

New Institutional Architectures and Substantive Rules in International Economic Law

The EU and the UN Sustainable Development Goals



Edited by Elisa Baroncini,
Carlo de Stefano, Luca Rubini

with the collaboration of Klarissa Martins Sckayer Abicalam



ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA



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Do We Really Need an Appellate Review in International Economic Law? What Sustainability Disputes are Telling Us

LUCA RUBINI

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1. A limited goal

The goal of this brief contribution is to try and think "out of the box" when we talk of dispute settlement in international economic law. It is a broad topic, but it nicely intersects with the issue of sustainability since the latter has recently offered good food for thought about the nature and limits of dispute settlement in international law, and also about the limits of the substantive law.

My impression is that when we talk of international economic law, and of the specific topic of appellate review in dispute settlement, there is a risk to accept the status quo, or (whenever there has been a change, even a dramatic one) a tendency to try and go back to the status quo ante, almost as if this by necessity represents the natural and only benchmark available. I will use international trade and international investment law to show this point. More specifically, in these discussions, the status quo (ante) and benchmark are represented by the World Trade Organization (WTO) Appellate Body.

One key point I want to convey is that technical details are important, but they can only follow the answer to the first questions, those that are directly related to the objective of key legal principles and institutions. When we talk of international dispute settlement the key questions are as follows. Why do we have dispute settlement in international law, and particularly in trade and investment law? Why do we need it? Do we need an appellate review in order to pursue the goals of dispute settlement internationally?

My brief comments will follow two directions. First, I will argue for the professionalisation of the current systems of dispute settlements. Secondly, I will highlight that, quite often, the root of the difficulty does not lie in institutional or procedural devices but rather in lacune in the substantive law (and it is here that sustainability helps us).

2. Setting the scene: dispute settlement in international trade law

Let's now start with international trade law. As known, initially the GATT did not have an appellate review – and not even a fully developed dispute settlement system (GATT Articles XXII and XXIII simply sketch the basic conditions for raising a complaint for “nullification and impairment” of the benefits Contracting Parties may expect from the GATT). Dispute settlement was provided for in the Havana Charter and the International Trade Organization (ITO) which, as known, never came into being.¹ What happened is that, with time and a great sense of pragmatism, the system developed a unique and pretty effective system of dispute settlement. The best indication thereof is that, despite the need for a positive consensus to any report coming out from the system, only 20% of cases ended up in an “unadopted report”.² What is this telling us? The veto power of the losing party was not consistently used because the system managed to produce solutions to disputes which were acceptable – also to the losing party. It is also known that the GATT dispute settlement system progressively acquired legal characteristics which were not present at the beginning. In other words, we progressively witnessed to a shift from diplomacy to law, from negotiated outcomes to judicial dispute settlement. The core of this shift is represented by the entrenchment of a “rule-based” system.³

An appellate review makes its entry in the world trading system only with the advent of the WTO. There are also several indications that this major development was not even much “thought of” or even subject to detailed discussions during the Uruguay Round negotiations.⁴ With time the Appellate Body, which started its operations in 1995, developed a very rich and sophisticated jurisprudence, arguably becoming the most developed system of dispute settlement in international law. This jurisprudence has generated an increased and sustained interest and, inevitably, criticism. And decisions in the area of sustainability are a good example of this.

With the passing of time, the relationship between Members and the Appellate Body has also got worse. The climax was reached when one key Member, the United States, effectively exercised a veto power, by refusing to appoint new members of the Appellate Body. They pulled the plug and in

¹ See Petros Mavroidis, *The Regulation of International Trade: Volume 1 the GATT*, Cambridge Mass, MIT Press, 2016, Chapter 1.

² See Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, New Haven, Butterworths: 1993).

³ For a critical analysis of this point see Joseph Weiler, “The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement”, 2001, *Journal of World Trade*, 191-207.

⁴ See Peter Van den Bossche, “From Afterthought to Centerpiece: the WTO Appellate Body and its Rise in the World Trade Organization”, *Maastricht Working Papers Faculty of Law*, 2005-1.

