CIS Working Paper

Nr. 63, 2010

published by the Center for Comparative and International Studies (ETH Zurich and University of Zurich)

The World Trade Organization's Dispute Settlement Mechanism – Analysis and Problems

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The World Trade Organization's Dispute Settlement Mechanism – Analysis and Problems

Forthcoming in **Oxford Handbook of the WTO (edited by Amrita Narlikar, Martin Daunton, and Robert M. Stern)**

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1. Introduction[1]

When the WTO came into being in 1995, its dispute settlement mechanism (DSM) was widely heralded as the "jewel in the crown". Fifteen years later, the DSM has moved further towards centre stage. Public attention has increasingly turned to the ways in which the WTO has dealt with trade disputes. Similarly, the academic study of the litigation mechanisms of the WTO has grown substantially.

Three main factors have contributed to the prominence of the DSM. First, the designers of the WTO have created one of the most legalized inter-state dispute settlement systems worldwide, thus changing incentives structures of governments and increasing the number of cases being brought before the DSM (Weiler 2001). The prospect of winning cases where the losing party could not block the process and prevent a formal verdict (as was the case under the General Agreement on Tariffs and Trade (GATT)), has appealed to many WTO Members. Second, since progress in the Doha round has been very slow, some WTO Members have tried to affect these negotiations by resorting to litigation. Third, the potential increase in judicial law-making and the difficulties of overturning DSM rulings through formal WTO treaty amendments or interpretations have given rise to perceptions of imbalance between litigation and negotiation. Critics claim that the "Geneva judges" tend to overstep their mandates by engaging in law-making through the back door, providing faulty interpretations of WTO commitments, and embarking on "gap filling".

[1] We wish to thank Todd Allee, Chad Bown and Susan Kaplan for their valuable comments.

While the Uruguay Round (UR) negotiations sought to solve some of the problems with dispute resolution in the GATT system, there was continued emphasis on non-judicial mechanisms for avoiding trade conflicts. The WTO Dispute Settlement Understanding (DSU) stipulates that "recommendations and rulings (…) shall be aimed at achieving a satisfactory settlement" (Art. 3.4 DSU) and that "the aim of the dispute settlement mechanism is to secure a positive solution to the dispute" (Art. 3.7 DSU). Special emphasis was put on the desirability of trying to settle the issue bilaterally before using the litigation machinery.[2] Consequently, consultations remain the cornerstone of dispute settlement. The designers of the DSU also provided multiple tools ranging from consultation procedures and mediation to arbitration and third party adjudication. The various options described in the DSU can be regarded as separate venues or mechanisms, but may also be seen as sequential steps. The empirical record shows that some dispute settlement tools have rarely been used (e.g., good offices, conciliation, mediation (Art. 5), special procedures for least-developed countries (Art. 24), or arbitration as defined in Art. 25), whereas other dispute settlement tools dominate within the DSM (consultation at one end and third party adjudication at the other). Given the lack of data on consultations prior to the launching of a case, research has focused predominantly on the cases that have been brought and has analysed the evolving case law. That said, alternative methods may deserve closer attention.

This chapter provides an overview of issues and progress in research on WTO dispute settlement. It also points out the remaining gaps in the existing literature. For reasons of space, the focus is primarily on research by political scientists and legal scholars. We pay only passing attention to the burgeoning normative literature on the legal accuracy of WTO rulings and the legitimacy and accountability of WTO dispute settlement. The following (second) section describes how the DSM works, notes the key differences with the older GATT dispute mechanism, and discusses some trends in WTO dispute settlement. The third section focuses on how the nature and functioning of the DSM can be studied. In the fourth section, we look at some key findings from recent research and in the fifth section we identify some remaining research gaps. The final section links research on the DSM with ongoing debates on reforming WTO dispute settlement.

2. The WTO's Dispute Settlement System

2.1 How it works and how it differs from the GATT system

[2] Art. 3.7 DSU stipulates: "Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful" and "A solution mutually acceptable to the parties (…) is clearly to be preferred."

