling the obvious need for such expression in the wake of the aborted Seattle Conference, contributes to the development of customary international law as a guide of authoritative value and in the promotion of policies to establish better standards of behavior and rules as regards the DSU. Such a work is of considerable worth in evaluating current practice and suggesting recommendations to improve the WHO dispute resolution procedure, may of which can be put into practice by relevant actors without change to the base written rule. It does, however, need to be emphasized that its true and final impact will be appraised upon the realization of states will to discuss, put into practice and develop the legal procedures suggested by the various authors in their individual spheres to promote mutual compliance with previously agreed rules. Drive and motivation in the official state sphere is required.

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