The Case for giving to Private Parties Access to the WTO Dispute Settlement System

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1. INTRODUCTION

The new characteristics of the WTO dispute mechanism were established by elaborating on the existing GATT panels procedure rather than by establishing a new mechanism. Preservation in providing security and predictability to the multilateral trading system is aim of DSU.1 The DSU2 is an agreement annexed to the Agreement establishing the WTO applicable, in case of dispute, to all the agreements concluded in Marrakech as well as to the basic treaty establishing the WTO.3 Does the WTO use the DSU to resolve disputes between individuals? The WTO uses the DSU to resolve disputes between nations. Is it time for the WTO dispute system to be developed into a fully judicial system rather than being merely a dispute system trying to achieve a political governance of state disputes as currently functions? There was an attempt of legalization or judicial lifting of the dispute settlement system reflecting the difference in approach between GATT and WTO.4 Procedural security and an execution mechanism in order to make certain compliance with the rules characterize an indispensable complement to the agreed substantive provisions. Panels and the Appellate Body are subject matter to clearly-defined restrictions as to subject matters, type of rulings they may issue, as well as the standards of review to be applied to domestic actions.5 It has to be taken into account that the WTO does not legislate but any regulation is the result of intergovernmental agreements accordingly accepted by national parliaments. Taking into consideration the current nature of the WTO dispute system, aim of the analysis is the examination of private parties' involvement and its effectiveness.

2. CHARACTERISTICS OF THE WTO DISPUTE SYSTEM

The WTO is not a “soft law” scheme subject matter to independent freedom of choice and negotiated modifications in case of non-compliance by Members. Expert

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1 Article 3.2 of the DSU.


dispute settlement bodies such as panels, the newly established Appellate Body and arbitration have to make their awards based on legal principles. On the other hand, law has to be interpreted by means of the "customary rules of interpretation of international law" and applying the principles of interpretation, provided for in the Vienna Convention on the Law of Treaties of 1969. General international law is the basis for the resolution of disputes within which the DSU and its rules function. So, DSU functions inside of the international legal order. Ad hoc panels have been retained but an appellate review has been introduced, conducted by a permanent body endowed with most of the characteristics representative of an international tribunal. Appellate review characterises most of interstate litigation submitted to dispute resolution bodies. Moreover, an appellate review of arbitral awards is a progress ousting national courts involvement in judicial review of awards regardless that in general appellate review is not established yet in ad hoc justice relying on an arbitral agreement between the parties to a dispute. On the other hand, the award of the dispute settlement bodies does not result in per se binding judgements (awards) but they are instead recommendations addressed to the parties in dispute all the way through the Dispute Settlement Body. The lack of officially obligatory results of the awards issued by the panels and of the Appellate Body is a weakness of the new system. By contrast, Sacerdoti thinks that "what is generally deemed by legal observers to be a weakness, namely the lack of formally binding effects of the findings the panels and of the Appellate Body establishing whether there has been a breach of a WTO obligation, should be viewed rather as an advantage of the new system".

Formally awards deriving from the Dispute Settlement Body (DSB) are considered to be mere recommendations. Hence, the WTO political body becomes the source of the award and takes that decision by adopting a panel or Appellate Body report. Moreover, it is the political body calling for performance from the Member concerned and eventually authorizes retaliation as a sanction, if the dispute has not been resolved in accordance with the rules, principally by on time compliance. Putting the influence of the entire WTO after any decision resolving a dispute persuades performance by making the political consequences of non implementation unbearable for any party that has to face the whole WTO, and not just its antagonist in the dispute. The system intends at avoiding the defeat of certainty in the organizations' reputation that would otherwise follow.


9 Article 21.1 of the DSU.