

DISPUTE RESOLUTION PROCEEDINGS IN WORLD TRADE ORGANIZATION AND INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARISON

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Abstract

The immense growth of arbitration proceedings in the last few decades has disseminated extensive knowledge about the general practice of international commercial arbitration. However, certain specific dispute settlement proceedings remain less known to the public at large. Among them the World Trade Organization (WTO) Dispute Settlement system deserves to be presented, as it incorporates original features designed to ensure compliance by Member States with the international trade-related treaties and arrangements within the framework of the WTO. The establishment of a specific Dispute Settlement Body, the possibility of review by an Appellate Body, the opportunity given to third parties, themselves Member States, to intervene in the proceedings from the preliminary steps of the procedure until the first hearings, and the support of an efficient Secretariat at all stages are among the characteristics that are most noticeable. Other features are shared to some extent with international commercial arbitration, and the present article highlights some of them.

I. Introduction

The immense development of arbitration proceedings all over the world in the last few decades has given judges and practitioners a good overview of the general characteristics of international commercial arbitration. In the words of the Swiss Federal Tribunal (the Supreme Court of Switzerland), an agreement to arbitrate is defined as: “*an agreement whereby two or several parties who are determined or may be determined agree to bring one or several present or future determined litigations to an arbitral tribunal that will rule over the dispute in a binding manner, to the exclusion of the State courts, and under a specific legal order that may be determined directly or indirectly*”.¹

Arbitration is now widely used in all forms of business activity, such as international and domestic contracts and investment, and has expanded to many other areas, such as inheritance law, protection of industrial property and copyright of the authors, competitive sports etc. On the other hand, the dispute settlement system under the WTO is largely the domain of a much smaller pool of trade specialists.

To what extent is the **World Trade Organization system of dispute settlement** comparable to the better known international commercial arbitration? There is no need to introduce the reader to the main characteristics of international commercial arbitration. Therefore, the author will present some general features of the WTO dispute settlement system and draw from his experience to compare them with some features of international commercial arbitration.

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¹ ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [*hereinafter* “ATF RECUEIL OFFICIEL”] A. AG vs B. N.V. [ATF] 130 III 66. (Switz.). Switzerland is the third most important country of seat for the International Chamber of Commerce (ICC) arbitration tribunals, after France and England.

II. The WTO Dispute Resolution System: The Legal Basis

The World Trade Organization [“WTO”] was founded in 1994 and embodies the effort of the community of States to facilitate world commerce. The aim of the WTO is to promote “*transparency, predictability and non-discrimination in trading relations*”². Until 1995, the General Agreement on Tariffs and Trade [“GATT”]³ was the most important treaty aimed at the liberalization of international trade. The Marrakesh Treaty of April 15, 1994 then established the WTO, which entered into force on January 1, 1995 as the successor of GATT, 1947.⁴ Notably, there already existed a dispute settlement system on the basis of Articles XXII and XXIII of GATT 1947, that evolved over fifty years of decisions⁵ which are still cited in the present dispute resolution proceedings under the ambit of the WTO. In that sense the present dispute settlement system of the WTO incorporates the experience and traditions of almost sixty years of State to State dispute resolution within the framework of GATT.

The basis for the present dispute settlement system is the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the Marrakesh Treaty [“**the Understanding**”]. Article 3 of the Understanding reaffirms the adherence of Member States “*to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein*”.⁶

However, the WTO dispute settlement system incorporates some important innovations to the former system under GATT 1947. In this article, the author will present some essential characteristics of the WTO dispute settlement system and draw a comparison between these characteristics and some features of the practice of international arbitration (section **III**). The author will then compare the formal adjudication procedure in both systems (section **IV**) and thereafter describe arbitrations under the ambit of the WTO (section **V**).

III. Some Characteristics of the WTO Dispute Resolution

A. Consultation Procedure

Article 4 of the Understanding gives a detailed regime for the *Consultations between States*. That is a distinct and welcome feature of the WTO Dispute Settlement system and its aim is to arrive at a mutually satisfactory solution.⁷ The Consultation phase under Article 4 may be followed by a phase of good offices, conciliation and mediation under Article 5. Ultimately, the Member States may also

² Antony A. Taubman, *Preface to A HANDBOOK ON THE WTO TRIPS AGREEMENT*, xix (Antony Taubman, et al. eds., 2012).

³ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [*hereinafter* “GATT 1947”].

⁴ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [*hereinafter* “Marrakesh Agreement”].

⁵ See mainly the Decision on Procedures under Article XXIII of Apr. 5, 1966, GATT B.I.S.D. (14th Supp.), at 18 (1996); The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, *adopted on* Nov. 28, 1979, GATT B.I.S.D. (26th Supp.), at 210 (1980); Ministerial Declaration of November 29, 1982, GATT Doc. No. L/5424, *reprinted in* GATT B.I.S.D. (29th Supp.), at 13 (1982); Ministerial Declaration of Nov. 30, 1984, GATT B.I.S.D. (31st Supp.), at 9 (1985).

⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, 1869 U.N.T.S. 401 [*hereinafter* “DSU”].

⁷ DSU, art. 4.3.

choose to take recourse to *ordinary arbitration*, which is well known in modern international relations since the *Alabama case*⁸. *Article 25* (discussed in detail below) provides some rules on arbitration, which is not open to third parties except with the consent of the original parties to the arbitration.⁹

Of course, in commercial arbitration too, there may be discussions between parties while the proceedings follow their course. However, there is no formal set of rules to take those settlement discussions into account. Thus, a situation may arise where an arbitral tribunal in an institutional commercial arbitration reaches the end of the procedure, and sends the draft award to the secretariat of the arbitral institution only to learn that parties have just reached an agreement on the settlement of the dispute!

