

What Makes the WTO Dispute Settlement Procedure Particular: Lessons to be Learned for the Settlement of International Disputes in General?

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I want to examine the WTO dispute settlement system within the context of certain institutional norms which are traditionally captured under the concept of the rule of law. That is a concept having an imperfect fit in many international law settings. But I believe that there are a number of features of what we mean by the rule of law which constitute useful benchmarks against which to understand a system such as the WTO dispute settlement system. And I think it may be helpful to utilize those criteria for the purposes of seeing both the evolution of the WTO system, its limitations and challenges. Before I articulate a rough sense of what I take the rule of law to mean for the purposes of institutional benchmarking, it is, I think, worth saying something about where the WTO system of dispute settlement comes from. Its roots are in the GATT system. And that was fundamentally a system of dispute resolution by diplomatic means. It thus lacked many of the basic hallmarks of what we would understand by dispute settlement under a system of binding law. It was a system of elective recourse. It was not compulsory and it was non-binding. It was simply, by and large, an adjunct to the diplomatic efforts that were necessary and utilized for the purposes of bringing a dispute to an end. Its hallmarks were therefore voluntary, its outcomes were non-binding and it was an *ad hoc* system of dispute settlement, parasitic upon the larger diplomatic efforts to resolve disputes between members.

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It is from this background, unpromising I would suggest from a rule of law perspective that the WTO system has grown. If one then examines the WTO dispute settlement system, there really was, under the Uruguay Round, a hard break. Key aspects of the diplomatic tradition of dispute settlement under the GATT system were decisively broken. And for an important reason. The Uruguay Round negotiated so many important rights and obligations that it was considered important to have a dispute settlement system that was binding and in this way distinctive from the past. In order, then, to examine the WTO dispute settlement system in the light of where it has come from and consider the system in the light of rule of law criteria, let me articulate, in a very rough way, what I take the rule of law to mean for the purposes of this exercise.

Fundamentally, in my conception, and I think this is well understood, the rule of law consists of the following principles. Firstly, that there should be an institutional separation of powers – in domestic settings between the legislative, executive and judicial authorities. The judicial authority must have the attribute of independence. There must be some recognition of equality under the law and before the law. This requires that binding rules should apply to all. Adjudication must be compulsory rather than elective, and its outcome must be binding.

If one looks at these criteria and applies them to the old GATT system, the constitution of Panels was a matter of choice, they were constituted *ad hoc* to consider a particular dispute, their decisions were non-binding. They were, as I've described, simply an adjunct to a larger process of diplomatic settlement.

If we then consider the WTO dispute settlement system, I think one can see that there is a significant change. It is a rules-based system. It contains rights and obligations that are binding upon all members and the dispute settlement system ensures that this is so. The dispute settlement system is compulsory in nature; no member can avoid the adjudication that it entails, and its outcomes are enforceable by way of remedy. It is a two-tier system: Panels are constituted in the first place at the instance of the parties, but failing their agreement, at the instance of the Director General. There is a standing Appellate Body, to which all appeals lie. It is obliged to render decisions on all issues appealed. Critical to the process of institutional independence is the fact that those decisions are adopted by negative consensus, which means that the only circumstance in which adoption will not take place by the members of the WTO, is when the winning party decides not to support its own victory in the dispute settlement system.

There are also enforcement mechanisms and a history of substantial compliance with the outcomes of decision-making within the dispute settlement system. There is a regime of remedy and sanction for failure to implement the adopted decisions of binding adjudication. So one has in general terms a system where adjudication is compulsory, there are clear rules as to how that adjudication takes place, the outcomes are binding in a relevant sense and the consequences of failure to adhere to the outcomes are stipulated, and have measurable consequences for those who fail to adhere to the system. Judged therefore in a rough and ready way, one would say that this system has many of the attributes required under the rule of law.

But I want to suggest that the system also has its obvious limits and some of the stresses within the system are apparent and perhaps will become more so as time goes by, notwithstanding the substantial success that the system has achieved. I offer here just a few basic facts concerning this matter, which is that since 1995 there have been 414 disputes referred to the system. There have been some 219 Panels constituted, and some two-thirds of those matters have been referred to the Appellate Body. The Appellate Body has rendered close to 100 decisions in its 15 year lifespan. For some time, the WTO dispute settlement system was principally used by the larger trading nations who are members of the WTO. With time, more and more members have utilized the system, including the significant role now played by developing countries.

