

THE ROLE OF LAWYERS IN THE WTO DISPUTE SETTLEMENT SYSTEM

by

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Lawyers as advocates: from international tribunals to the WTO dispute settlements organs

Before entering the subject matter a terminological specification is necessary. By "lawyers" one can refer both to advocates and more generally to "jurists". In this contribution I will refer to lawyers as advocates in their capacity as representatives of parties in proceedings before the WTO dispute settlement organs (the panels and the Appellate Body). I will also focus on their role as legal advisors to interested private parties; these are first of all enterprises indirectly involved and affected by the outcome of these proceedings. Other private parties have also to be considered, such as Non-Governmental Organizations (NGOs) when they have an interest of a general nature in the result of a given case in the light of the interest they pursue.

The role of advocates in international litigation is well known. If we take as a classical example proceedings before the International Court of Justice, the distinction between "agents" of a government and lawyers that argue, both orally and in writing on their behalf, is recognized in the relevant rules. Most governments are not equipped with the legal expertise necessary to submit and carry on a case before an international court, be it as claimants or defendants or third parties. Lawyers have stepped in in their specific capacity. Experts in public international law, mostly academics, have been relied upon and some well-known experts in this field have established a reputation for appearing on behalf of governments. Many international law firms have increasingly specialized in such litigation and some of their members also appear regularly before international courts.²

The multiplication of permanent international courts, regional and specialized, and the increased recourse to interstate arbitration for the settlement of disputes between states based on the rule of law has expanded this type of practice. The practice itself has become diversified following the specialization of the bodies entrusted with the settlement of these disputes. Lawyers in those various capacities are also required by, and before, bodies that decide issues based on law through adversary proceedings, where due process is required, but that are not strictly tribunals. The UN Compensation Commission established after the Gulf war is a foremost example.

Besides traditional interstate disputes, the pluralism of international justice involves currently claims of human rights infringements by individuals against states before human rights tribunals, such as the European Court of Human Rights in Strasbourg. Individuals are normally represented by lawyers although this may not be strictly required. The international criminal courts offer a different type of international justice where individuals are parties both as defendants accused of crimes and as victims; the role of advocates, predominantly criminal lawyers, in these courts is essential also in discovery and investigation.

Private parties, mostly enterprises and companies, have become parties as claimants in a recent growing sector of international adjudication, namely in direct investment arbitration based on arbitration clauses but also, more and more, based on treaty clauses allowing such direct litigation, as found in regional agreements (such as NAFTA or the European Energy Charter), and in Bilateral Investment Treaties. Although this arbitration has been modelled on traditional international commercial arbitration, this type of dispute settlement presents increasingly features which are typical

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² See Cesare P. Romano, *The Americanization of International Litigation*, 19 Ohio State J. Disputes Resolution, 89 (2003).

of interstate litigation, especially within the framework of the ICSID Convention.³ Lawyers, both academics and experts in international commercial arbitration are called upon here also as arbitrators.

Where does the WTO dispute settlement system stand in this constellation of international adjudication? Two features are relevant in this respect. First, the WTO panels and the Appellate Body are not formally endowed with an adjudicative function: they do not issue "judgements" endowed with *res judicata* effect; their reports are recommendations to the parties and to the WTO Member governments, not *per se* binding and final. At the same time, they have to apply the various WTO agreements, interpreting them in order to conclude whether the measure of a WTO Member challenged by another Member is or is not consistent, in law, with such agreements. Second, as to content, the standard recommendation in the reports of panels and of the Appellate Body is "that the Member concerned bring the measure into conformity with that agreement".⁴ Legal reasoning and legal findings are the typical content of their reports, in order to determine which party is right and which is wrong. It is well known moreover that the system is framed in a way such that their reports are "automatically" adopted as a rule by the political organ of the WTO (the Dispute Settlement Body (DSB)) and that Members involved in a dispute are expected to comply promptly with those recommendations adopted by the DSB.⁵

We can follow the dominant view therefore that the function performed by panels and by the Appellate Body is typical of adjudication by international arbitration panels and permanent tribunals. This function is even enhanced by being the central element of a larger, innovative framework that starts with compulsory consultation in the first phase, before adjudication based on law, and is concluded by multilateral surveillance of implementation with a view to ensuring that the findings, rulings and recommendation(s) do not remain a dead letter. This reflects the general statement of Article 3.1 of the DSU: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system". Compliance is meant accordingly to "ensure effective resolution of disputes" not just in the interest of the litigants but "to the benefit of all Members"⁶.