In the ordinary course of WTO dispute settlement, the establishment of a panel and the ensuing proceedings due to the failure to yield a satisfactory result may be seen as a true *ultima ratio* as far as consultation proceedings are concerned. That, however, is not the case in international commercial arbitration, where the initiation of arbitral proceedings is often paralleled by further settlement discussions between the parties.

Further, it is to be noted that in practice, the Member States may carry their conflicting views outside the dispute settlement system, to the WTO's other organisations, such as the Council for TRIPS, the Council for Trade in Goods, or the Council for Trade in Services. The purely diplomatic endeavours within those councils bear no similarity with the practice of international commercial arbitration, but are of course sometimes to be observed in investment arbitration cases.

B. Role of the Secretariat

An important difference between the WTO system and international arbitration is the role of the WTO *Secretariat* outlined in Article 27 of the Understanding. In practice, as discussed throughout this article, the Secretariat assumes important responsibilities all along the proceedings. In this author's experience, the Secretariat undertakes these responsibilities with great dedication, such that the different panels reach a high level of consistency and reliability in their findings. The role and expertise of the Secretariat is important to ensure that panels interpret the cases shaping international trade law correctly, conforming to the tradition of interpretation of international treaties and conventions under the Vienna Convention on the Law of Treaties, and with due respect to the jurisprudence under GATT 1947. The Secretariat's high level of legal expertise guarantees efficiency of its involvement. The situation is very different in usual commercial arbitration, where the members of the secretariat of institutions need not necessarily be well versed in substantive law. If such is the case, the greater involvement of the institutional arbitration secretariat may well result in more delays without having the same effect of the WTO Secretariat in ensuring the greater quality of decisions.

C. Involvement of Third Parties

⁸ *Alabama Claims* (U.S. v. Gr. Brit.), 29 R.I.A.A. 125 (Sept. 14, 1872).

⁹ See below Section III.C.

Article 10 of the Understanding has provisions on the right of interested Members to be heard as *third parties* by the panels, and such third parties are allowed to file written submissions to the panels.¹⁰ These submissions are also provided to the main parties to the dispute and the panel report will reflect them. Further, under Article 17.4, third parties with substantial interest can make written submissions and be given an opportunity to be heard by the Appellate Body.

Decisions as to which stage of the procedures third parties may file submissions, and if they can assist and/or participate in the hearings is taken by the panel for each particular case. Participation in the first hearing, however, is seen as a right.¹¹ The point is particularly important when a large number of third parties have shown interest in the case. For instance, in the joint Australia — Tobacco Plain Packaging cases, which concerned the WTO consistency of tobacco plain packaging measures taken by Australia, there were over 30 third parties.¹² Obviously, the management of the procedure, the analysis of the parties' and third parties' submissions and the obligation to take into account the very differentiated positions of over 35 Member States on intricate issues of fact and law put a heavy burden on the authors of the panel report. There is no exact equivalent to the author's knowledge in international commercial arbitration, even though there are instances of several entities being party to the same proceedings.

D. Consolidation of Proceedings

Another example of the advanced nature of the WTO Dispute Settlement System can be found in the *consolidation* of disputes where the same matter is at issue, even though the complainants are different. Article 9 provides that a single panel should be established, wherever feasible, to examine several complaints. If that does not appear practical, at least the same persons should serve as panelists on each of the separate panels, and the timetable for the panel process in such parallel disputes shall be harmonized.

It is well known that with the exception of recent rules by arbitral institutions including the ICC and LCIA¹³, this topic is not regulated with precision under most arbitration rules in the world, with the result that the same core dispute involving the same or different legal entities may be subject to two, three or more parallel arbitration proceedings. This entails the risk of conflicting findings, delays at the stage of the recognition and enforcement of the awards, and immense costs for the parties. The situation is even worse when parties have recourse to ordinary State courts in different countries. An interesting approach to this problem was taken by the American Law Institute which proposed the adoption of international rules on litispence and consolidation of ordinary court proceedings in the area of intellectual property, where the danger of conflicting outcomes of parallel proceedings is most acute, due to the ubiquitous nature of intellectual property's subject matter. Copyright,

¹⁰ DSU, art. 10.

¹¹ DSU, art. 10.2.

¹² *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/441/458/467 [hereinafter "Australia-Plain Packaging"]. This matter arose out of proceedings initiated under the DSU against Australia by Honduras, Dominican Republic, Cuba, Indonesia, and (at the onset) Ukraine. The measure at issue was Australia's Tobacco Plain Packaging Act 2011.

¹³ See e.g., ICC Rules, art. 10 (2017); LCIA Rules, art. 22.6 (2014); SCC Rules, art. 11 (2017).

inventions, designs, and trademarks are universal in essence and should enjoy the same ownership and legal regime in all countries of protection.¹⁴

E. Time Frame and Emergency Proceedings

The *time frame* for rendering the Dispute Settlement Body [“DSB”] decisions, provided in Article 20, is certainly optimistic: 9 months from the date of establishment of the panel to date of consideration of the report for adoption if no appeal is filed and 12 months otherwise.¹⁵ The author has witnessed only two panel proceedings, both of which lasted longer than the time frame so provided: not quite two years in the Havana Club Case¹⁶, even three years in the consolidated Australia — Tobacco Plain Packaging cases. In the latter case, the fact finding process was difficult in view of conflicting expert reports filed by the parties, while the Havana Club Case has been extremely difficult as a matter of interpretation of substantive international trademark law. Due to non-compliance by the United States of America, the dispute itself lasted approximately a decade.

