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Edited by Refus Yerxa and Bruce Wilson

Excerpt

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PART I

Introduction and General Considerations

The power of the WTO dispute settlement system

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The dispute settlement system of the WTO is one of the most important elements of a rules-based multilateral trading system. By way of introduction to the very instructive chapters that follow, I would like to make several observations about the nature of dispute settlement in a trading system based on national sovereignty, followed by some comments on how the system is designed to ensure integrity and fairness in the WTO's adjudicative process.

1 WTO dispute settlement and national sovereignty

The unique feature of the WTO is that, unlike many international regimes, it has an adjudication process that is mandatory and binding. Yet what does that mean, given the fact that the WTO operates in a world where international rules do not override national sovereignty? Remember, most WTO Members do not give direct effect to WTO rules or decisions, and implementation of any ruling requires actions by the Member in question, often by a complex process of legislation. Furthermore, there is no WTO jail, and we have no power to levy fines or other monetary sanctions. In essence, sanctions, just like compliance, must come from sovereign actions of the WTO's Members.

Put another way, the GATT/WTO dispute settlement system has always had to deal with a basic paradox. On the one hand, it is unrealistic to expect Members to cede control over their borders to an international decision-making body. Yet the Members of the WTO clearly want the rules to mean something, and this cannot occur without some credible

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enforcement mechanism. (One needs to keep in mind that we are talking about a very lengthy and detailed set of rules and commitments. The WTO agreements themselves run to hundreds of pages, and the full set of schedules of Member commitments are 130,000 pages long.) So the trick here was to develop an adjudication process that respects national sovereignty yet gives Members a compelling reason to comply with its decisions.

2 A contract between governments

How has the WTO solved this basic paradox? The answer goes back to the very origins of the GATT – the predecessor to the WTO, which came into effect in 1948. The GATT Agreement relied on the concept of mutually beneficial concessions exchanged among its members: in other words, a contractual arrangement. So the rights and obligations of the WTO – like the GATT before it – are contractual in nature. In fact, GATT members were called ‘contracting parties’.

It therefore makes sense that the dispute settlement system works on the basis of contractual remedies. What this means is that the violation of WTO rules by one Member gives adversely affected Members the right to withdraw some equivalent value of commitments in order to rebalance their respective rights and obligations. Please note that I said it gives them the right! However, the decision to ‘retaliate’ is entirely up to the aggrieved Member itself, just as the decision to correct a violation rests on the sovereign decision of the violator.

Thus, the dispute settlement process is merely a means of adjudicating whether a Member has acted contrary to its obligations, and if so, the extent to which other Members might be entitled to ‘withdraw equivalent concessions’ if the offending Member does not correct the violation. There are elaborate procedures designed to ensure that this ‘right’ they obtain from a WTO ruling is proportionate and fair.

These are some of the basic realities one has to keep in mind when examining the WTO dispute settlement process. The WTO system works only to the extent Members want it to work, and only if they decide that compliance is in their overall economic interest. It therefore rests on the credibility of the rules, and also on the credibility of the dispute settlement decisions. In fact, we see a large number of cases where Members do comply, and retaliation for non-compliance has, in the past, been limited to a few disputes.

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3 Ensuring credibility

A lot has been done to ensure credibility in the WTO dispute settlement system. For example, both the initial panels (which are like courts of first instance) and the Appellate Body are designed to be free-standing and independent, not subject to pressure from either Members or the WTO Secretariat. Secretariat officials do have some functions within the dispute settlement process. For example, the Director-General is required to appoint panelists in cases where the disputing parties cannot mutually agree on panel composition (this is regrettably becoming the case more often). And lawyers from the Secretariat do advise the panelists and the Appellate Body, although they operate under strict rules of confidentiality and standards of conduct. In fact, neither the Director-General nor any WTO official other than those assigned to assist a panel in a dispute have any idea what that panel decision is until after it is rendered. The same is true for appellate decisions. Only the Appellate Body members and the Appellate Body Secretariat staff assisting them know the content of a decision before it is made public.

Most importantly, the Members and, where necessary the Director-General, take special care in assuring that panelists (who are appointed on an ad hoc basis for each case) and Appellate Body members (who are appointed for fixed terms) are individuals of high integrity and are without bias or conflicts of interest.

The dispute settlement system has given rise to charges that WTO decisions are made by ‘faceless bureaucrats’, but when I hear this I often wonder what these critics would rather have: a system where decisions are made by well-known politicians? A coin toss? A system where might makes right? No dispute settlement system at all? The system may not operate perfectly but no one has yet been able to prescribe something better with respect to its basic fundamentals.