Notwithstanding its rudimentary legal basis (two articles in the GATT) and the right of defendants to block the process, GATT dispute settlement (1948–1995) has been described as surprisingly successful (Hudec 1990). Two key problems were, however, recurrent. First, recalcitrant defendants (especially the European Community (EC) and Japan) would block the establishment or adoption of panels. Second, determined complainants (especially the United States (US)), frustrated with lack of progress in obtaining desired outcomes through the GATT, would unilaterally decide that another party had breached its obligations and impose trade sanctions without the GATT's approval. It is this dual problem that gave rise to the DSU revolution (Pauwelyn 2005): in exchange for dropping the veto (a US request), WTO Members committed to stopping unilateral enforcement and to bringing all WTO claims exclusively to the WTO DSM (a demand by the EC and developing countries). As an insurance policy against "runaway panels" within such a veto-free system, panels could now also be appealed. In addition, to limit the consequences of this more legalized DSM and further reign in unilateral retaliation, the remedy for WTO violation was limited to prospective, state-to-state retaliation capped and multilaterally controlled through arbitration (see also van den Bossche 2005). Hence the three key novelties of the new system: the right to a panel (no more vetoes), strengthened multilateralism (no more unilateral sanctions), and the establishment of an Appellate Body (AB) (to soften the blow of automatic panel adoption).

The WTO DSM foresees up to four steps. First, consultations to attempt to settle the dispute amicably. Second, third-party adjudication by a three-member, *ad hoc* appointed panel, who decide whether a WTO Member's conduct violates the WTO treaty. For each case the WTO Secretariat proposes possible panellists who the disputing parties may reject. If there is no agreement on the composition of the panel after 20 days, however, either party may request that the Director General of the WTO appoints the panellists (which, so far, has occurred in 60% of cases). Third, the possibility of an appeal at the request of either party by a newly established Appellate Body (AB) composed of seven members, each of whom is appointed for a term of four years (renewable once) but whose examination is limited to legal questions. Fourth, implementation of adverse rulings, monitored by the Dispute Settlement Body (on which all WTO Members have a seat), with the possibility of reverting to a compliance panel and, as a last resort, bilateral retaliation by the winning party against the Member delaying implementation. A separate arbitration process ensures that this retaliation is equivalent or proportional to the original violation (no punitive sanctions). Crucially, moving from one step to the next in this new system requires a decision by the DSB (except

for appeals) but such a decision is taken by reverse consensus: only if all WTO Members vote against moving forward can the process be blocked. In other words, the new system is automatic as soon as one party wants to move forward.

2.2 Some trends[3]

Between 1995 and 22 September 2010 (i.e. within 15 years), 414 requests for consultations were filed. After 10 years of operation, more requests had already been filed with the WTO than with the GATT (around 300). Of these 414 requests for consultations filed with the WTO, (so far) only 125 led to a panel examination and adopted panel reports. Of these 125 panel reports, 78 have been appealed. In 85% of appeals, panel reports were reversed or modified. This, in turn, demonstrates a high level of appeals and a high success rate of appeals. Finally, only 19 arbitrations on retaliation have been entered into (and 17 retaliations have actually been authorized). Most recently, Brazil was authorized to restrict United States (US) imports and protection of US intellectual property rights following non-compliance by the US in the *US – Cotton* dispute. This means that retaliation is a formal tool for enforcing DSM rulings that WTO Members rarely resort to. The overwhelming majority of dispute rulings have been implemented without resorting to retaliation (Bown and Pauwelyn 2010).

Although on average 28 requests for consultations have been filed per year, the overall trend in the number of cases per year has been downward (with a peak of 50 requests in 1997 and a low of 11 requests in 2005). There are some indications that with the end of the financial crisis and the renewed pressure for protectionism brought on by the crisis, the number of requests may be rising (14 in 2009; 12 in the first 9 months of 2010 alone). Panel proceedings take on average 12 months. The AB must conclude its proceedings in 90 days (although on occasion it has taken longer).