December 2019, when the minimum number of members to operate (3) evaporated, the Appellate Body effectively died. Why did the US veto? Many complaints have been levied which all essentially boil down to the indictment of “judicial activism”. Rather than interpreting the law, the Appellate Body would have created it.⁵ They would have “added to the rights and obligations of the parties” thus explicitly and fundamentally breaching the key duty of their mandate as enshrined in Article 3 of the Dispute Settlement Understanding (DSU). Importantly, empirical research carried out by scholars of the European University Institute has shown that many WTO Members shared the same sentiments of the US.⁶ It therefore looks like that the death of the Appellate Body was the consequence of the end of the necessary trust of the Membership towards its “judges” (which, by contrast, was significantly there during the GATT era: the basic data outlined above on report adoption support this point).⁷ Few WTO Members have reacted to the “gap” created by the demise of the Appellate Body by creating a temporary appeal system, the so-called “Multi-Party Interim Appeal Arbitration” (MPIA).⁸ At the time of writing, though, this temporary solution is here to stay since there is no tangible prospect for a reinstatement of an appellate review.

3. The goals of dispute settlement in the WTO

The key question is whether we really need an Appellate Body. To answer this fundamental question, it is necessary to think about the goals of dispute settlement in the WTO. Article 3 of the DSU is the key reference provision. It refers to “security and predictability” but it also mentions “management” and “settlement of disputes”, “positive solution to a dispute”. It is difficult to challenge the observation that these must be the key goals of the system. But are there any other objectives? Should the dispute settlement also have other functions? Those that adopt a constitutional view of international law, and international trade law specifically, would suggest that dispute settlement is also

⁵ The paradigmatic example of this complaint is the consistent Appellate Body jurisprudence that prohibited zeroing in all phases of anti-dumping investigations, which, in view of the US, would have patently breached the special standard provided for in Article 17.6 of the Agreement on Anti-Dumping (ADA).

⁶ Fiorini, Hoekman, Mavroidis, Saluste, and Wolfe, *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members’ Revealed Preferences* (November 2019). Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2019/95.

⁷ EUI reference

⁸ This is nothing else than an arbitration system based on Article 25 of the Dispute Settlement Understanding. It entered into force on 30th April 2020.

needed to create law, to ensure the uniformity of the legal system. This view was strongly debated in the late 1990s and early 2000s.⁹

Two remarks are in point here.

First, it is obvious that any tribunal or court somewhat “creates” law. That being said, it is a matter of degree. We can think of dispute settlement, and judicial activity, as a spectrum. Which degree of creativity judicial bodies should embrace substantially depends on the key tenets of the legal system within which they operate. The WTO DSU, which includes the key guidelines for dispute settlement activity, talks of “preservation of the rights and obligations of the parties”, and repeats that “recommendations cannot add to or diminish the rights and obligations provided in the covered agreements” twice (Article 3 e art 19).

As Claus-Dieter Ehlermann, one of the first members of the Appellate Body, wrote in 2002 when he summarised his 6 years on the World Trade Court bench, the Appellate Body was particularly cautious in its interpretation activity in its early days. The first members of the Appellate Body strived to adopt “circumvention” when approaching the law. This is why in the very two first disputes they highlighted that they would have been guided by Articles 31 and 32 of the Vienna Convention of the Law of Treaties. That may appear obvious but what is probably less obvious is the emphasis put on textual interpretation which, as Ehlermann noted, was expressly motivated by the willingness to be “circumspect” and ensure that their interpretations be more easily accepted by the litigants and by the WTO constituency at large. In other words, circumspection to garner legitimacy.

Secondly, we need to highlight one key difference between international law is domestic law. We don’t have supreme courts or constitutional courts at the international level. The example of the Court of Justice of the European Union is truly unique and is the result of a unique history of integration. From another perspective, I would suggest that international law, and especially international economic law, still retain a strong “contractual” nature. This means that circumspection in interpreting the law should be of the essence.¹⁰

⁹ For a critical analysis of the issue see Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading Order*, Oxford, Oxford University Press: 2005. See also the thought-provoking book review written by Joost Pauwelyn and published in the *American Journal of International Law*, 2001, 986-991. I still remember attending in May 2001 the first WTO law conference organized in London by the Institute of International Economic Law (Georgetown) and the British Institute of International and Comparative Law. The title of the first session, opened by Professor John Jackson, was: “The World Trade Organization and its Dispute Settlement System: Is there a Constitutional Crisis Emerging?”.

¹⁰ Age of innocence.

4. The Secretariat's expanding role: An issue of "institutional design"

The role of the Secretariat in dispute settlement, at both Panel and Appellate Body levels, has raised important issues.