Let me move then to the respects in which the system, though having satisfied many of the attributes of the rule of law, nevertheless contains fissures. The first of them concerns the issue of independence. Whereas, the Appellate Body is a standing body which is appointed by the membership after a rigorous process of selection, the system depends upon Panels, as the adjudicators of first instance. And the Panels still bear considerable residues of the past. They are constituted *ad hoc*, they depend in the first place upon agreement between the parties and, failing that, by executive decision-making as to their composition. They are brought together simply for the dispute, they still quite frequently contain or are made up of diplomats who have other pressing calls upon their time. And it is probably fair to say that, in consequence, the influence of the Secretariat (the permanent WTO staff who assist Panels) upon the deliberations of the Panels may be considerable. As Panels have engaged with ever more complex cases, particularly in respect of their fact-finding function, the Panels are under-resourced. Panels lack the permanence required to secure institutional coherence.

The Appellate Body fares rather better on that score. It is, as I've indicated, a permanent body, it is appointed by the membership on the basis of a competitive selection process. It must be broadly representative of the membership. It is independent as a matter of design. But I would draw attention to a particular respect in which that design is flawed.

An Appellate Body member is appointed for a four year term of office, renewable at the instance of the members for a second term of four years. This does not cohere with a proper regard for the principle of independence. Tenure in office should never depend upon the favour of those who are subject to adjudication. I know of no Appellate Body member who has been influenced by the need to secure the consensus of all members to extend his or her term of office: but that depends upon their personal attributes and not institutional protection. There may very well be pressures that could be brought to bear and could conceivably be apprehended. So as to the criterion of independence, the system is adequate, but certainly, in my view, could be improved particularly, by moving towards a permanent system of panels as adjudicators of first instance. Further, Appellate Body members should be appointed to a single non-renewable term of office.

In respect of the other criteria which are fundamental to the rule of law I want to dwell in a little more detail on the separation of powers. The system of the WTO is under some stress. And it arises in a perfectly straightforward way. If one thinks of the WTO system as one might think of a domestic system of government, the following features are discernable. There is a legislative branch, which depends upon successive trade rounds being negotiated between the members, based upon a principle of consensus and a single undertaking. That has sometimes led to successful outcomes. But it is highly dependent upon a number of political contingencies and economic circumstances so as to bring about the right alignment of interests and the successful conclusion of a trade round. As we know, the Doha Round is now in its tenth year, and there seems little prospect, regrettably, that that is going to move forward any time soon. To some degree, of course, that is the result of the success of the system. It reflects the diffusion of economic power and the fact that the basis upon which trade rounds were dealt with in the past (essentially by way of agreement between Japan, the EU and the US) no longer leads to a confluence of interest. We live in a multi-polar world. That is I think a sign of success. But it also creates with it the great difficulty that to bring a trade round to fruition is hugely complex and difficult. This poses particular problems if one thinks about the institutional coherence of the WTO system. Because what it means is that an

essential check on adjudicative power is lacking. In a balanced system, authoritative interpretations that are the outcome of adjudication are subject to legislative change if those responsible for lawmaking decide that the outcome is wrong or undesirable and should no longer be adhered to for any of a number of reasons. Under the WTO system the Appellate Body renders interpretations of the covered agreements. Those are sometimes controversial, sometimes not. More and more attention is given to adjudication within the system. And the ability of the membership to change those outcomes is limited because of the difficulty of concluding the next trade round. This creates an asymmetry of decision-making within the WTO and as a result two things happen. The first is that more and more matters are litigated because there is simply little prospect of changing any outcome or moving forward any agenda through the legislative means of trade negotiation. And secondly, it means that ever greater attention is given to adjudication because members look to that part of the system to advance their interests. Adjudication in this form can give rise to considerable problems because members may consider adjudication to be far too powerful in the overall scheme of the WTO. And there is no quick fix for this problem.

Obviously, if a trade round were to be concluded, it would diminish the pressure placed on the adjudicative part of the system. But what needs to happen is to bring better alignment into the system. That may well require significant institutional change within the WTO and one which is of course entirely beyond the remit of its adjudicative functionaries. How that will happen is the subject of much discussion. One notion is that the Doha Round is simply too unambitious as to what it has put on the table and consequently, no one is sufficiently interested in bringing it to a conclusion. This seems unlikely, given how difficult it is proving to conclude the round on even limited issues. The second is that we need to be thinking about other ways of securing legislative action which do not depend upon a consensual principle as the only basis of coming to agreement. In consequence, various plurilateral alternatives and the like are much discussed. Whichever way this debate finally comes out, what is certain is that if adjudication remains the centrepiece of what the WTO does, then the system will be subject to considerable challenge. And one can, I think, already observe this. From time to time the argument is made to turn back the clock and return the WTO system to the old GATT system, to reassert the importance of diplomatic resolution of disputes and strip away many of the rule of law attributes which, at least in my conception, are qualities of the system. But that is

a necessary consequence of what happens when the institutional framework is out of balance in the way that I have described.