Most requests continue to raise claims of violation of the original GATT (316) or focus on anti-dumping (85) or subsidy (80) matters. Only 29 requests have been filed under the new Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement and 20 requests under the equally new General Agreement on Trade in Services (GATS). Although most complaints have been filed by developed countries, participation by developing countries is important and increasing. Between 1995 and 2009, developing countries were complainants in more than 45% of cases and defendants in more than 43%. That said, few cases have been filed by or against low-income countries (respectively, 27 and 24 of the 414). The most active

[3] Data obtained from the WTO website and www.worldtradelaw.net (visited on 30 September 2010).

participants have been the US (22% of requests filed; 27% of requests filed against) and the EU (19% of requests filed; 21% of requests filed against). Although China joined the WTO only in 2001, it already ranks fourth in numbers of cases defended (20; the same amount has been filed against India, a WTO Member since 1995).

When it comes to who was selected to serve on WTO panels, of the 459 panel positions only 66 were held by women. Given the rule that nationals of either parties or third parties cannot serve on a panel (unless the parties so agree), only 12 panel positions have been taken by US nationals, but 41 by New Zealand nationals, 38 by Swiss nationals, and another 38 by Australian nationals. In almost 90% of adopted dispute reports at least one violation of legal obligations under the WTO was found.

3. Conceptual and Theoretical Issues

3.1 Why dispute settlement?

Why are dispute settlement provisions in international trade agreements needed? International relations (IR) scholars started to look at this question in the 1980s. Keohane (1984), for example, suggested that mistrust and lack of transparency are major obstacles to international cooperation. At the heart of the analysis in liberal institutional IR theory has been the game-theoretic model of the prisoner's dilemma (PD) which serves as a starting point for illustrating the difficulties of cooperation. An important way to address incentives for free-riding or reneging on commitments then is to provide states with a functioning system of settling disputes that enhances trust and information (e.g., an enforcement mechanism).[4] Even if, as in the WTO case, dispute settlement is not associated with centralized enforcement, it establishes a system of reciprocity and creates a normative reference system that imposes significant constraints on the unilateral exercise of power ("right over might"). From a liberal institutionalist viewpoint, the WTO thus facilitates global trade liberalization by deterring non-compliance with WTO rules, imposing multilateral legal pressure on states reneging on their commitments, and by disciplining decentralized enforcement if non-compliance is established through the multilateral judicial process (e.g. by limiting retaliation to a level proportional to a formally established violation of legal rules).

[4] The economic trade theory literature focuses largely on decentralized sanctioning to overcome the problem of the PD. Institutions in economic models are usually agreements. Different strands of economic theories (e.g. the terms-of-trade school or the political externalities school) have not addressed variation in forms of dispute settlement and in particular the existence of strong third party delegation for enforcement (Keck and Schropp 2007).

Realist theories of IR, for their part, tend to downplay the importance of dispute settlement in multilateral treaties as long as obligations for states remain weak (e.g., Downs, Rocke and Barsoom 1996). Within the realist tradition, there is also a widely held view that only hegemonic power politics can impose some discipline on the international community. By implication, realists assume that compliance with international commitments is strong only when such commitments are weak and basically reflect what states would do anyway, or when a hegemonic power acts as an enforcer (e.g., as the US presumably did in the GATT system). From this perspective, key features of international institutions, such as dispute settlement, are simply part of the general international landscape in which power politics plays out, but do not have important effects of their own. Hence they are considered epiphenomenal.

The WTO dispute settlement system creates a challenge for both realists and liberal institutionalists. From a realist perspective, the move towards a highly legalized system (e.g., automatic adoption, the creation of an appeal institution) and substantial concessions accepted by powerful nations calls for an explanation. From a liberal institutionalist perspective, the creation of a strong DSM remains a puzzle given the positions of GATT contracting parties at the onset of the UR.[5]

3.2 Conceptualizing the DSU

Beyond general debates in IR research, many approaches embedded in the broader literature on law and economics as well as on delegation have inspired and advanced the study of WTO dispute settlement.

The law and economics view of dispute settlement adds several new elements to the liberal institutionalist perspective in IR theory, the most important being the notion of incomplete contracts (e.g. Horn, Maggi and Staiger 2006).[6] When comparing WTO agreements, however, there are important differences in terms of their "incompleteness". In some issue areas negotiators have clearly defined what contractors are allowed to do (in particular when expected or unexpected "events" occur). In other areas, obvious gaps in the

[5] The main arguments put forward to explain the overall deal are US-centric; first, a transatlantic plot inducing others to follow (Steinberg 2002), second, a successful lock-in strategy applied by the US Trade Representative (USTR) in order to bind the hands of US Congress (Brewster 2006, Thompson 2007). Yet, negotiation dynamics over time involving a number of actors with salient positions on dispute settlement (e.g., India, Japan and Canada) have been largely overlooked so far.