Nevertheless, such long drawn proceedings are, by no means, absent from international commercial arbitration. Complex disputes entail long procedures, as due process and careful considerations of the parties’ submission will command time.

However, within the WTO system, in cases of emergency, for instance when perishable goods are concerned, Article 4(9) provides that the parties during the consultation phase, as well as the panel and Appellate Body, shall make every effort to accelerate the proceedings to the greatest extent possible. Many institutions offering commercial arbitration these days also know of expedited procedures, especially where the amount in litigation is not very high.¹⁷

F. Right to seek information

Another interesting feature of the Dispute Settlement system is the *right to seek information* under Article 13 of the Understanding.¹⁸ This right is not a discovery procedure as practiced in today’s international arbitration proceedings. Rather, it is a right of the panel to conduct an inquiry on the facts, and to seek, to this end, information from any individual or body which the panel deems appropriate.

However, the panel has to respect the sovereignty of the Member States and must first inform the authorities of the Member State within whose jurisdiction the individual or body from whom information is sought is located. In practice, an individual or body of a State may avail of the rules

¹⁴ AMERICAN LAW INSTITUTE, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES 219 (Rochelle C. Dreyfuss et al. reporters, 2008).

¹⁵ See DSU, art. 20.

¹⁶ Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, 683 (adopted on Feb. 1, 2002).

¹⁷ See Expedited Procedure under Article 30 of the revised Rules on Arbitration of the International Chamber of Commerce, adopted on Dec. 8, 2016, for claims under 2 million USD (entry into force Mar. 1, 2017); see also the expedited procedures under the Swiss Rules and under the rules of the International Centre for Dispute Resolution, Singapore International Arbitration Centre, Stockholm Chamber of Commerce, Australian Centre for International Commercial Arbitration and German Institution of Arbitration.

¹⁸ DSU, art.13.

on protection of *confidentiality of public records*, or may also decline to answer on the basis of the *extra costs* that the consultation might entail in view of its ordinary activities. In the view of this author, no adverse conclusion can be derived from the silence of the individual or body that cannot or will not answer a question by the panel, even if the individual or body is asked to give information *ex officio*, when he is acting as representative of the State in the area in which the dispute is to be settled. In the case of a legal entity or body being part of the Member State's public administration, the panel may have to deduce from its silence conclusions as to the facts or arguments at issue, but again without presumption of any kind against the facts as they are presented in the submission of that State. This conforms to the practice of limited discovery that is current in international commercial arbitration.

However, the Parties to the dispute being Member States of WTO have a general obligation to instruct their ministers, officers and public servants as well as administrative bodies to cooperate with the fact finding procedure undertaken by the panel, which in this author's opinion seems derived from Article 3 on General Provisions¹⁹. It seems that the main difficulties don't arise when further information is sought from an authority or body of the Member State itself, but from a third entity that is not subordinated to the central authority of the Member State, such as a body depending on a public health institute subsidized by a federated state in a federal State Member. Under the third sentence of Article 13 (1), only the *Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate*. Naturally, a panel cannot *subpoena* an individual or entity. However, it is understood that Member States will live up to their obligations of cooperation within the WTO system.

G. Confidentiality within the Panel and WTO and the of Formulation of Dissenting Opinions
Article 14 provides that *panel deliberations* shall be confidential. The reports of panels shall be drafted without the presence of the Parties to the dispute, in light of the information provided and the statements made. The opinions that are expressed in the panel report by individual panelists shall be anonymous.

This does not entirely conform to the practice of international arbitration, as nominal dissents are known to be filed by one or two members of the arbitral tribunal, especially in the Anglo-American world. The author has had to explain several times to English or American co-members of arbitral tribunals why in the Continental practice, filing a dissent remains a very exceptional avenue left to an arbitrator who thinks that his diverging opinion might be usefully voiced in a dissent. Some understanding of Continental views in this respect may be expected from internationally active Anglo-American arbitrators, although experience shows that it is not always forthcoming. This is certainly one of the main differences in legal culture between North America and the British Commonwealth on the one side, and most Continental European jurisdictions on the other.

¹⁹ *Id.* art. 3(1), "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified therein". Article 13 of the DSU is one of those rules.

The WTO Dispute Settlement system neither expressly allows for a dissent to be filed nor does it preclude it entirely, but the case seems exceptional.²⁰ Rather, the report may discuss a contrary view opined by a panelist without mentioning his name, in keeping with Article 14 (3). In the author's view, the uncertainty that is fed by dissenting opinion would not be welcome in a dispute resolution system that is not domestic but multilateral, extending to 164 States²¹. Ensuring that there is security in the interpretation of the rules is more important than expressing personal opinions.

