

The Legal Regulation of International Trade
Assessed Essay Autumn Term 2005

Question two:

Van den Bossche has asserted that “The WTO system for resolving trade disputes between WTO members has been a remarkable success in many respects. However, the current system can undoubtedly be further improved.” Law and Policy of the WTO p.304

Comment on the relative success of the WTO dispute settlement procedure and ways in which it might be further improved.

Introduction

One of the essential debates underlying the GATT system was its dispute settlement mechanism. At the early stages of the GATT, negotiations between member states was the trend, as disputes were usually settled after going through diplomatic procedures by 'semi-annual meetings' of the contracting parties, then the 'intercessional committee' of the contracting parties has been in charge of settling disputes. Later on the so called 'working parties' has been introduced which are composed of representatives of nations and finally, panels have come up (Jackson, 1998). The difference between a working party and a panel is that while the former involves the disputants as well as meetings of members of the working party, the latter only involves members of the panel who meet by themselves (Lowenfeld, 2002/2003).

The Uruguay Round Negotiations (URN) has been considered a massive development in economic history as it has experienced the basic shifts in the dispute settlement process (DSP) which had been previously criticized throughout the GATT period.

This essay will start off by pointing out the major shifts from the GATT to the WTO systems. It will then examine the success of the WTO DSP. Then it will move on to identify some of the basic problems of the current WTO DSP and finally address some of the main suggestions for improvements of the WTO DSP. However, the essay will not address much of the provisions of the DSU as they are listed elsewhere in detail.

Part one: An evaluation of the WTO Dispute Settlement success.

In order to evaluate the success of the WTO's DSP, its objectives should be taken into account. According to the Punta Del Este Declaration, the goals of the URN are to ensure the efficiency of resolving disputes as well as compliance with recommendations after improving the GATT dispute settlement rules. Accordingly, the question at stake is, does the WTO DSP accomplish such goals? (Stoler, 2003).

Generally, the URN had seen a replacement of conciliation by adjudication, as panels no longer attempt to compromise between disputants as has been the case in the GATT system. But they only recommend parties who are GATT inconsistent according to their legal analysis of the dispute (Cottier, 1998). The WTO DSP has also provided a time schedule for the undertaking of procedures, although practically, it is not obligatory, as it may be subject to the agreement of disputants for extension (Op.cit.).

One of the significant shifts was that a panel is adopted automatically unless the DSB decides by consensus not to adopt it. In contrast, according to the GATT system, consensus had the opposite meaning, as the establishment of a panel would be declined if one party, probably the losing party, objects it. This shift prevents the losing party from blocking the establishment of the panel as previously has been the case in the GATT system. As regards the adoption of the panel or the appellate body's (AB) report, reports are adopted unless the DSB decides unanimously not to adopt it (Dillon, 2002; Jackson, 1998).

Undoubtedly, the composition of a standing AB consisting of seven experts in law was considered one of the fundamental shifts of the WTO DSP, as under the GATT system, the losing party had no choice to appeal other than to block the adoption of a panel by objecting it. The AB's task basically is to review, amend or reverse the panel's legal findings as well as conclusions (Trebilcock & Howse, 2005).

A further remarkable shift of the WTO DSP was the expansion of its ambit of application to include the so called 'covered agreements' such as the TRIPS, GATS, etc. As according to the previous GATT system, for instance, disputes relating to intellectual property rights were subjected to a different DSP than other disputes (Cottier, 1998; Jackson, 2002). The WTO DSP has also expanded the panel's jurisdiction so as to settle disputes regarding preferential trade agreements as in the previous GATT; they were under the jurisdiction of diplomatic working parties who turned out to be inefficient in this regard (Cottier, 1998).

A further shift of the WTO DSP was the independence of the procedures regarding the violation nullification or impairment from those of the non-violation nullification or impairment, as, while the former case requires a recommendation for consistency, the latter requires negotiation and compensation (Jackson, 2002).