The second feature of the system dealing with separation of powers, which also needs to be addressed, is that the WTO has an underdeveloped executive function. And here, too, it means that there are two polarities of legislative and adjudicative authority, without executive decision-making that would allow for decision-making between significant legislative events. This would require a form of devolution of powers within the WTO system to make it more efficacious and balanced.

So these are some of the fundamentals of the WTO system and the problematic against which one has to understand the ability to preserve adjudication within the scheme of the rule of law.

I want very briefly to touch on two other areas which I think point to where the system is going and what might be controversial about it. One of the further consequences of the way in which the WTO system has developed is that the cumulative interpretations of the covered agreements by the Appellate Body and the Panels constitute a body of law that is now quite considerable. There is a well trodden debate as to the proper interpretive remit of the Appellate Body. Key to this debate is an understanding of what those who interpret the covered agreements are faced with when trying to bring coherence to negotiated texts. Whether the Appellate Body has been successful or not, I will let this audience judge. What plays out in the debates around interpretation is simply an echo of the issues around the legitimacy of adjudication within the system as a whole. So those who would speak for strict constructionism seek to hold to a narrow concept of fidelity to the text and the limited powers of adjudication that this entails. While those who affirm a wider context and a purposive interpretation of the texts would have the system operate with a much wider interpretative remit, so as to develop WTO law in a way that deviates significantly from *ad hoc* arbitration awards. One sees therefore, again, the articulation of political interest within the system borne out through debates around interpretation and the proper remit of interpretation. And that has one other consequence, which is that there have been considerable debates in two dimensions that are particular to this system of law. The first concerns the use of precedent. Now formally, of course, the WTO system has no *stare decisis* but as a matter of the discourse, there is unquestionably the use of authority of past decision-making as the means by which adjudication takes place. To articulate that practice as doctrine, if it is a doctrine, is highly controversial. Those who wish to see in the system the control by members over adjudication resist the notion of authority of

the cumulative force of decided case law. They would revert to the old system of the GATT, *ad hoc* decision-making simply to resolve a particular dispute between particular parties without any necessary consequence for the members as a whole. I believe that members do not generally adhere to this view of the jurisprudence of the WTO. Domestic laws are clearly refined by members in the light of the threat of decision-making under the WTO system, which is clearly adaptive conduct that recognizes the authoritative interpretations as they have been developed within the system. But here too, one sees the contestation between members as to how significant a role adjudication should have and how consequential the results of adjudication should be.

The last matter that I wanted to touch upon is innovation, which of course is itself a consequence of how one understands interpretation. Now plainly, it is not the role of WTO adjudication to make obligations for the parties in any way whatsoever. But that rather simple nostrum really doesn't engage the complexity of the matter. And it has played itself out in matters of procedure. There have been developments, again sometimes controversial, to secure within the system a procedural law that is innovative and meets the requirements of the system. The *amicus curiae* brief and the opening of proceedings, where parties are willing to allow it, are just two instances of procedural innovation. For some purposes then, there is a recognition of a competence to develop procedure. Yet this competence is not unbounded, and where the line is to be drawn raises much debate. Thus for example the need to accord the Appellate Body the power of remand is almost universally acknowledged but most members doubt that the Appellate Body enjoys the competence to accord itself this power.

So, *quo vadis*? And here I will conclude. The WTO system of dispute settlement has developed into a significant body of jurisprudence. It has been developed carefully and without excess, but certainly it is cumulatively significant and has had a major stabilizing effect on the system as a whole and in that sense, it has been successful. It is utilized significantly and its outcomes are generally adhered to. Whether the system can endure in its present form is the central question that I pose. And I would suggest that it is necessary to engage in institutional reform. That could have very different consequences, depending upon the premises from which the system is understood. For some, it would be to turn back the clock, to strip away the powers and reduce them in respect of the adjudicative functions of the WTO. In my view, and this is perhaps predictable, I would think that regressive and something which would

not do justice either to the system as a whole or the utility of the system for the stability of the world economy given its present fragile state. Nevertheless, there are those who argue that the WTO dispute settlement system is far too powerful, going way beyond what was originally contemplated. And then there are those who think that the system has all the essential ingredients of what is required, but needs to be stabilized, reformed in part, in respect of the Panels and elsewhere, but re-balanced above all. To rebalance the distribution of powers within the institution of the WTO as a whole is a task of great difficulty but great importance. It requires a re-think of the way in which the system legislates. This will allow adjudication to enjoy its proper place, free of the risk that those who claim that the adjudicative competence has too much power may settle that claim in the unstable currency of contested legitimacy.

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