In this regard, a brief mention of the role of the WTO Secretariat is relevant. The Secretariat that helps shape the findings of the panels also helps the Appellate Body, which relies on some members of the Secretariat to assist in the correct expression of the rules of law. In practice, there is a Chinese wall between the two activities, namely the assistance rendered to panels and the preparation of the decisions of the Appellate Body, but this does not exclude a certain awareness of the reactions of the Appellate Body among the members of the Secretariat. There may rarely be an informal exchange of thoughts inside the Willam Rappard Palais in Geneva where the panels, the Appellate Body and the Secretariat all work. In the practice of the two panels the author has been privileged to follow at least, the constant wish to respect the rules as set down by the Appellate Body has been observed throughout at the panel and the Secretariat level. The WTO practice is unlike any lower jurisdiction that may attempt to escape the framework of higher-jurisdiction precedents by tentatively innovating rulings and decisions. Therefore, dissenting opinions would in any case appear less useful in the WTO framework, as dissenting opinions may be better justified in a system of appellate review by a court entertaining no contact whatsoever with the jurisdiction below.

H. Confidentiality outside the panel and WTO

Confidentiality outside the panel debates and decisions is a difficult matter, since diplomats in Geneva often follow closely the WTO proceedings that may impact the economy of their respective

²⁰ See e.g. M.K. Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 (4) J. INT'L ECON. L. 895 (2006), stating that ten years ago "fewer than 5% of panel reports and 2% of Appellate Body reports contain separate opinions of any kind. ...WTO is in fact actively discouraging dissents". The view of this young scholar is typical of the Anglo-American, at times blind approach to dissent, as he argues that half of the arguments raised in dissents at the panel level were adopted in whole or in part on appeal by the Appellate Body, "thus illustrating that dissents can and do make a difference" as if the Appellate Body with the help of the parties and their learned counsel would not come by itself to correct the panel report on the points that are raised in the dissent. Actually, the possible usefulness of dissents would not show in the case at hand, but in further development of the law, due to the influence a dissenting opinion may have on the adjudication of the next dispute involving similar issues of law. There is mention of six WTO cases as containing a dissent, namely Panel Report, *European Communities Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, (adopted on Apr. 20, 2004), as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, 1009; Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, (adopted on May 9, 2006), as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, 521; Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (adopted on June 13, 2012), as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, 2013; Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1 (adopted on May 24, 2013), as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, 237; Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1 (adopted on Aug. 29, 2014), upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, 1127.

²¹ As of end of 2016.

countries. Concerning the information that a State may be called upon to provide to the panel, Article 13 paragraph 1 last sentence of the Understanding provides:

“Confidential information which is provided [to a panel] shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.”

Therefore, in order to make sure that confidential data is not disseminated outside the circle of Parties and (sometimes) business firms that are directly interested in the dispute, the panel may issue protective orders that are not fundamentally different from such orders as are frequently issued in international commercial arbitration.²² The panel may wish to restrict access to some documents or appendices containing confidential data to the Parties and/or their counsel. The panel may even restrict access of the Parties and/or their counsel as well as their Expert Witnesses. It may also appoint a panel’s Expert who will be entitled to review evidence and report to the panel *in camera*. A combination of those measures may also be envisaged.

In addition, the panel might order redaction of some documents, for instance, to assure the anonymity of medical records, or rather request the party providing the information to redact the documents before the evidence is filed with the panel and the other parties.

It is important to mention that the limitation deriving from due process requirements is even more important in WTO proceedings than in ordinary commercial arbitration: the panel as well as the Arbitral Tribunals can hardly base their report or award on data that the parties did not have the opportunity to see and comment on. Assuredly, if commercial arbitration is taking place in a country such as Switzerland, in which the legislation traditionally favours utmost secrecy in proceedings,²³ the use of documents that have not been entirely put to the other party for examination and rebuttal, is permissible. However, other countries may require more access under stricter rules of due process.²⁴

²² For an example of such a protective order implying redacting a certain contract to be filed with the adverse party, see CONFIDENTIAL AND RESTRICTED ACCESS INFORMATION IN INTERNATIONAL ARBITRATION, ASA SPECIAL SERIES NO. 43, 173-176 (Elliott Geisinger ed. 2016), (Appendix 14 reproduces a procedural order for the protection of confidential information in the framework of document production.).

²³ SCHWEIZERISCHE ZIVILPROZESSORDNUNG [ZPO] [Civil Procedure Code] [CPC] Dec. 19, 2008, SR 272, art. 156 (Switz.) provides for the protection of interests of the parties themselves or of third parties, mentioning notably the protection of trade secrets and business information. BUNDESGESETZ ÜBER BUNDESZIVILPROZESS [Civil Procedure Act] Dec. 4, 1947, SR 273, art. 38 (Switz.) provides that “*Les parties ont le droit d’assister à l’administration des preuves et de prendre connaissance des pièces produites. Lorsque la sauvegarde de secrets d’affaires d’une partie ou d’un tiers l’exige, le juge doit prendre connaissance d’une preuve hors de la présence de la partie adverse ou des deux parties*” (Parties have the right to be present for the taking of evidence and they have the right to get access to the documents that are filed. When required for safeguarding business secrets of a party or of a third party, the judge shall get access to a piece of evidence with the adverse party or the two parties being absent) (translated by the author). This other Act on Civil Procedure applies only to some rare proceedings coming directly before the Swiss Supreme Courts when the parties are the Swiss Confederation and one or several Cantons, or when the dispute is between two or several Cantons.