And because the system is not perfect, Members are considering how to improve it. But for the time being it is the best we can do, and perhaps one could say that it is like Wagner’s music – it’s better than it sounds. It has led to a remarkably clear and elaborate body of decisions interpreting and applying WTO rules. During the first decade of the WTO, the Dispute Settlement Body adopted some 83 panel reports, 56 Appellate Body reports, 12 implementation review panel reports, 8 implementation review Appellate Body reports, and circulated 16 arbitration reports regarding retaliation. Some interesting statistics covering the first ten years are set forth in the Annexes to this volume.

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4 Conclusion

Notwithstanding some criticism of certain panel and Appellate Body decisions, support for the WTO dispute settlement system is growing, and Members continue to view the Dispute Settlement Understanding (DSU) as crucial in providing security and guaranteeing that their substantive rights and obligations within the WTO can be enforced. But the principal reason that the DSU has worked reasonably well is the WTO Members themselves – both through their serious participation in the system and through their respect for the decisions being rendered by the WTO's adjudicating bodies. In this regard, WTO Members are to be congratulated.

The WTO dispute settlement and general international law

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I have been asked by way of introduction to the contributions that follow to address the subject 'WTO Dispute Settlement and General International Law'. Such a topic needs volumes and to treat it here in a few words is well-nigh impossible.

As some of the readers may not be familiar with the mechanics and the dynamics of the WTO system, I shall first describe briefly how the process of WTO dispute settlement looks from the outside to a lawyer who tries to classify it and where it can fit in the usual categories he has in mind. Then I will briefly comment on the substantive law which is applied.

If we want to classify the process of dispute settlement in the WTO, where would we put it? Is it mediation? Is it conciliation? Is it arbitration? Is it judicial settlement? Where in these types does it fit best?

Rufus Yerxa has described in the previous chapter how the system was created and developed, but I would like to add one or two observations to his. GATT was established under very peculiar circumstances, because there was supposed to be a third international economic organization in addition to the Bank (IBRD) and the Fund (IMF) that would deal with international trade: the International Trade Organization (ITO), not the WTO.

Its constitution was adopted in 1947, the Havana Charter. But the Havana Charter was very heavily attacked in the United States, and had no possibility of passing the Senate. So the United States extracted some of the rules dealing basically with trade in goods and invited all the countries that had friendship commerce and navigation treaties with it, to adopt these rules as an interim measure, under the label of the General Agreement

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on Tariffs and Trade (GATT). In order for the United States to adopt it, it had to take the form of an executive agreement and not a treaty, which would have been the necessary legal instrument for the charter of an international organization. But as a treaty, it would have needed the Senate advice and consent, which was politically unattainable.

The founding myth of GATT ever since has been that it was a mere agreement; in other words norms without institutions, because if institutions were injected into it, it would have become an organization and would not have passed the American Senate. This idea is still deeply ingrained even in the WTO, more than 50 years later.

The mantra of the WTO is that it is 'a member-driven organization'. Everybody keeps reiterating it in a ritualistic way as if there are organizations which are not member-driven. But what it simply means is that the organs are not supposed either to be there or to have autonomous powers; that all decisions remain exclusively in the hands of the 'Contracting Parties'.

How does this reflect on a system of settlement of disputes? There was no system of settlement of disputes at the beginning. I am speaking roughly because we can argue on the details, but in fact when there was a dispute, the Contracting Parties started by creating a 'study group' and then it became a 'special group', and later on it was called a 'panel'.

This reflects unconsciously models or modalities of international dispute settlement. A 'study group' evokes the mildest type of intercession; a 'special group' a little bit of mediation; but when it comes to 'panel' the word evokes arbitration; though it was not arbitration.

Why was it not arbitration? First, because the outcome, the 'report', was not binding. To be binding it had to be accepted by the 'Contracting Parties', meaning by the plenary political organ, by consensus; positive consensus. Everybody had to accept it, including the two or more parties to the dispute. If one of them did not agree, it did not pass. So, at best, from a technical legal point of view, it was a system of conciliation. Conciliation is almost like arbitration, in that the organ or third party takes a certain distance from the parties, and develops recommendations on the basis of applicable law, though taking into account other considerations as well. But the recommendations do not bind the parties, who can accept or reject them.

What happened at the Marrakesh Ministerial Conference in 1994 creating the WTO was a very important qualitative change, and it was done by changing one word, one adjective. The consensus which was needed to adopt a report of a panel became that which is now needed for stopping

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its adoption; otherwise the adoption is automatic, i.e. it became a negative consensus. In other words, in order to stop the final outcome from becoming obligatory, all the members have to agree that the report be set aside.

We suddenly move from a completely consensual system into a system which has a gridlock at the end, a legally inescapable outcome, unless all the members of the organization agree to set it aside; we suddenly move into something really jurisdictional in the full sense of the word.