As per the Sutherland Report, the WTO DSP has accomplished two essential contributions; firstly, unilateral trade measures shall not be imposed prior to undertaking a dispute settlement procedure. Secondly, the DSP preserves developing countries' rights to challenge measures imposed by massive developed countries such as the US or the EU for the sake of protecting their interests, instead of having to settle them through bilateral trade negotiations where power plays a significant role in this matter. Moreover, US-Underwear and EC-Sardines disputes are good examples to prove that developing country members have successfully challenged the trade measures imposed by the two biggest trading powers (Matsushita, 2005). The latter contribution is of great importance to ensure the equality of the system.

Most of the commentators agree that the WTO DSP has recorded an unforgettable success in various fields. Statistics may also prove such success, as until late February, 2003, 281 disputes in 228 different subject matters from 43 distinct WTO members have been brought under the system which shows how confident they are about the system (Stoler, 2003). By applying the URN's goals to these shifts, it clearly appears that most of them have been accomplished. However, if such success is appropriate for

nowadays disputes, it might not be in the future and consequently, will require further improvements.

Part two: Proposals for the future of the WTO dispute settlement process.

Notwithstanding the WTO DSP's success, the system has numerous shortcomings. Developing countries may encounter problems relating to the lack of in-house expertise and the fact that they do not bring up much actions due to the non-internalization of the DSU's new rules as regards trade agreements' administration and the non-availability of the adequate human resources enabling the undertaking of the task regarding the prevention of non-compliance with agreements. The essay agrees with the suggestion to establish a 'WTO Center' in each developing country and adds that it should be supervised by experts from developed countries as well as with the suggestion that developing countries should develop their human resources and make use of the existing DSU's articles regarding special and differential treatment or call for new ones in order to overcome these problems (Gabilondo, 2001; Jackson, 1998; Matsushita, 2005). Despite the fact that articles in the DSU relating to special attention to be given to developing country members' interests as well as to the effect on developing country to be taken into consideration have not been used at all, some commentators were hesitant of whether or not they would distort legitimacy (Broek, 2003; Petersmann, 2003). This essay views that these articles are legitimate and should be used more often on the grounds that those countries are in great need for support whether financially or morally.

Broek observes that, the WTO DSP is not on the right track as regards attempting to prevent 'Pure power' between states as the system relies more on this matter. For instance, a least developed or even a developing country suspending its concessions with a developed country is not likely to impact much on the latter as compared to the loss it will incur (Broek, 2003).

Some would suggest that retaliation should be replaced by ‘monetary or punitive damages’ on the grounds that retaliation would harm retaliated developing countries. However, this view has been criticized in that, firstly, the economic position of particular countries might encounter pressure due to high compensation. Secondly, compensation is said to be not as effective as retaliation. Thirdly, developed countries may continue paying compensation for a long time for the sake of the violation if the outcomes of the violation outweigh such compensation (Broek, 2003). However, the essay agrees with this suggestion as it supports O’Connor’s observation that retaliation is detrimental not only to the defendant but also to the complainant and in specific, disputant developing countries as well as its obvious effect to the distortion of trade yet the imposition of a sanction such as compensation has a similar effect but not to that of the retaliation’s extent (O’Connor, 2004).

The essay agrees with O’Connor’s view that remedies should involve private companies which incur loss due to a breach of any of the covered agreements (O’Connor, 2004). Moreover, the essay moves further and agrees with Jackson’s proposal that the system should grant private companies the right to bring actions directly to panels against member states that are in breach of the WTO or a covered agreement (Jackson, 2002). Furthermore, the essay adds that there must be some kind of strict restrictions such as a minimum amount of loss incurred and a high standard of evidence, so as to prevent infant industries from bringing up spurious claims and wasting the panel’s time.

