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The Role of the World Trade Organization

I.

One reads in the academic literature, and the lawyer specialists seem largely to agree, that "the new WTO dispute settlement system was the Jewel in the Crown of all the Uruguay Round results"; and that it has been an outstanding success. It is quite a shock therefore to be faced with a question which asks, directly, whether the DSU (as it is called) is adequate to the task.

Let me start with a synopsis of the DSU[1], to be clear what the provisions are and how it works; and also give you some of the basic statistics on cases since 1995.

Synopsis[2]

It is designed to deal with state-to-state disputes (being part of the WTO which is itself an inter-government treaty).

- It does not replace entirely the usual bilateral and diplomatic efforts, which form a part of its approach, especially in the early stages. Throughout the process an amicable solution which is acceptable to both parties is to be preferred to a legal ruling, and a 'good offices' procedure, as well as mediation and conciliation, are envisaged in some circumstances.
- Where two countries are in dispute, either one of them can notify the matter to the WTO and there is a period of 60 days during which bilateral consultation has to take place.
- After 60 days the complaining party can seek to have the DSB establish a panel (composed of three neutral persons, trade specialists and/or lawyers) in order to examine the case in detail.
- Such a request can be refused once (allowing time for final bilateral efforts) but MUST be accepted on a second occasion.

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[1] The formal title is: "Understanding on Rules and Procedures Governing the Settlement of Disputes". The full text can be found at Annex 2 to the Marrakesh Agreement establishing the WTO, adopted at Marrakesh on 15 April 1994. This spells out the detailed provisions to be applied, and establishes a body (the DSB) to exercise surveillance and to take all necessary decisions, with regular reporting to the General Council (the WTO supreme body).

[2] For a fuller exegesis of the DSU process, see inter alia the chapter by *W. Davey* in Trade, Environment and the Millennium (ed. *G. Sampson & W. B. Chambers,* UNU Press, 2002) at pages 145 to 174.

THUS: a complaint, if not otherwise solved, will automatically go to a panel.

- Panels take in general between 9 and 12 months to do their work, after which a report is issued, first to the parties in draft, then to all WTO members.
- Panel findings in all cases address the issue whether there has been a violation of WTO obligations under one or more WTO agreements.
- A panel report may be adopted (it must be considered within 30 days) or it may be appealed to the Appellate Body established by the DSU.[3]
- Appeals are to be completed within 60 days, or 90 days in more complex cases, and their reports are also issued to all members.
- In both cases – a panel report which is not appealed, or an AB report – the report will be automatically adopted unless there is a consensus against its adoption (a situation which has never arisen and was not expected to happen).

THUS: a complaint, once examined, will lead to a formal WTO finding on violation.

- After this, the matter enters the phase of implementation, with first an agreement on how long a defending party should have to put its house in order (the so-called "reasonable period of time" allowed to accomplish internal administrative or legislative changes).
- During this period, the matter is kept under surveillance and the defending party must provide information as to its actions. Once the period is completed, the DSU considers that the issue has been solved by compliance with the ruling unless the complainant party challenges this by initiating a new procedure.[4]
- If however it is plain that no changes have been made, or if the challenge process shows that implementation has not been satisfactory, then the complainant may seek bilateral consultations to discuss possible compensation, and if need be may also seek DSB authority to apply trade measures (sanctions) to the other party.[5]

Analysis of the statistics[6]

- Of the 273 complaints notified, *almost three-quarters (71%) have not gone on to the Panel stage, to be formally examined within WTO.* Many of these complaints are moribund and are not pursued, some others are the subject of bilateral agreements.
- At this time, 63 cases have been the subject of a Panel or AB report (or both) and have resulted in a formal DSB ruling (with 16 further cases "in the pipeline").
- *Two-thirds of these reports have been appealed* (45 appeals completed and 3 more in pipeline).

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[3] The Appellate Body consists of seven appointed members who may serve for two consecutive terms of four years. It is regulated by, and its functions defined in, DSU Art. 17 with the aim of reviewing appeals on the legal elements of a Panel's work ('limited to issues of law and legal interpretations') and it has the power to uphold, modify or reverse Panel legal findings and conclusions.

[4] If no action has been taken to comply, or if the action is considered to be unsatisfactory, then the complainant may invoke DSU Art. 21.5 and have the matter reviewed again, normally by the original Panel. This situation has occurred in 11 cases, one of which is still pending.