²⁴ See Karl Pörnbacher & Sebastian Baur, *Confidentiality and Fundamental Rights of Due Process and Access to the File: A Comparative Overview*, in CONFIDENTIAL AND RESTRICTED ACCESS INFORMATION IN INTERNATIONAL ARBITRATION: ASA SPECIAL SERIES NO. 43, 21-43, (Elliott Geisinger ed., 2016), mentioning that in Austria and Germany, for instance, restriction of the disclosure of confidential information to only the arbitral tribunal and the expert is incompatible with the right to be heard, and therefore inadmissible. According to the personal experience of this author, the same situation

It is important to note that business and consumers associations or environmentalist lobbies, non-governmental organizations, and other interested participants in the debates of the civil society have no access as such to the proceedings before the Dispute Settlement Body of the WTO. They do not take part in the hearings. They may file an *amicus curiae* brief, if so authorized by a panel. Nevertheless, they will not have access to any confidential information provided by a Member State to the panel, unless of course the Member State itself directly provides that information under the relevant legislation of that State.

IV. Formal Adjudicatory Proceedings: A Comparison

Both WTO panels and Appellate Body are *adjudicatory authorities*, as are arbitral tribunals. They all aim at settling a dispute with a decision binding on the parties. In the WTO, there are exceptions to that practice in case of non-violation complaints under Paragraph 1(b) or 1 (c) of Article XXIII of GATT 1994 (as incorporated in Article 26 of the Understanding). Then the Understanding applies only up to and including the point in the proceedings where the panel report has been circulated to the members (in case of Article. XXIII Par. 1 (c)), On the other hand, the provisions of the Understanding may apply subject to conditions set out under Article 26 (a) through (d). When there is no actual violation of a covered agreement, there is no obligation to withdraw the measure.²⁵ Article XXIII deals with the alleged nullification or impairment of benefits that a party expects from the application of the GATT, and allows for a Member to make written representations or proposals to the other party, which “*shall give sympathetic consideration to the representations or proposals made to it*”²⁶ (this was mentioned already in the text of GATT 1947). As is obvious, the system here is different from commercial arbitration, although international commercial contracts may contain a stipulation akin to the spirit of that provision, requesting, for instance, parties to arrange for consultations at the highest level, that is, between their CEOs or CFOs or both, before going into arbitration.

In a comparison of the formal adjudicatory proceedings, the following differences between the WTO Dispute Settlement system and international commercial arbitration are worth considering.

A. The Interim Review Stage

Unlike in international commercial arbitration, the findings of the panel are not immediately definitive with regard to the parties. Instead, in WTO Dispute Settlement, the interim review stage first allows the parties themselves to submit comments in writing on the draft findings of facts of the panel.²⁷ The aim is to ascertain that all allegations of facts and law have been properly understood. The rule is that the panel must examine in its report all allegations by the parties, either in the text of the report, or at least (in very complicated cases), in the footnotes to the report, and possibly too in the technical or scientific annexes to the report. The practice of interim review is indicative of the increased need for prior verification of the correctness of the findings in a multilateral trading system, and is helpful in this regard. There is also a consideration of due process

appears to prevail in France. In England, the United States of America and Switzerland, for example, protection of trade secrets may justify a restriction of access to confidential information even *vis-à-vis* the other party.

²⁵ DSU, art. 26.1(b).

²⁶ GATT 1994, art. XXIII.1.

²⁷ DSU, art. 15.

here: as the Member States that are party to a dispute will have to accept recommendations and, eventually, suffer compensatory measures by the other party or parties if they do not comply with the report's recommendations, the possibility of review of the factual and argumentative sections of the draft report ensures that their rights are respected.

In institutional commercial arbitration, such as the arbitration under the rules of the International Chamber of Commerce in Paris, there is a review of the draft award by the Secretariat of the institution. Nonetheless, the Secretariat cannot change the facts as have been found by the arbitral tribunal and can only make suggestions as to the arguments that are espoused by the arbitrators, noting for instance, that a given point of law could be buttressed by the citation of relevant cases or commentary.

It may be observed that nothing would really prevent an ordinary arbitral tribunal from proceeding in the same manner in commercial cases. However, this author has not been able to observe such an interim review stage in commercial arbitration. The closest example in the author's experience has been in an instance where, acting off the record, the arbitral tribunal disclosed to the parties, in a meeting that was dedicated to this question, its preliminary findings as were put down in a draft award that was not itself made available to the parties. This was done with a view to facilitate an amicable settlement between the parties which the arbitral tribunal thought might be forthcoming and which actually was reached after the arbitral tribunal disclosed its preliminary findings. The model for this practice can be found in the civil procedure of some commercial courts, for instance, in the German part of Switzerland, where the rate of settlement before judgement is around sixty to seventy per cent of all cases. However, as mentioned above, this practice is not common in international commercial arbitration.

In the WTO system, after the first interim review on the facts and arguments has allowed parties to file comments, the panel will issue an interim report to the parties, including both descriptive sections and the panel's findings and conclusions.²⁸ The parties are then free to request the panel to revise one or several specific aspects of its draft decision.²⁹ A further meeting can be held at the request of a party, to clarify the issue or issues that have been identified as contentious.³⁰ If no comment is received, the interim report is treated as a definitive report and will be circulated to all Member States of the WTO.³¹

The WTO Dispute Settlement system obviates the need for an avenue to revise awards on request by a party. As is well known, a request for correction of an award rendered in a commercial arbitration can first be filed with the arbitral tribunal itself, within a short period of time, then in case of the discovery of new facts or other important new information, by a request for revision lodged with the competent State court. The request for revision is not known under the WTO system of

²⁸ DSU, art. 15.2.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

dispute settlement, but the provision for interim review preceding the adoption of the panel report allows an opportunity for the parties to ask to revisit an issue.