[6] The IR literature has focused more on how to explain opt-outs and assumes that incomplete contracts are endogenous decisions in the first place (Rosendorff and Milner 2001).

original contracts exist. Recourse to dispute settlement instruments is likely when one contracting party questions the fulfilment of contractual obligations by another (breach of contract). This leads to a delegation of interpretative power to adjudicating bodies to assess whether an alleged ex post non-performance (e.g. a national policy measure) is a legal breach or violation of the contract (Schropp 2010). What drives overall demand for dispute settlement is not so much the need to enforce unambiguous obligations under a certain WTO agreement (sanctioning of known defectors), but the existence of contractual silence on issues (clear gaps) or ambiguous wording with the effect of creating different expectations as to the interpretation of the contract (strategic ambiguity) (Maggi and Staiger 2008). Seen in such a light, the dispute settlement system addresses the conflict and might (depending on the standpoint) fill contractual gaps. From the perspective of the adjudicator, the question arises of what type of interpretation should assist in addressing incomplete contracts (see Shaffer and Trachtman, this volume).

In IR research, a fruitful debate among scholars relying on delegation theories has emerged. These types of middle range theories (e.g., principal-agent theory) assist in conceptualizing the functions and the politics of dispute settlement. Within delegation theories, views differ as to the most accurate conceptualization of the two main bodies of WTO dispute settlement (panels and the AB). It is largely undisputed from a functional perspective following liberal institutionalism that the main function of the DSM is to make commitments more credible. Yet, alleged variation in delegation (e.g., mandate, discretion) from WTO Members (principals) to panels and AB (agents) leads to different expectations as to the functioning of the DSM. While there is general agreement that panel members are less autonomous and work as arbitration agents, the members of the AB have more discretion individually and as a group. How much autonomy the AB possesses and how it reads principals' signals, however, is the subject of continued debate among scholars and calls for further empirical analysis. For some scholars, the AB is a trustee beyond control of WTO Members (see Alter 2008, Grant and Keohane 2005) – this view is based on the argument that re-contracting or sanctioning is not possible given high thresholds.[7] For other scholars, the AB is a group of agents with substantial autonomy, whereas principals influence agents through ex ante control tools, such as nomination and selection (Elsig and Pollack 2010). In sum, delegation theories assist in better grasping the conditions under which principals successfully use control tools to affect the behaviour of those mandated to adjudicate disputes.

[7] In order not to accept a panel or AB ruling, the Members would have to reject it by consensus or indirectly they could attempt to engage in an "authoritative interpretation" for which a ¾ majority is necessary.

Finally, legal scholars have analysed the DSM not only as a commitment and enforcement device that makes defection more costly, but also as a stabilizing factor that promotes peaceful relations between countries by identifying breaches in an impartial manner and putting a cap on retaliation (Schwartz and Sykes 2002), by offering legal clarification and predictability to private traders (Jackson 1997), and by fulfilling a domestic constitutional function of protection against government abuse (Petersmann 1986). Legal scholars have generally applauded the move from a power or diplomatic approach to a legal rules-based judicial approach. However, some of them have highlighted that legalization is not a unidirectional process away from politics, but rather requires a careful balance between more law (reduced exit options) and more politics (increased voice) (Pauwelyn 2005).

4. Progress in Research

Beyond broader conceptual issues that have guided studies on the DSU, a number of specific research activities have emerged over time. In this section we discuss what we regard as the most important areas of research on WTO dispute settlement from a political science and international law perspective.

Does increased legalization matter?

