

**«Vingt ans de droit de l'OMC»
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**La contribution de l'Organe d'Appel à la
construction du droit international
économique**

Slides in English

International Trade Law and International Economic Law

- ❑ International Trade Law: The Multilateral Trading System (WTO law)
- ❑ Regional Trade Agreements
- ❑ International Investment Law
- ❑ Other sectors of International Economic Law:
 - International Monetary Law

From direct to indirect relevance of the WTO Appellate Body, basically (just) a treaty body of the WTO

AB relevant for «construction» or for «development»?

Legal Features of the WTO Multilateral Trading System

- ❑ The WTO as an International Organisation under Public Int. Law
- ❑ MTS as a treaty-based sub-system within PIL
- ❑ The horizontal character of the WTO Agreements:
 - rights and duties between Members
- ❑ The absence of secondary rule-making («member-driven» int.org.)
- ❑ The importance of the Dispute Settlement System (Art.3.2 DSU):
 - solve legally specific disputes between litigants (but role of Third Parties)
 - ensure compliance
 - «clarify» rules in accordance with PIL customary rules of interpretation
 - provide «security and predictability» to the MTS

The functions of the Appellate Body

- ❑ WTO DSS is unique exclusive, compulsory law-based third-party adjudication, with binding decisions for 165 Members!
- ❑ AB specific function within DSS: decide appeals on legal issues (DSU 17) by application of WTO law
 - binding between parties upon adoption by DSB
- ❑ AB broader role:
 - sets methodology of review, reasoning, interpretation
 - guide to panels (*US-Stainless Steel from Mexico*)
 - sets precedent for future disputes between any Member & practice
 - ensures unity & coherence between the various WTO Agreements
 - resolves open issues (WTO as an «incomplete contract»?)
 - «mends» WTO Members lack of action (no interpretation adopted *ex Art.IX.2*; no DSU review; no Doha Round completion)
- ❑ But AB:
 - « cannot add or diminish» to Members' rights and obligations (DSU 19.2)

The basis of AB authority as the WTO permanent adjudicatory body

- ❑ The legal set-up:
 - AB composition (small number);
 - position within the WTO;
 - selection process,
 - individual qualifications and mix
- ❑ The exercise of its functions:
 - separate, independent, collegial, unanimous, unbiased towards all parties (no politicization), persuasive reasoning
 - restrain in exercise of its role (no over-reaching) but effective review of members' measures («standard of review» by Panels of domestic measures)
 - cautious in interpretation: text and «internal» context, no direct application of non-WTO law, practice by some Members only not sufficient (*EC-Chicken Cuts*)
- ❑ Consistency of case law (no «*révirement de jurisprudence*»), reliable

Positive effects of legal and acquired authority of AB

As a result:

- ❑ Recognition of AB authority by all Members, fear to undermine it, legitimate expectations based on AB jurisprudence (*US-Sunset Review OCTG*)
- ❑ Broad participation by Members to / confidence in the DSS
- ❑ Systematic (excessive?) reference by parties to AB case law
- ❑ Even criticized AB innovations have reinforced broader acceptance:
transparency, *Amicus Curiae*: supports *legitimacy* of WTO
- ❑ AB: from criticism («faceless judges») to model in RTAs & Investment Law!

The contribution of the AB: systemic issues

- ❑ «not to be interpreted in clinical isolation from PIL» (*US-Gasoline*)
- ❑ Methodological application of VCLT to interpret WTO Agreements
- ❑ Follows closely Art.31 VCLT, text, context, object & purpose, etc.
- ❑ Limited resort to preparatory works; no guessing of parties' intent
- ❑ Coherence pursued between GATT and Uruguay Rd Agreements
- ❑ WTO practice as «subsequent agreements» (*US-Cloves; US-Tuna II*)
- ❑ «Protection» of WTO law from external sources (reluctance on precaution, modification of treaties between some parties only, application of other agreements (*Mexico – Soft Drinks, Peru-Additional Duties*))
- ❑ But reference to int'lly recognized non-trade values/objectives (*US-Shrimps; EC-Preferences; China-Raw Materials; EU-Seals*)

The contribution of the AB: procedural issues

Procedural correctness:

- ❑ object of consultations vs. panel request (DSU 6.2);
- ❑ standard of review of panel reports (DSU 11);
- ❑ use of experts by panels;
- ❑ exceptions vs general rule;
- ❑ burden of proof
- ❑ good faith in proceedings (*Peru - Additional Duties*)

The contribution of the AB: selected substantive issues

- ❑ «like/ directly competitive products» and «less favourable treatment» (GATT III.4, TBT 2.1):
 - from «aim and effect» to «economic impact on competition»
 - «structure, design and operation of the measure»
- ❑ Examination of Art.XX GATT exceptions: list and «chapeau»
- ❑ «Necessary» in Art.XX: less than indispensable, more than any contribution; weighing and balancing factors, trade restrictiveness; practical alternatives (*Tyres*)
- ❑ Risk assessment requirements (SPS 5):
 - not «in vitro» but in real world; consider a country's capability (*EC-Hormones*); based on scientific evidence
- ❑ «legitimate regulatory concern» (TBT 2.1.) as a justification

Conclusions as to AB contribution to development of WTO law

- ❑ WTO agreements as an integrated whole – the multilateral trade law regime / WTO law
- ❑ AB as «interpretative guardian of the system»
- ❑ WTO law as an integral part of PIL
- ❑ WTO law as *lex specialis* prevails over Art.41 VC (*Peru-Additional Duties*)
- ❑ Balance between Members' regulatory powers and respect of trade obligations

- ❑ AB thereby contributes also to the development of PIL:
 - AB contribution recognized by ILC (Study on Fragmentation)
 - AB contribution recognized by authors / in academia
 - AB as a model for other courts (approach to treaty interpretation, evidence, burden of proof (ICJ, *Whaling in Antartica*, Australia-Japan, 2014)

- ❑ AB authority «extensive but fragile»?

The indirect role of AB jurisprudence in RTAs

- ❑ Notwithstanding broad RTAs their parties go on referring disputes to the WTO – limited use of RTAs dispute settlement
- ❑ Texts of RTAs refer to WTO Agreements, hence as interpreted by AB
- ❑ Adjudicators in RTAs DSS directed to follow AB case law
(EU-Korea FTA art. 14.16; CETA art. 14.10)

Reference to WTO Agreements as interpreted by AB reduces fragmentation

The indirect contribution of the AB to the development of Int'l Investment Law

- ❑ *Currently:*
 - Interpreting common concepts (Non-discrimination, MFN, NT, necessity, likeness) in BIT arbitration (ISDS) in accordance with AB case law: is it appropriate?

- ❑ *As to reforming ISDS:*
 - Introducing appellate review patterned after the WTO model
 - Importing art.XX-type of exceptions (TPP)
 - Providing for formal consultations prior to initiating ISDS (CETA 10.21)

Conclusions

Merci pour votre attention

et

Bonne continuation!