B. Adoption of the panel report

After the circulation of the report to the Member States and before its adoption by the DSB, the States may give written reasons for their possible objections.³² Within 60 days of the date of circulation of the panel report to the Member States, the DSB will adopt the report unless a party formally notifies the DSB that it will appeal the report.³³ By consensus the DSB can also decline to adopt the report. If there is an appeal, the DSB shall not consider the report for adoption until after the completion of the appeal procedure.³⁴

C. Appellate Body Review

Article 2 of the Understanding establishes the *Dispute Settlement Body* to administer the rules and procedures, as well as the consultation and dispute settlement provisions of the covered agreements, except as otherwise provided in a particular covered agreement. Accordingly, the DSB has the authority to establish *panels*, and to adopt reports of the panel as well as that of the appeal authority, the *Appellate Body*. The Appellate Body is a Standing Committee for appellate review and was established to examine the reports of the panel on request of at least one of the parties to ensure the consistency and correctness in law of the reports.³⁵ The DSB also has the authority to maintain surveillance of implementation of the rulings and recommendations, and to authorize the suspension of concessions and other obligations as a consequence of non-compliance with a ruling.³⁶

The panels are comparable to arbitral tribunals of the *first degree*, while the Appellate Body is comparable to a reviewing authority before which arbitral awards, or in the terminology of WTO the *report* of the panels may be appealed. This shows that in comparison with usual commercial arbitration, the WTO dispute resolution system is more complex in many ways, one of which is the existence of an institutional in-house appeal system. There are, in effect, two degrees of jurisdiction.

A point often made is that other systems of dispute resolution could benefit from an institutional review opportunity outside the State courts. This has been advocated, for example under the Uniform Domain-Name Dispute Resolution Policy [“**UDRP**”] procedures against the cyber-squatting of domain names. However, the only other (limited) example of institutional in-house review procedures is in investment arbitration within the International Centre for Settlement of Investment Disputes [“**ICSID**”] framework. It benefits from a somewhat less developed system of

³² *Id.* art. 16.1.

³³ *Id.* art. 16.4.

³⁴ *Id.*

³⁵ *See* DSU, art.17.

³⁶ *Id.* art. 2.

appeal under the Annulment Procedure regulated by Article 52 (2)-(6) and ICSID Arbitration Rules 50 to 55.³⁷

Not surprisingly, States are party to the ICSID arbitration procedures as well as the WTO dispute settlement procedures, the latter being entirely a State-State dispute settlement mechanism. We see here that States are inclined to favour appellate review of awards concerning their primordial interests. The swiftness of the resolution of disputes is relatively less of a concern to them than to private parties in an international commercial arbitration. Reciprocally, the additional guarantee for better adjudication and better application of international law is an even more important concern for them than for business firms relying on arbitration for adjudicating commercial disputes.

One of the reasons for the preference for appellate review may also reside in the de facto *law setting* function of the WTO reports. International law evolves from treaties *and practice*. The de facto precedent-setting dimension of WTO awards is essential when the text of the Marrakesh Treaty is scant in detail, especially in the protection of intellectual property rights³⁸ that falls under the Agreement on Trade Related Aspects of Intellectual Property Rights [“TRIPS”], Annex 1C of the Marrakesh Agreement.

The review of the panel’s report by the Appellate Body is the most innovative feature of the WTO Dispute Settlement system in comparison with ordinary international arbitration. The appeal mechanism is also different from the system of the ICSID arbitration and Article 52 of the ICSID Rules on Annulment. At the WTO, the review is made by an authority, the Appellate Body, which is a permanent body. The Appellate Body is composed of seven persons, three of whom shall serve on any one case.³⁹ They work part time, in practice it seems at least half of their time, often much more. The Appellate Body members are appointed for a period of four years and reappointment is allowed once.⁴⁰ The members are appointed so as to be broadly representative of the membership in the WTO⁴¹, and they must be unaffiliated with any government.

³⁷ See Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are they Today?: The Lalive Lecture 2012*, 28 (4) *ARB. INT’L.* 577, 589 (2012).

³⁸ The author would like to stress that his personal experience is limited to the participation as panelist in two panels dealing with intellectual property and technical barriers to trade, while only a handful of cases have been brought in the twenty two years which have bearing only on intellectual property matters, out of more than 518 WTO DSB cases as to the date this article was written (Jan. 17, 2017) (in 34 cases the TRIPs was cited in the request for consultation, but most of these requests did not deal mainly with intellectual property), See *Disputes by agreement*, WORLD TRADE ORGANISATION, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm.

³⁹ DSU, art. 17.1.

⁴⁰ DSU, art. 17.2.

⁴¹ As of now, the Appellate Body members are : Ujal Singh Bhatia, India, (Chairman), (Dec. 11, 2011 - Dec. 10, 2015; Dec. 11, 2015 — Dec. 10, 2019); Thomas R. Graham, United States, (Dec. 11, 2011 — Dec. 10, 2015; Dec. 11, 2015 — Dec. 10, 2019); Hyun Chong Kim, Korea (Dec. 1, 2016 — Nov. 30, 2020); Ricardo Ramírez-Hernández, Mexico, (July 1, 2009 — June 30, 2013; July 1, 2013 — June 30, 2017); Shree Baboo Chekitan Servansing, Mauritius, (Oct. 1, 2014 — Sept. 30, 2018); Peter Van den Bossche, Belgium, (Dec. 12, 2009 — Dec. 11, 2013; Dec. 12, 2013 — Dec. 11, 2017); and Hong Zhao, China (Dec. 1, 2016 — Nov. 30, 2020).