There is an additional feature which is of paramount importance for our subject here. Proceedings are conducted both at the panel level and before the Appellate Body with full respect and application of the principles of due process and adversary proceedings. This is implied by various provisions of the DSU, especially Articles 11 and 19⁷; is specified by the Working Procedures of the Appellate Body; and has been repeatedly underlined in the latter's reports. Confidentiality of the proceedings, which is spelled out in various articles of the DSU⁸, reflects the GATT tradition and is typical of arbitration rather than of international tribunals; it does not affect however the strict respect due to those procedural principles.

It is not surprising therefore that early on the Appellate Body ruled explicitly that a government could be represented by private lawyers before it, including in appearing and orally pleading at hearings on its behalf.⁹ This ruling reflects moreover the freedom of sovereign states to be represented generally by persons of their choice and trust. It enables small countries to seek competent legal services, when they do not possess them internally, in order to protect their interest on an equal footing with any other country.

³ Giorgio Sacerdoti, *Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID Rev.-FILJ, 1 (2004)

⁴ See Articles 3.2 and 19.1 of the DSU.

⁵ See Article 21.1 and 21.3 of the DSU.

⁶ See Article 21.1 of the DSU.

⁷ See also the prohibition of *ex parte* communications, Article 18.1

⁸ See Articles 14, 17.10, 18.2.

⁹ *EC – Banana III*, WT/DS27/AB/R adopted 25 September 1997, one of the first disputes submitted to the Appellate Body.

Since that ruling many, possibly most countries, have resorted to private lawyers to counsel and represent them. The accumulation of case law and the intricacy of the WTO agreements and of WTO proceedings has made this practice more and more common. In turn, private lawyers, as experts in litigation, have contributed to the emphasis on the procedural correctness of proceedings. The Appellate Body has not encouraged reliance on procedural niceties *per se*, that is when they would not serve the requirements of due process and the proper reaching of an objective decision. The requirement of a speedy resolution of the dispute has not been sacrificed to formalities.

This development has in turn encouraged legal professionalism in addressing the features of WTO dispute settlement and the specialization of many lawyers, not only in big international law firms, in this new field of international law and litigation. Young private practitioners of diverse nationality and backgrounds have found here, and will undoubtedly find in the future, a challenging field in which to apply their legal abilities internationally. A new specialized international bar has emerged, comprised of specialists in WTO law and litigation, parallel to the specialists in international investment law and litigation, which has been also a hitherto almost inexistent bar.

Lawyers as counsellors of private firms in international trade litigation

WTO law and litigation involves yet another dimension of interest to private lawyers. WTO disputes are between sovereign governments: there is no *ius standi* for private parties before panels and the Appellate Body, the cautious admission of *amicus curiae* briefs by judicial interpretation of the DSU notwithstanding.¹⁰ Still, disputes usually concern economic sectors of WTO Members, as importers or exporters, and often specifically individual firms. This is especially the case in the so-called trade remedy cases, where the issue is the legality under the WTO of domestic safeguards measures, countervailing duties or anti-dumping proceedings, enacted in order to protect a domestic sector, possibly specific enterprises. In these instances the claimant state pursues the interest of a specific export sector, or of a distinct group of enterprises, if not of a named company. Indeed some disputes are generally known by the names of the firms directly involved or affected. One reads of the *Fuji – Kodak* and of the *Havana Club* cases, not to speak of the current *Boeing – Airbus* dispute between the US and the European Community.¹¹