It is known that panellists are appointed *ad hoc*. Working part-time, modestly remunerated, they do not have sufficient incentives to perform at the highest possible level. There is an official roster but those appointed are often not included in this roster. There is no clear and transparent logic in appointments. Most importantly, there are often serious doubts about the quality and capacity of the appointees. This may generate a phenomenon whereby the support activity of the Secretariat becomes too much preponderant. A common allegation has been that the secretariat played a significant and ubiquitous role also in the context of the activity of the Appellate Body. Simple observation of the Appellate Body members appointed since the beginning up to the end of its activity makes it evident that, against initial appointments which were highly qualified, the professional quality of the members subsequently chosen progressively decreased. Close to the end of the life of the Appellate Body, it is not difficult to note that, out of the seven members, only a handful had a strong legal background. Participation at lectures or conferences could have been enough to realize that some members did not even have a proficiency in English – the working language of the World Trade Court. The author of this piece was attending a conference on occasion of the twentieth anniversary of the Appellate Body when one (at the time) current member of the Appellate Body was quick to issue the disclaimer that he could not positively participate in the debate on the case-law of the Appellate Body since he was not a lawyer!

Irrespective of professional and language qualifications, the fact is that, if you have an international adjudicating body, this has to take legal decisions. If the members of that body are not fully qualified in doing so, who does take the actual decisions? Who gives a meaningful contribution to the meetings? Who leads in discussing the legal issues, the various alternative interpretations and the possible solutions? Who eventually writes the reports and the key language of the key paragraphs? Anecdotal evidence and, more recently, even scholarly work have been suggesting that the Appellate Body secretariat has increasingly been playing a key role in many, if not all, of these steps. To be sure, the issue is not that judicial decision making should not be supported by the work of law clerks or assistants. The key issue is that judges or adjudicating body members should always have the intellectual leadership in deliberating and externalizing their reasoning. More recently, highly authoritative voices have planted the seed of doubt. The most clamorous *j'accuse* has come from a former member of the Appellate Body, the American Thomas Grant, when he delivered his farewell

speech on 5th March 2020 at Georgetown University (when the Appellate Body's doors had already closed).¹¹ More recently, an article published in the *American Journal of International Law*, co-authored by Professors Joost Pauwelyn and Krzysztof Pelc, has constituted the strongest and more reasoned academic piece analysing the topic.¹² This article sparked a very lively debate with a symposium published in the same journal in late 2022 and, most dramatically, another former member of the Appellate Body, Professor Giorgio Sacerdoti, responding to the claims in a blog post.¹³

My view is that, whatever may be the merits of the claim, if there is a problem, this is not one which only focuses on the people and their (lack of) qualifications or leadership but, more radically, also with the institutional design of the Panels and the Appellate Body.

If this is correct, the solution is not to create an appeal system based on arbitration – in which key WTO Members (think of the US) do not participate – on the dubious premise that this is just a temporary solution to the permanent comeback of the Appellate Body. This is just fudging the issue. The solution is to take dispute settlement seriously which, above all, means to professionalise it. What does professionalisation mean? Full time members (perhaps even divided up by area specialisation), high qualifications relevant to the job, financial and human resources (for example, to set up a proper system with legal clerks under the direction of each member). If this were done, perhaps there would be no need for an appellate review. In other words, if Members already had one instance of adjudication which is impartial, qualified, efficient and permanent, for what other reason you would *also* need an appellate review? This is not a new idea.¹⁴ It was put forward by many, for example the EU, and rehearsed also in academic and policy circles alike. The final question is political. Why, despite a good solution has been there for a while, nothing has happened? Perhaps, because WTO Members do not have an interest in having a robust system of dispute settlement.¹⁵

¹¹ Farewell speech of Appellate Body Member Thomas R. Graham, 5th March 2020, available [here](#).

¹² Joost Pauwelyn and Krzysztof Pelc, "Who guards the 'Guardians of the system'? The role of the secretariat in WTO dispute settlement", *American Journal of International Law*, Volume 116, Issue 3, 534-566.

¹³ Giorgio Sacerdoti, "A critical reaction to Joost Pauwelyn and Krzysztof Pelc's 'The WTO Secretariat's Open Secret': Unpacking the Controversy", *EJIL Talk*, 2nd September 2022, available [here](#).

¹⁴ See, for example, Bernard Hoekman and Petros Mavroidis, *To AB or Not to AB?: Dispute Settlement in WTO Reform*, *Journal of International Economic Law*, Vol. 23, p. 703, 2020; European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Working Paper No. RSCAS 2020/34 (2020).

¹⁵ There are various factors showing this, the best example being the lack of retroactivity of remedies in GATT/WTO law, which is a unicum in public international law.

5. Investment Law

Much of what has been said with respect to international trade law is also relevant to investment law.

