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The Role of WTO in Trade Dispute Resolution: An Analysis of its Effectiveness

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ABSTRACT

The Uruguay Round's success in achieving more binding and "law-oriented" dispute settlement has been praised by trade diplomats and academics, but the same group, as well as several NGOs and other observers, have questioned the jurisdictional breadth of dispute resolution. Ultimately, should these little courts with no direct democratic legitimacy decide on important matters facing the global trading community, such the interplay between environmental and commerce values? More international law (particular treaty-making) in these crucial areas has been demanded by many voices, including the author's. The goal of this essay is to provide a more nuanced and realistic perspective using analytical methods from the fields of law and economics. It aims to outline the reasons why resolving disputes could be the best way to decide these matters. On the other hand, it aims to provide a method for figuring out or forecasting when these matters can benefit from more targeted legislative action. The purpose of this article is to outline the function of dispute settlement in the framework of international trade law.

To achieve this, I first look at the role and purpose of WTO dispute settlement. I investigate the differences between the body of general international law and the WTO dispute settlement sphere. There are jurisprudential and practical concerns about the discrepancy between the WTO's positive law dispute resolution system and the more political, natural law type of dispute settlement that is accessible in conjunction with the majority of other forms of international law. Second, I look at two related legal and economic analysis methods in an effort to provide some justifications for the delegation of authority to WTO dispute resolution rather than WTO legislation (treaty-making). These two strategies are (i) unfinished contracts and (ii) guidelines and norms. Lastly, I apply these strategies to two significant instances in the WTO legal system: (a) the type of trade and environmental conflict illustrated by the recent Appellate Body Shrimp/Turtle decision, and (b) the issue of non-violation nullification or impairment, which was addressed in the recent Film panel decision.

Keywords: WTO, Dispute, Resolution, law, Appellate Body

1. Introduction

Concerns have been raised by several academics, trade diplomats, and environmentalists about the extent of decision-making authority granted to the WTO Appellate Body and dispute settlement panels. The Uruguay Round's success in achieving more binding and "law-oriented" dispute settlement has been praised by trade diplomats and academics, but the same group, as well as several NGOs and other observers, have questioned the jurisdictional breadth of dispute resolution. After all, should important matters like the interplay between commerce and environmental principles be decided by these little courts that lack direct democratic legitimacy? This author is among the many who have advocated for more international law (namely, treaty-making) in these crucial areas.[1]

The goal of this essay is to provide a more nuanced and realistic perspective using analytical methods from the fields of law and economics. It aims to outline the reasons why resolving disputes could be the best way to decide these matters. On the other hand, it aims to provide a method for figuring out or forecasting when these matters can benefit from more targeted legislative action. The purpose of this article is to outline the function of dispute settlement in the framework of international trade law.[2]

To achieve this, I first look at the role and purpose of WTO dispute settlement. Second, I look at two related legal and economic analysis methods in an effort to provide some justifications for the delegation of authority to WTO dispute resolution rather than WTO legislation (treaty-making). These two strategies are (i) unfinished contracts and (ii) guidelines and norms. The literature on incomplete contracts examines the causes and ramifications of the fact that all contracts, just like all treaties, are inevitably lacking in their ability to define the standards that will be applied to specific behaviours.

[1]Hersch Lauterpacht, *The Development Of International Law By The International Court Of Justice* 155 (1982).

[2]Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3.2,contained in The Results Of The Uruguay Round Of Multilateral Trade Negotiations: TheLegal Texts (1994), 33 I.L.M. 1144 (1994).

According to the literature on rules vs standards, a law is a "rule" if it specifies the behaviour to which it applies beforehand. Conversely, a standard is a law that, in relative terms, is closer to the other end of the spectrum. It provides broad guidelines for those who are governed and those tasked with enforcing the law, but it doesn't outline exactly what behaviour is expected or prohibited beforehand. These definitions' relativity is crucial. Additionally, every legislation is made up of a variety of guidelines and criteria. Nonetheless, it will be helpful to discuss rules in broad terms as distinct from standards.

I conclude by applying these strategies to two significant instances in the WTO legal system: (a) the type of trade and environmental conflict illustrated by the Appellate Body's recent Shrimp/Turtle4 ruling, and (b) the issue of non-violation nullification or impairment, which was discussed in the most recent Film panel.