In these instances one may view WTO dispute settlement as being, in substance, an example of espousal of a private claim by means of diplomatic protection; indeed it is up to the national government of the affected domestic enterprise to decide whether to pursue the case within the WTO system. But with one peculiarity, namely, that there is no requirement of previous exhaustion of local remedies. As an example, an enterprise which is the object of an anti-dumping proceedings in a foreign country may elect to seek judicial review of the substantive and procedural legality of the measure in that country, under local law, but may instead or even at the same time request its government to challenge the same measure within the WTO for lack of conformity with the relevant WTO trade agreement.¹² Indeed the fact that WTO agreements cannot as a rule be invoked domestically to challenge domestic implementing legislation¹³ increases the likelihood that an alleged

¹⁰ Also these briefs are normally drafted by lawyers, sometimes acting *pro bono*, as they put forth legal arguments.

¹¹ See generally Alberto Alemanno, *Private Parties and WTO Dispute Settlement System*, Cornell Law School LLM Paper Series 1 (2004); Giulio Peroni, *La tutela degli interessi privati nel sistema OMC e il possibile concorso di giurisdizione con altri sistemi ad esso estranei*, 18 *Diritto Commercio Internazionale* 723 (2004).

¹² In *US – Countervailing Duties on Certain EC Products*, proceedings against the same US countervailing duties were pending before the US Court of International Trade, see Report fn.334. In *EC – Tube and Pipe Fittings*, Brazil challenged the conformity with the Anti-Dumping Agreement of the application of an anti-dumping measure by the EC in respect of a specific Brazilian exporter.

¹³ This is the situation in the European Community law; see the ECJ decisions in the *Biret* and *Van Parys* cases (C-93/02 of 30 September 2003 and C-377/02 of 1 March 2005 respectively) notwithstanding the contrary suggestions of Advocates General Jacobs and Tizzano respectively.

WTO inconsistency of the latter as applied in a given case will be brought to the WTO dispute settlement system.

In such a case proceedings at the WTO appear as a kind of continuation of the domestic dispute in the multilateral framework. The WTO challenge may be viewed, and may have been resorted to, as a kind of "international appeal" in the same dispute. The lawyers who have handled the case before the domestic authorities and courts may well be the same that prepare the challenge in Geneva. Knowledge of the features of the WTO system and the ability to handle it may be essential, even more so since the government may well leave to the private enterprise or company the responsibility to carry on the case at the WTO.

Another instance where private parties may be affected by WTO dispute settlement mechanisms is in case of non compliance by a state with a panel or Appellate Body report that requires it to remove measures found in breach of that state's WTO obligations. The other WTO Member bringing the complaint may be authorized by the DSB to impose countermeasures, in the form of suspension of tariff concessions normally resulting in additional duties against exports from the non-complying WTO Member into the territory of the "winning party". "Innocent exporters" or "innocent importers" will thus be affected and will need to protect themselves as far as possible, by also using the services of lawyers in both countries.¹⁴

Thus WTO litigation becomes, directly or indirectly, an integral part of the legal services that international trade lawyers are expected to offer to their clients. This may involve handling a case not only before domestic authorities and courts, but also in international *fora*, and finally presenting it to the national authorities in order to convince them to pursue WTO remedies. It is worth recalling that in many countries the latter aspect is not left to expediency and lobbying but is governed by specific provisions. This is the case of EC Reg. 3286/94 of 22 December 1994 on obstacles to trade – enacted in order to enforce the rights resulting for the EC from the Uruguay Round – which regulates the submission of European industry claims against the alleged non respect of these rights by other WTO Members.¹⁵ International trade lawyers may find in this area new directions for their practice.

¹⁴ Also importers of affected products in the country considering the imposition of additional duties may be adversely affected and may be granted procedural rights in the procedure leading to such imposition in that country; see f.i. the "Notice seeking comments on possible trade retaliation against the US in response to the US failure to repeal the *Byrd Amendment*", Canada Gazette, Part I, Extra Vol.138, N° 19 of 23 November 2004.

¹⁵ See generally Henry Lesguillons, *Origines et développements du Règlement sur les obstacles au commerce (ROC)*, Rev. de droit des affaires internationales (International Business Law J), 2000, No. 8, 959.