The Appellate Body reviews only issues of law and legal interpretations developed by the panel.⁴² This may be best exemplified by a finding of reversal in the dispute between the European Union and the United States of America in United States — Section 211 Omnibus Appropriations Act of 1998.⁴³ In its report, the Appellate Body reversed a finding by the panel that Article 8 of the Paris Convention for the Protection of Industrial Property of 1883, as revised, dealing with the protection of trade names would not be incorporated into the TRIPS.⁴⁴ The Appellate Body deemed Article 8 of the Paris Convention to be part of the TRIPS as dictated by the wording of Article 2 paragraph 1 of the TRIPS.⁴⁵ Therefore, it was held that the Member States are deemed to be under a TRIPS-based obligation to protect foreign trade names.

D. Adoption of the Appellate Body Reports

An Appellate Body report has to be adopted by the DSB within 30 days, unless the DSB decides by consensus not to adopt it.⁴⁶ The adoption will close the procedure of settlement of the dispute, unless one party does not conform to the recommendations of the report as adopted. Article 21 of the Understanding provides for the surveillance and implementation of the recommendations and rulings by the Dispute Settlement Body. Article 22 allows for an aggrieved State to adopt compensatory measures and suspend concessions or other obligations *vis-à-vis* the defaulting State.

For example, at the end of the United States-Gambling case,⁴⁷ Antigua was authorized on January 28, 2013 to retaliate against the United States for its failure to comply with the DSB Rulings concerning US legislation that prohibited on-line gambling, thus preventing the free cross-border delivery of gambling services that should prevail under Article XVI of the GATS. The retaliation was authorized at an annual level of 21 million USD, or by means of a temporary suspension of American rights accruing from intellectual property.

Of course, there is nothing similar in ordinary international commercial arbitration. Conversely, all the questions on the recognition and enforcement of an arbitral award under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“**New York Convention**”] are irrelevant for the WTO Dispute Settlement system.

V. Different Procedures of Arbitration within WTO

In order to afford a more holistic view of the WTO dispute settlement procedures, it is useful to mention two of the arbitration procedures under the WTO namely, the *arbitration* under Article 25 of the Understanding, and the *arbitration* under paragraph 6 of Article 22.

A. Arbitration under Article 25

⁴² DSU, art. 17.6

⁴³ See Appellate Body Report, *United States, Section 211 Omnibus Appropriations Act of 1998*, WT/DS/176/AB/R. (Jan. 2, 2002) (adopted Feb. 2, 2002) D.S.R. 2002:II, 589.

⁴⁴ *Id.* at ¶¶ 320-341.

⁴⁵ This provision reads as follows: “*In respect of Parts II, III and IV of this [TRIPs] Agreement (TRIPS), Members shall comply with Articles 1 through 12, and 19, of the Paris Convention (1967)*”.

⁴⁶ DSU, art. 17.14.

⁴⁷ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) (adopted on Apr. 20, 2005) DSR 2005:XII, 5663.

Arbitration under Article 25 is a consensual adjudication of any issue, for instance, the level of nullification or impairment of benefits of a Member by the legislation of another Member. Any other issue can also be submitted for arbitration.

The arbitrator or arbitrators may be the same persons who served as panelist(s) in the prior dispute settlement procedure. If the arbitrators first envisaged by the parties are no longer available, the Director General of WTO will appoint other arbitrators. The parties may agree that the award will be final and binding, which is the hallmark of any arbitration, as opposed to mediation, negotiation or mini-trial. The proceedings will be conducted in Geneva, but could be held elsewhere. The parties determine the timetable and the rules of procedure applicable for that particular arbitration. For example, the parties may provide for only one exchange of memorials, and no admittance of third parties.

An interesting illustration of this arbitration procedure can be seen in the arbitration of 2001 in *United States—section 110 (5) of the US Copyright Act*. This has been the first instance of an arbitration conducted under Article 25, and the arbitrators took great care to determine the scope of their mandate.⁴⁸ They decided that they were competent to determine their competence, a well-known principle of arbitration law also applicable in international commercial arbitration. However, for this decision on competence, the arbitrators relied on Article 21 of the Optional Rules of the Permanent Court of Arbitration for arbitrations involving international organizations and States.

Further, the arbitrators noted that the arbitration under Article 25 is an “*alternative* means of dispute settlement”. However, the term ‘*alternative*’ does not mean that Article 25 would supersede the panel procedure that has been expounded above, or conflict with it. In other words, the arbitrators may be competent to determine the level of benefits nullified or impaired as the result of a violation, as a Member may take recourse to arbitration under Article 25 whenever necessary within the WTO framework.

Thus, the arbitrators found that they had the mandate to determine the level of benefits of the European Communities that was nullified or impaired by the United States. The measure in question was the exemption of payment of royalties (in contrariety with Article 11 of the Berne Convention (as incorporated in TRIPS) on public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work. The award fixed the level of EC benefits that were being nullified or impaired as a result of the operation of Section 110 (5)(B) of the US Copyright Act as the equivalent of € 1’219’900 per year.