But in social physics, you cannot forget about history. Much of the inheritance from the GATT dispute settlement remains, at least in peoples' minds. If we look at the dispute settlement system as it is – and I now come to the present system of the WTO – it goes through three stages, starting with political negotiation and conciliation in the political body, the Dispute Settlement Body (DSB). But the process functions as a juggernaut that cannot be stopped. If one party insists on going to a panel, it ends up getting a panel, and then the panel report will be adopted if presented to the DSB within the prescribed period, unless there is a negative consensus to set it aside, or if one of the parties appeals; and with the appeal, the result is the same: the report cannot be stopped from being adopted by the DSB unless there is a negative consensus by all the Members to set it aside.

What is very interesting, again from a general international law point of view, is that if we look at the panel process, it is a process which is typical of arbitration. We speak of 'terms of reference' that have to be agreed by the parties; we speak of designation of panelists, which is done by the parties. It is true that there is a fallback position, because if they fail to agree, the Director-General of the WTO fills the gap; but that exists also in arbitration, for example in the International Centre for Settlement of Investment Disputes (ICSID) system.

The procedures are confidential. Only the parties are privy to them. Even the other Members of the organization are not privy to the procedure, unless they intervene as third participants. That is very much arbitration; and there is even an intermediate stage, where the parties can negotiate, and even settle the case before it is finalized.

Here we are really bathing in the arbitration model, leaving the process largely in the hands of the parties. (*L'arbitrage est la chose des parties*.)

When we come to the last stage, that of the Appellate Body, however, the model changes completely. It is a permanent body with permanent membership, which can only examine the points of law, not the points of fact. Points of fact are not appealable. So it is an appeal in the common law

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sense. In the civil law sense, it is 'cassation', not appeal, because an appeal in civil law reopens the whole case rather than only certain points of law. In sum, the Appellate Body has a kind of supreme court jurisdiction to control the interpretation and application of the law.

Here, we are in the presence not only of a judicial system, but of a very developed judicial system of judicial control of legality. The procedure is that of a judicial body. However, a remnant of the heritage of the past, procedures are confidential, which leaves room for some people to criticize the system, in total ignorance of reality, as being run by faceless bureaucrats!!

That brings me to the second part of my observations concerning substantive law. I have previously referred to the classification of the dispute settlement process according to general international law. But when it comes to the substantive law applicable in these processes, how does it relate to general international law? And does this relationship pose any particular problems?

WTO law is conventional or treaty law. Article 3 of the DSU provides that the agreements have to be interpreted according to the customary principles of interpretation of general international law. Thus, the relationship as such poses no special problem. If there is a problem, it comes from the mantra that this is a member-driven organization and that the members control everything, which generates a tendency to consider that the agreements are legally self-sufficient, constituting a hermetic or 'self-contained regime'. This impression is reinforced by Article 3 of the DSU which provides that the dispute settlement system should not add to or diminish the rights and obligations of the parties.

However, there is no treaty that can live in a vacuum and in 'clinical isolation' from general international law, to use a picturesque expression from the first report of the Appellate Body; for how can it live outside its legal environment? Suffice it to illustrate this proposition with the following three points.

First, in terms of procedures, the definition of what is the judicial function, and what are the modalities of its exercise, is not provided in the DSU or the agreements. For example, there are no rules of evidence. Where are we going to get such rules? We have to go to the general principles of international procedural law which govern the exercise of the judicial function.

Second, the WTO agreements themselves are treaties. A treaty is a legal instrument which has a life cycle; and this life cycle is regulated by general rules which have been codified by the famous Vienna Convention on the

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[More information](#)

Law of Treaties of 1969. These rules have not been reproduced in the WTO agreements, but we have to refer to them and apply them all the time.

Finally, there remain the substantive rules of general international law. In the GATT, Article XXI:3(c) says that the Agreement is subject to the compulsory decisions of the Security Council under Chapter VII of the Charter of the United Nations. In fact, this is only one application of international public policy or mandatory international law, the famous *jus cogens*. In the *EC – Hormones* case, the Appellate Body examined whether the precautionary principle had become crystallized into a general principle of customary international environment law. But if there is general agreement that a rule has acceded to the status of mandatory public policy (*jus cogens*), we have to apply it, because in such a case it overrides not only the WTO agreements, but even the Charter of the United Nations.

Beyond that, can we refer to a rule of general international law such as good faith? Can we have a legal system without the rule of good faith? In one case, the Appellate Body referred to the principle of proportionality as a general principle. That gave rise to a lot of criticism. Can there be any system of law that can work without a reasonable concept of proportionality? I conclude with these open questions, without trying to answer them, as they are subject to controversy among the WTO membership.