[5] This first occurred in the two EU cases over hormone treated beef and banana imports; and later in the case brought by Canada against Brazil on aircraft export subsidies.

[6] The annex provides more detailed statistics, as of 29 October 2002.

- *Involvement of developing countries* is remarkably high, not only as defendants but also as initiators of complaints.[7]
- Among the more *active participating developing countries* are India and Brazil, with 8 cases each, and Korea with 7, as both complainants and defendants. Argentina (almost all as defendant) and Mexico are also actively engaged.
- In total more than (40) WTO members have participated in Panels, with all regions engaged except Africa. This demonstrates a degree of confidence in the ability of the system to deliver a fair result.
- *United States*: is by far the most active participant (a party to 40 cases) but has been the defendant (21 cases) far more often than either the EU (7) or Japan (3).
- *United States*: has now been the defendant more often than the complainant (21: 19). This seems to be mainly the result of multiple challenges to recent US decisions on steel related issues (anti-dumping and countervailing cases, and safeguard measures).

Annex

Total number of consultations	Panels and AB reports adopted	Cases appealed	Art. 21.5 challenges
Total = 1995–2002			
273	63	45	10
Ongoing cases (at 29–10–02)			
About 20[8]	16	3	1

Explanatory notes:	
Total number of consultations in 1995–2002 period, as notified to WTO:	273
– *of which:*	
Panels and AB reports adopted, ie. *completed*:	63
– *In addition:*	
Panels *ongoing*, ie. set up and in composition or at work (situation as at 29–10–2002)	16
Cases appealed (total numbers and ongoing)	48 (3 ongoing)
Art. 21.5 challenges (total numbers and ongoing)	11 (1 ongoing)
Estimate of consultations still being actively pursued[9]	about 20

[7] Of the first 10 panels established, for example, in the period 1995–96, six were initiated by developing countries (and four of those were against the USA or the EU). Taking the 16 "active panels" currently under way as another example, developing countries are involved in 10 of them, in 7 cases as complainants (and in 4 of those a complaint against another developing country).

[8] This corresponds broadly to those cases which are relatively recent (notified during 2002).

[9] Of 273 complaints, 63 cases have been completed and 16 more are in the pipeline; another 15 or so might still be referred to a panel.

EU and US record overall, ie. vis-à-vis all partners

	1996	1997	1998	1999	2000	2001	2002	
EC plaintiff	1	0	2	1	10	4	2	20
EC defendant	0	1	3	0	0	2	1	7
US plaintiff	1	2	6	5	3	1	1	19
US defendant	1	2	1	1	5	7	4	21

Comments

- It would be dangerous and misleading to measure *the success of the new system only by the number of complaints* since many of these are not pursued (and some may in fact have been settled outside the DSU framework). However the number of completed cases is still quite high, on average 8 per year of its operation, and growing.
- *Success in securing a solution* comes in two ways: by full use of the DSU process, but also by reaching amicable settlements, often under the pressure of being exposed to the full process and facing a formal ruling of violation.
- *In areas where the members had experience*, that is where the old GATT system was clearly perceived to be inadequate, the corrections made in the DSU have been in general successful, especially in ensuring that panels are set up to address complaints and in having their reports adopted.
- One might however regard *the weakest link* as being those areas in the DSU where there had been less experience in the past (the principal "terra incognita" being in implementation of panel/AB rulings and in ensuring satisfactory enforcement).
- Where *implementation* is a political problem, we should be re-examining how to create the necessary domestic pressures in favour of change (given that the status quo always has its supporters).

II.

If the DSU is considered to be "inadequate" or "insufficient", or simply unable to achieve its objectives in full, then the question must arise: inadequate in relation to what? What is the standard to apply? What is the point of comparison?

1. In relation to the previous GATT system of dealing with (settling) disputes?

This is plainly a ludicrous proposition. There was so little confidence among GATT members in the previous system that it was used relatively rarely and, when used, had little or no consequence to change governments' policies. In both of these respects the new DSU is clearly a substantive improvement.

2. In relation to other international tribunals whose objective is to settle disputes?[10]

This also is not plausible. Other tribunals which hear complaints between governments (or states) such as the ICJ in The Hague are not without their own problems. Referral of cases can be blocked when one of the parties does not accept the Court's jurisdiction (this remains an option within the UN, as provided for in the Court's own statutes, rather than being compulsory). Rulings are generally not legally binding on the parties, no doubt due to national sovereignty considerations (but their moral force is strong and compliance has in general been good – no state likes to be considered outside the pale).[11] Also, cases tend to take around 4–5 years on average before any ruling is issued.