2. The Origin Of The WTO Dispute Settlement Mechanism: The Gatt System And Its Evolution

One of the main problems with the Uruguay Roundo's global trade reform is the WTO dispute resolution process, which is only one aspect of it. Regarding the binding force of GATT council decisions, the new system might be seen as a response to the ineffectiveness of the previous one. Through a distinctive application of the rule of law, the new one seeks to establish new relationships between WTO members based on more equal standing.

3. Key features of the GATT resolution dispute mechanism

The previous GATT system was improved upon to create the WTO dispute settlement process, which is not a new idea. This later developed to offer a more judicial approach to international trade disputes in the 1980s. The International Trade Organization's failure led to the creation of the GATT in 1948, which changed from being a solely "diplomatic and negotiated" organisation to one that was more "legally orientated." Nonetheless, this system was still shared by "diplomatic" and "legal" methods. A more objective appraisal of a disagreement was provided by the application of legal considerations, although this did not result in a binding ruling. The parties to the contract might choose to follow the dispute resolution guidelines or not.'[3]

The dispute resolution mechanism, which dealt with core articles XXII and XXIII of the amended GATT, was based on two steps: first, the parties had to look into a potential amicable settlement through bilateral negotiations, or "consultations." If this option failed, they could either call for the Director-General's mediation or ask the High Contracting Parties to form a working group that was staffed by representatives of each party. The next step was for the working group to create a report on the disagreement. 14 The report was regarded as an opinion on the pertinent issue, but it was not immediately and automatically enforced since other GATT members could be interested. For approval, it had to be submitted back to the GATT Executive, the Council of Representatives.

The panel of experts was sought by disputing parties as an alternative to the working group process. This alternative solely addressed a specific issue and was more devoted to conflict resolution. Through the council of representatives, the parties advocated for the formation of a panel consisting of three to five impartial specialists. Compared to the working group process, which included both written and oral inputs, the proceedings were more judicial or adversarial. investigation for a potential amicable resolution and, if unsuccessful, a panel report established on legal grounds. Since the council of representatives was the only entity with the authority to implement the study's conclusions, the report was returned to them. In practice, the council was allowed to take a number of actions, including suggesting that one party's duties be lifted. The panel of experts' report was just an advisory opinion, therefore apart from a few controversial aspects, this method was more akin to a conciliation mechanism.

4. Controversial results of the GATT dispute resolution mechanism

For a number of reasons, the panel mechanism in the GATT system has been considered a qualified success. On the down side, the number of recommendations skyrocketed during the previous 10 years of this system, and many panel findings were neither approved nor executed. 17 As a result, the proceedings took longer than expected. The selection and lack of independence of experts was the subject of yet another critique. Prior to the mid-1980s, the GATT secretariat's suggestions and instructions were used to select secretaries or trade counsellors as representatives of the Ministry of Foreign Affairs. Positively, there were much more disagreements settled via the panel mechanism, demonstrating the need of such a process. However, the length of the panel of experts' process (an average of 13 months) and the system's lack of full trustworthiness were two of the GATT dispute resolution mechanism's primary flaws. After advocating for "less legal rules and a more diplomatic approach," the United States of America even reversed course and demanded clearer trade regulations and penalties for their infractions.[4]

The variety of actions that may be taken against a contractual party for breach of its duties was another intriguing aspect of the GATT dispute resolution system. according to article XXIII. When available, three different forms of remedies were offered: recommendations, decisions, and obligation suspension. If the GATT General Council was given decision-making authority, it was more focused on reaching a compromise than imposing penalties on a single party. The main goal of the GATT system was to restore normal commercial relations by requesting that one of the parties either conduct in accordance with its commitments or remove its measures when they conflicted with GATT requirements. In an attempt to return things to normal, responsibilities were even suspended as a kind of cross-retaliation.