A further problem of the current system relates to the interpretation of provisions. For example, if there is a conflict between two provisions of the covered agreements or even in the situation where a provision is ambiguous, should the panel and/or the AB undertake such interpretation solely? And to what extent may the interpretation be correct? According to Raghavan, interpretation should be authorized by the General Council to the panels and AB (Raghavan, 2000). This essay suggests that there should be a committee composed of three WTO experts who are completely familiar with most of

the provisions of the covered agreements. This committee should convene by the presence of the three experts administratively supervised by the General Council.

The EC has suggested the establishment of a ‘permanent panel body’ (PPB) consisting of 15-20 full time individuals who should not be government affiliates, as most of them should be lawyers, assigned for a period of 6 years. This suggestion has been one of the main concerns of the Doha Declaration in 2001 and has been supported by some of the critics such as Hudec, John Kingery and Chang who adds that there should be a combination of part time and fulltime panelists, while others such as Shoyer object its application. The EC supported its suggestions by stating that if it applies it will save time that is wasted under the current process through the selection of the disputants to their panelists. In addition, the EC believes that this would be advantageous to the system through broadening the panelists’ experience as well as enhancing their efficiency and practicality in undertaking procedures and consequently, the issuance of a higher quality of reports and the reduction of the number of disputes reversed by the AB as agreed by Davey. The EC pointed out another advantage of the suggestion which relates to the ‘legitimacy of panelists’ as it requires that panelists should not be government affiliates so as to prevent the conflict of interests of panelists in issuing their reports. Moreover, Davey is not optimistic about this advantage, as he does not believe that this will wholly solve the problem. However, he has no doubt that this would reduce it. Furthermore, some of the supporters of the suggestion state that it would lead to the decline in the secretariat’s effect who is in charge of the choice of panelists under the current system (Cottier, 2003; Chang, 2003; Davey, 2003; Shoyer, 2003).

This essay agrees with the group of critics who support the EC’s proposition and further suggests that the ppb should be composed of panelists specialized in different fields as well as a general background in the WTO, for example, panelists specialized in agriculture (Chang, 2003). The essay adds that the PPB should be composed of an adequate number of panelists, 3-4 in each specialization who are to handle disputes according to their specialization. In contrast, according to Bourgeois’s view panelists should not be specialists, as history has proven that they have been efficient, he also adds

that if they are specialists, it will be very hard for them to connect their field of specialization to the wider 'WTO context' (Davey, 2003; Bourgeois, 2003). In response to the latter view, firstly, if history has proven the efficiency of panelists while they are not specialists, what might make it inefficient in case of specialized panelists? Perhaps it would be better to provide specialized panelists who shall handle disputes in a more depth view. Secondly, the essay requires that panelists should have a general background on the WTO which will enable them to connect their fields to the 'WTO context'.

Conclusion

To sum up, this essay has given a brief historical background of the DSP, and then it pointed out the major shifts from the GATT to the WTO that had mainly taken place in the URN and which had proven to be successful in the previously mentioned fields.

The essay pointed out some problems underlying the current DSP relating to developing countries, as it agrees with the suggestion of the establishment of a 'WTO Center' in each developing country in order to overcome those problems. It also addressed problems relating to panels. In this regard, it agrees with the EC's proposition as previously stated under the condition that there must be 3-4 panelists specialized in each field having a wide range of general experience in the WTO, as proposed. It further addressed problems relating to interpretations as it has suggested the establishment of a committee composed of 3 specialists supervised administratively by the DG to be in charge of such interpretation. It has also addressed remedies in addition to the different suggestions given in this context including their criticisms. As regards such matter, the essay suggests that retaliation should be struck out of the system as it completely distorts trade and instead, it suggests a compulsory compensation, despite this latter remedy distorts trade too but unfortunately not like the former one.

The essay also agrees with the suggestion that remedies should involve private companies which incur loss due to the violation of the WTO or one of the covered agreements. It also agrees that those private companies should have the right to directly bring actions to panels under strict restrictions. It further proposes that the DSU should be divided into sections according to subject matters and perhaps should address new issues to cope with globalization.

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