3. In relation to other types of dispute resolution such as arbitration?[12]

This is where the "like to like" argument applies. Arbitration does play a role in disputes about international relations, where both parties can agree and where they prefer to have a third party suggest the best way forward. But it is essentially ad hoc;

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[10] The ICJ deals essentially with disputes between states and in general the liability of the state (eg. for aircraft accidents over another country, or default on loans) or issues of sovereign territorial rights (eg. in the Antarctic or over the Corfu channel). The Treaty background in each case, and the principles of public international law, provide a general legal context, but most cases are political in nature (government policy or decisions) rather than a matter of strictly legal arguments.

The nearest equivalent to the WTO system is the International Tribunal set up under the Law of the Sea to rule on disputes over territorial waters, fishing rights etc; but this has so far been so under-used that it provides little basis for real comparison.

(Another possible point of comparison is the European Court of Justice (ECJ) which has similar functions in deciding when government actions are in violation of European law but which of course works within a more limited jurisdiction than that which applies to the international economic order).

[11] Art. 94 of the UN Charter provides that members will comply with Court judgments.

[12] There is a long history of international arbitration, often the result of Treaty provisions or under the terms of particular Conventions, going back at least to the Hague Conventions of 1899 and 1907 (on Pacific Settlement of International Disputes). These Conventions envisaged a permanent panel of jurists to act as arbitrators, and some 20 cases were in fact tackled in this way between 1902 and 1932.

The agreement to set up the Permanent Court of International Justice, under the League of Nations, led to a different focus, with the Court issuing judgments and advisory opinions; and this approach was later confirmed in 1946 by the establishment of the ICJ itself. That arbitration as a procedure has its limits is shown by the fact that DSU Art. 25 provides for this as an alternative to the Panel process, where both parties agree; but the Article has remained unused in practice.

(In more recent years commercial arbitration is thriving, after the 1958 UN Conference with active support and involvement of the Council of Europe and the Inter-American States, and with the blessing of UNCITRAL; and, more recently, the Int. Chambers of Commerce have set up a procedure to deal with purely commercial disputes. Equally, since 1965, the Convention on Settlement of Investment Disputes (CSID), sponsored by the World Bank, has been active in settling disputes in that particular area.)

and is not a guaranteed method for dealing with disputes between states. (Commercial arbitration is as a general rule between companies exclusively, and over the terms of specific contracts; and arbitration in the context of labour disputes is a separate and even more specific case, often an integral part of the bargaining process.)

4. In relation to *an ideal situation* where disputes could be settled without delay and where enforcement of legal rulings causes no political difficulties?

Here there are criticisms to be made. Few man-made systems are ever perfect, and the DSU is certainly no exception. Trade Ministers, at their 1994 meeting in Marrakesh, recognised this by adopting a separate Decision to review the operation of the DSU within four years. Nevertheless one should underline some of the unique elements that it does contain before reaching any premature conclusions.

Thus:

It is very rare, possibly unique, in the international context, to find that governments have agreed on a dispute settlement mechanism which, once the facts and the arguments put forward by both sides have been heard and thoroughly examined, gives power to panel to issue a legally binding ruling.[13] Usually this implies a verdict that a particular law, or measure, or practice is or is not in violation of international trade rules; a verdict which, in addition, carries with it an obligation on a government to make such changes as are necessary to bring its actions into compliance with WTO provisions;

Further, it is rare that such a process can be completed in little more than 12–18 months from the time that a complaint is referred to a panel until the final ruling;

It is also rare for an international instrument of this kind to regulate the use of countermeasures (especially unilateral ones) by the more powerful members in cases of perceived non-implementation. This is an exceptional reinforcement of the rule of law in the dispute settlement field, and at the same time protects the smaller members from being exploited in an unfair manner; and, finally,

while implementation of the rulings is not perfect, it has in general been rather satisfactory, with relatively rare cases where domestic political circumstances make changes of law or practice impossible, or impossible immediately; and *no cases where governments have ignored the findings or simply dismissed them as an unacceptable interference in the exercise of sovereign national powers.*

III. Business enterprises and their role in the WTO process

In this context, I understand this to mean participation in the panel and appeal process under the DSU (although it could also have a wider application, participation in WTO activities in general). If business was allowed to participate, other civil society actors would certainly claim the same access.