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[3] J Croome *A History oj the Uruguay Round* at 147-148

[4] E-U Petersmann *The GATT/WTO Dispute Settlement System* at 182 and the comparative table of *Political me[hods of dispute? settlement and Legal methods of dispute settlement*

5. The New System: The Dispute Settlement Understanding

The essential connection between the WTO agreement and its annexes on the one hand, and the dispute resolution mechanism on the other, is the basis for the system's renewal. WTO members are required to ratify a package deal that includes the first three annexes and the WTO agreement. A member state must accept the DSU as it is a component of this system. With the exception of the new DSU's strengthening of mandatory procedures placed on member states in the event of a dispute settlement impasse, this seems to be comparable to the former GATT system. The new method may be characterised as having the same first-stage procedural characteristics as the GATT system, with the exception that the proceedings are no longer obstructed or postponed. The Appellate Body's potential review of the case on legal concerns is the second unique feature. The Dispute Settlement Body (DSB), a general body that represents member states, still oversees this system. However, it operates on the inverse principle known as "negative consensus," which holds that a panel of experts' report may only be rejected by a unanimous vote against its acceptance.

6. Object and objectives of the system

Three key tenets of the WTO dispute resolution process stem directly from its subsidiarity, variety, and balance. First off, the principle of subsidiarity governs this system, which means that any amicable (or mutually agreeable) resolution must be chosen above a formal or traditional settlement. This is shown by the 'consultations' process, which aims to prevent a topic under discussion from turning into a disagreement. The panel and the appeals process are additional ways to verify this. The Appellate Body or a panel must encourage the development of a compromise. They will only provide their own suggestions if they are unsuccessful. Conciliation 31 is still the foundation of the DSU system. With political elements still present, this system might be considered a hybrid of conciliatory and combative.

Second, there are several alternative methods inside the exclusive and unitary conflict resolution system. Article 23.1 of the DSU makes this idea very explicit. The ICJ and all other forms of dispute settlement, including the standard ones under public international law, are inappropriate. For example, this implies that any unilateral action is incompatible with the WTO. Article 5 of the DSU offers parties that seek to resolve their disagreement via the proper offices another characteristic that confirms its exclusive nature. the Director-General's mediation or conciliation. These methods may be used alone or in conjunction with the expert panel. They should, however, ideally be started during the consultation process prior to the formation of an expert panel. Arbitration is still a viable option despite the exclusive nature of dispute resolution. This arbitration procedure has to be quick, founded on the parties' agreement, and deal with matters that are well-defined. Every conventional aspect of arbitration is relevant: The parties must follow the arbitration ruling, and the procedure should be guided by a foundation.

7. Conclusions:

The gap between the corpus of general international law and the WTO dispute settlement jurisdiction is examined first in this article. There are jurisprudential and practical concerns about the discrepancy between the WTO's positive law dispute resolution system and the more political, natural law type of dispute settlement that is accessible in conjunction with the majority of other forms of international law. How is it possible for a WTO dispute settlement ruling to disregard other international law? However, how can the WTO dispute resolution procedure claim to be able to interpret and implement international law that is not part of the WTO? Although it seems that current WTO legislation forbids the direct application of non-WTO international law, this stance appears untenable given the growing tensions between trade and non-trade principles. Standards like the special provisions of art. XX or laws governing the more precise relationship between trade values and non-trade values may be used to resolve these issues.

This article makes the argument that more detailed international law isn't necessarily a desirable thing and aims to provide a taxonomy of variables to take into account when figuring out how precise international law should be. Lacunae are situations in which neither a law nor any restrictions apply. This is quite different from a standard, where a conflict resolution tribunal may apply the law, but the tribunal is given fewer specific instructions on how to make its decision. However, by definition, rules provide tribunals less discretion. Therefore, choosing between norms and standards is not the same as choosing between more and less international law. Tribunals may create regulations, but lawmakers and adjudicators often make the institutional decision. This statement is predicated on the idea that tribunals that apply standards, despite their claims to the contrary, enact laws. There is more to take into account than just institutional experience or competence when deciding between adjudicators and lawmakers.

The relative frequency of disagreements and the strategic costs of negotiating an effective resolution under standards versus norms are two important considerations that may alter over time. It's interesting to note that a dispute resolution tribunal weighs the costs of public choice associated with rule formulation against the costs of decision legitimacy in accordance with a standard. varying situations may result in varying relative costs, and the variance may be influenced by NGO interest.

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pursuant to a standard becomes so illegitimate as to make it more attractive to specify rules.