B. Arbitration under Article 22 (6)

A different situation arises when a party fails to carry out the recommendations and rulings of the DSB and the other party intends to suspend concessions as retaliation. That other party may request authorization to take such measures, and the respondent party may wish to object to the level of retaliation envisaged. Arbitration therefore may be carried out by the original panel, if its members

⁴⁸ See Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act – Recourse to Arbitration under Article 25 of the DSU*, WT/DS160/ARB25/1, §§ 2.1 - 2.7 (Nov. 9, 2001).

are available, or by an arbitrator, either one or a number of persons, appointed by the Director-General of WTO. Time is of the essence there, and the arbitration should not last more than 60 days, during which time concessions or other obligations shall not be suspended by the aggrieved party.

The arbitrator will examine whether the level of the suspension is equivalent to the level of nullification and impairment. If a defence has been raised in that respect, the arbitrator will also determine if the proposed suspension is allowed under the covered agreements. Finally, when the respondent party claims that the relevant principles and procedures (under Article 22 paragraph 3) have not been followed, the mandate of the arbitrator will include that claim.

The award will be final and the parties will not seek a second arbitration. The party so empowered by the award will request the DSB to authorize the suspension of concessions or other obligations.

C. Non Application of the Swiss Rules on Arbitration

Unlike international commercial arbitration with its seat in Switzerland, it is obvious that an arbitration under Article 25 or 22 (6) of the Understanding does not fall within the scope of Chapter XII of Switzerland's Federal Codes Law on International Private Law of December 18, 1987 ["CPIL"].

The activities of the Members of WTO, when regulating their market and the import of goods or services thereto, are typical of sovereign and administrative duties. Both the European Convention of State Immunities of May 16, 1972 (in force in 8 countries) and the United Nations Convention on Jurisdictional Immunities of States and their Property of December 2, 2004 (not yet in force)⁴⁹ clearly exclude a State from being summoned before a foreign court for its sovereign and administrative acts. Submitting the award of WTO's so-called arbitration procedure under Article 25 and 22 of the Understanding to Article 176 *et seq.* of the CPIL would entail that the forum court may be called on to take some procedural decisions. Furthermore, an appeal would be open to the Swiss Federal Tribunal⁵⁰ under Article 190 of the CPIL. The mere mention in the agreement to arbitrate between the Member States that the *award of the arbitrator shall be final*, as is usual under Article 25 arbitration agreements, would not in itself suffice to exclude the appeal under Art. 192 paragraph 1 of the CPIL.⁵¹ The exclusion rather derives from the system of the State immunity under general principles of international public law.

Moreover, the New York Convention is not applicable to the DSB decisions and arbitral awards within the framework, and the manner in which the WTO decisions are enforced (as discussed above) is starkly different from the enforcement of international commercial arbitration awards.

⁴⁹ UN General Assembly, Convention on Jurisdictional Immunity of State and their Property, G.A. Res.A/RES/59/38 (Dec. 2, 2004).

⁵⁰ CPIL, art. 190.

⁵¹ The requirement that a renunciation to appeal must be entirely explicit and that the words stating that the award is to be 'final' are not sufficient to exclude the appeal against an award rendered under Chapter XII CPIL, *see* ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE (RECUEIL OFFICIEL) [ATF] 131 III 173 (Switz.), citing precedent decisions.

VI. Conclusion

WTO Dispute Settlement mechanisms and international commercial arbitration have much in common. Both serve to settle a dispute by a final and binding award. They are both hugely successful. For one, more than 500 disputes have been settled under the WTO Understanding in 20 years. That is approximately double the number of cases heard by the International Court of Justice in the Hague in its 60 years. The WTO Dispute Settlement system, ICSID arbitration, as well as ordinary international commercial arbitration, will all be called to play an even more important role in future international trade and investment, even if some WTO Members should wish to renegotiate multilateral agreements.

The methods adopted by the arbitrators in all these systems are also not fundamentally different. For example, considerations of due process play an eminent role in the DSB decisions on procedural issues, as they do in international commercial arbitration. A marked difference, however, seems to derive from the very effective involvement of the DSB Secretariat in assisting the panels in the conduct of the proceedings and the drafting of its reports. There is no equivalent in commercial arbitration. Even when a secretary or assistant to the commercial arbitral tribunal has been appointed with the consent of the arbitrators and/or the parties, a one-person assistance cannot be compared to the multi-faceted, multi-professional assistance of a team from the WTO Secretariat comprising lawyers well versed in different specialisation of the international law, economists, and statisticians. The reader may wonder if this feature of the WTO system allowing for great intrinsic quality of decisions should be a model for the practice of international arbitration. Will one day a whole entity, such as a law firm or an auditing company, be appointed as chairperson of a commercial arbitral tribunal? That may ensure the coordination of skills that are so crucial in rendering justice in complex claims of investment arbitration and sophisticated commercial litigation. The appointment of an auditing firm is already practiced in commercial contracts and other important transactions as an alternative method of reference for possible disputes.

In the author's view nonetheless, the parties to commercial arbitration will continue trusting their interests in the resolution of a dispute to one or more individuals. The arbitral institutions also appoint natural persons rather than legal entities as arbitrators. The personal experience of a judge or a seasoned arbitrator is what arbitrating parties need most, even if experts organised as legal entities may give information and advice to the arbitral tribunal. Individuals are the best suited to practice the advice that Chief Justice Pathak has repeated to me time and again, "*Adjudicating is applying law, equity and good conscience*".