On the one hand, it is known how investor-state arbitration, which is the central system of dispute settlement in international investment law, is fraught with opacities, conflicts of interests, biases, fragmentation.¹⁶ On the other hand, it has been suggested that one solution to at least some of these illnesses could be represented by the creation of a centralised appellate review. In its proposal, the EU has even suggested that the Appellate Body of the WTO could have represented a model.¹⁷ That happened before the Appellate Body's death.

6. Lacune in substantive law: the example of sustainability

But, at this point, there is another important observation – which eventually is leading me to talk of the central topic of this symposium: sustainability. Many of the problems of dispute settlement in international economic law do not stem out from dispute settlement itself but, more fundamentally, from the inefficiencies of the substantive laws which the various adjudicating bodies – WTO Panels, Appellate Body, ISDS arbitrators – have to interpret and apply.

International environmental law and the law of sustainability offer great example in this respect.

The WTO Panel and Appellate Body in *Canada – Renewable Energy/FIT* (DS 412; DS 426) made significant efforts to conclude that the measure at issue (a policy to incentivise green energy production) was not a subsidy under WTO law. In so doing, they have been subject to significant criticism for having distorted basic rules of legal interpretations and creating a “carve out” not present in the rules.¹⁸ Why did this happen? Because, fundamentally, the legal system does not provide an explicit exception for subsidies pursuing good public policy objectives (in the case at issue, green energy generation).

It is known that traditionally investment law has not been very responsive to the public interest objectives pursued by host governments and to their right

¹⁶ See Federico Ortino, *The Origin and Evolution of Investment Treaty Standards*, Oxford, Oxford University Press, 2020; Rodrigo Polanco, *The Return of the Home State in Investor-State Disputes: Bringing Back Diplomatic Protection?*, Cambridge: Cambridge University Press, 2019.

¹⁷ Céline Lévesque, *The European Commission Proposal for an Investment Court System: Out with the Old, In with the New?*, Centre for International Governance Innovation, Investor-State Arbitration Series, Paper No 10, September 26, 2016.

¹⁸ See, e.g., Luca Rubini, ‘The Good, the Bad and the Ugly. Lessons on Methodology in Legal Analysis from the Recent WTO Litigation on Renewable Energy Subsidies’ (2014) *Journal of World Trade*, 895-938.

to regulate.¹⁹ As a result, the introduction of new, more demanding, environmental rules have often been considered as forms of indirect expropriation breaching investment laws.²⁰ To be sure, we may criticise individual arbitration awards but, in many cases, the root of the problem does not lie in the interpretation of investment treaties but in the substance itself of investment treaties. The key question, in other words, is whether the fair and equitable standard is apt to sustain the complex balancing of investor interests and public interests, or rather whether basic needs of legal certainty would require the introduction of express provisions safeguarding the right to regulate for the pursuit of certain objectives. Like in the international trade scenario, it is therefore clear that the key question is a matter of substantive law and not of dispute settlement.

The said lacunae in the law have created difficulties and pressure on adjudicating bodies forcing them to adopt sub-optimal, even incorrect, decisions.²¹ If this is true, the solution is not to create an appellate review to remedy mistakes of first instance adjudication but rather to be bold enough to address the problem at its roots: reform the law.²²

7. Conclusions

In conclusion, as I was suggesting in a blog post few years ago,²³ the most important thing is to start from the key, first questions. What do we need? What do we want the dispute settlement of this particular regime of international economic law do for us?

Only clear answers to these questions enable the analysis of the issue of the need for an appellate review. Otherwise, it may become a dangerous diversion because we are wasting precious resources for the wrong investment. And, these days, the political capital to invest in international negotiations is terribly scarce

¹⁹ See Ortino, *op. cit.*; Polanco, *op. cit.*, *passim*.

²⁰ For an overview of recent disputes see the chapter written by Maria Laura Marceddu in this e-book.

²¹ That was the essence of my call in Luca Rubini, ‘Ain’t Wastin’ Time No More. Subsidies for Renewable Energy, the SCM Agreement, Policy Space and Law Reform’, *Journal of International Economic Law*, 525-579.

²² See Luca Rubini, ‘ASCM disciplines and recent WTO case law developments: what space for “green” subsidies?’ in Thomas Cottier and Ilaria Espa (eds) *International Trade in Electricity and the Decarbonisation of the Economy. The World Trade Forum 2014* (Cambridge: Cambridge University Press), 311-355

²³ Luca Rubini, “‘The Crown and the Jewel.’ The Rise and Fall of the WTO Appellate Body: a Critical Analysis”, in *International Economic Law and Policy Blog*, 5th October 2021, available [here](#).