[13] I use the terms verdict, ruling or findings in this text in an interchangeable way, to indicate the report which is issued by the panel or in some cases by the Appeal Body.

If that is the sense, then it clashes directly with the argument frequently advanced by NGOs that the WTO is already too much influenced by the interests of big business, and that this leads it to neglect the wider social, consumer and environmental factors which ought to bear more strongly on trade policy. The classic example usually given is on Intellectual Property issues.

The fact is that neither of these arguments is feasible or accurate. In the WTO context, given that at root it is an inter-governmental treaty, *it is the members (the states, the governments) that take decisions.* Any influence on the process therefore must come through lobbying the members, rather than through direct participation, and big business is free to do that, as indeed are the NGOs and others.

As regards the DSU, more precisely, there is a particular difficulty. Only the two parties (the complainant and the defendant) normally participate in the work, by making written submissions and rebuttals to a Panel, and only they are present at the Panel's sessions. There is one exception to this: those countries that have specifically asked to have 'third party status' (meaning a general or systemic interest in the matter in dispute) are given an opportunity to meet with the Panel and submit a written paper, but they are not present through the whole discussion.

In consequence, since the process is not open to all WTO members, it is hard to see how it could be opened at this stage to outside bodies from civil society, whether from the world of business, or from NGOs, or from the trade unions.

In this respect, while there are similarities with the way that courts operate at the national level, the DSU is very different in one important sense: *there is no right for the public to attend hearings.* To move in that direction is not totally excluded, in principle, but the fact is that the members are not for the moment favourable to the idea.[14] Some have argued that the DSU has already moved too far in the direction of a judicial procedure, and that the more political or diplomatic aspects are not given proper weight. Clearly, to allow direct participation would inevitably mean that more general public policy considerations would be put forward, thus tending to obscure the focus on violations of binding rules.

Bibliography

W. Davey, chapter on WTO dispute settlement in "Trade, Environment and the Millennium", published 1999 by UNU Press, revised 2001, ed. Sampson/Chambers, at page 145;

- See note 3 at p. 170 on GATT panel experience, based on R. Hudec's studies: "Of 25 panel reports circulated in 1986–1990, only 3 were not adopted. Of the 24 reports circulated in 1991–1995, 11 were not adopted." Yet those involved had the impression of increasing blockages and failures to achieve a solution, perhaps especially in cases where the USA and the EC were against each other.

[14] Even the more limited notion of greater transparency in the dispute process as a whole is not one that is universally supported.

Article on: WTO dispute settlement and human rights by G. Marceau, in Eur.J Trade Law, vol. 3, No. 4, Sept 2002.

- p. 760, "a rare system of international law that has managed to regulate countermeasures by powerful states".
- p. 768, on non-violation claims as [attacks on failures to apply] 'good faith implementation of the GATT contract', but not to be used to introduce new legal provisions where they do not exist.

Article on: The 'Trade and ... Conundrum', by D. Steger in Am.J Int. Law, vol. 96, January 2002 (commentary on several papers by others in a symposium).

- p. 142, issue of *de jure* and *de facto* discrimination in relation to Art. III provisions on national treatment. Hudec stated that of the first 207 legal complaints only a handful raised the *de facto* discrimination issue and the first affirmative ruling on such a claim was approved in 1987.
- p. 140, on greater transparency in dispute settlement proceedings: "developing countries oppose this, not because they are undemocratic or want to keep the WTO as a closed club, but because they fear that they will lose the little control they have over the system to NGOs and other non-state actors from the two largest trading powers". (Since they already feel excluded from some of the WTO decision making, they oppose giving greater power to others – especially those resident in the West – which they do not have themselves.)

Book review by D. Steger for the J Int. Economic Law, OUP 2002, on Claude Barfield's book: Free Trade, Sovereignty, Democracy: the Future of the WTO.

- p. 566, CB cites evidence of pressures on the DS system (and the AB) to create 'soft law' or 'customary law'.
- p. 567, CB recommends greater recourse to mediation, conciliation and arbitration mechanisms; but there are obvious difficulties.
- p.568, "If members believe that certain disputes may be too politically charged, and could threaten the system, then they should exercise great prudence and caution before launching formal WTO complaints". Examples: Helms Burton, Japan Autos, Chile Swordfish.

Encyclopedia Britannica: general background on the ICJ and preceding International Courts within the UN and League of Nations systems, and on Arbitration precedures, Conventions etc.