An important question in research on WTO dispute settlement has been whether legalization or judicialization matters (see Stone Sweet 1999, Goldstein and Martin 2000, Zangl 2008).[8] Research on this issue has been embedded in a wider quest for an understanding of how international law works. To the extent that legalization can be regarded as an independent factor, research has focused on various effects thereof and has illuminated several causal mechanisms. Goldstein and Martin (2000) have theorized about the effect of increased legalization on the incentives of domestic groups to mobilize. In their view, greater legalization goes along with more transparency, which changes the balance of the domestic political economy in favour of import-competing groups. This change, in their view, leads to less willingness to liberalize further.[9] Along similar lines, Pauwelyn (2005) has argued that a stronger DSM (reduced options to exit from treaty commitments) requires a corresponding need for more political participation and contestation (more voice and insistence on consensus in overall WTO affairs), making further trade liberalization more difficult (e.g. because of the

[8] On legalization, see Abbott et al. (2000); on judicialization, see Stone Sweet (1999).
[9] For a similar argument, see Stasavage (2004).

consensus requirement) and increased transparency and input into the DSM inevitable (to allow for this increased demand in participation and contestation). While often referred to as an argument as to why the Doha Round is deadlocked (see Elsig and Dupont in this volume), the evidence that "legalization has gone too far" is still limited (see also Rosendorff 2005, Poletti 2011). Instead, a number of scholars have conjectured about indirect causal effects of existing rules enforced through a strong dispute settlement system. For instance, Allee (2005) argues that the existing DSM (the shadow of harder law) can serve as buffer against protectionist policies. Focusing on US trade remedy measures demanded by import-competing industries, he finds that the existence of the WTO DSM deters US authorities from accepting demands for protectionist measures where the merits of a legal case under the WTO are weak. Zangl (2008) focuses on implementation of actual rulings. He provides evidence, relying on pair-wise GATT and WTO cases across time, that while it is still far from being a system of rule of law, legalization has contributed to a better implementation record.[10]

Dispute initiation

Most quantitative (i.e., large-N statistical) research has focused on explaining the initiation of dispute proceedings.[11] Three types of determinants of dispute initiation have received particular attention: economic factors, legal capacity, and power.[12] Several studies have found substantial evidence that countries of greater economic size and with stronger trade flows are more likely to become involved in trade disputes, both as complainants and defendants (Horn et al. 1999, Sattler and Bernauer 2010). In addition, for smaller states, the removal of trade barriers via WTO adjudication needs to lead to sufficient economic benefits; otherwise launching a case is too costly (Guzman and Simmons 2005). This pre-litigation assessment hinges on an estimation of the chances of winning the case and the likelihood of concessions by the defendant.[13]

[10] Zangl relies on a least-likely case design. He focuses on the US (and EU). Put differently, if judicialization matters in these cases, it is assumed to affect oucomes for less powerful states.

[11] The large-N literature has struggled for some time with the "iceberg" issue. The difficulties in clearly defining the potenital universe of cases (as actual cases are only the visible top of the iceberg) has led to concerns of selection bias. More recent studies have attempted to remedy this by focusing on pre-litigation conflict data (Young 2005 on sanitary and phytosanitary measures; Allee 2008 on trade remedies), or estimating the likelihood of cases that potentially qualify for litigation (Horn et al. 1999, Sattler and Bernauer 2010).

[12] Other arguments exist in the literature, e.g. that cases are launched in reaction to cases suffered, or that parties learn from experience and therefore the likelihood of launching a case is affected by past involvement (Davis and Blodgett Bermeo 2009). There has so far been less evidence to support these claims.

[13] The second point is linked to the possibility of using retaliatory measures in cases of non-compliance (Bown 2004a, 2005; Bown and Pauwelyn 2010).

Other research has emphasized the role of legal capacity in the decision to launch a case. The underlying argument assumes an entry barrier due to high litigation costs as disputing countries need to rely on specialized law firms (assisting litigants throughout the entire process). However, legal capacity is also required before and after litigation (see Bown 2009). Kim (2008), for example, argues that legal capacity is likely to play an even bigger role in the WTO DSM than in the corresponding GATT system. The more legalized WTO DSM, she argues, has created the unanticipated effect that litigation costs are a substantial barrier, privileging developed countries over others. Studies examining the implications of variation in legal capacity have worked with a variety of proxies for this concept. Most researchers have used indirect measures, such as income (gross domestic product (GDP) per capita) or domestic bureaucratic quality (e.g. Guzman and Simmons 2005). As a reaction to criticism concerning the validity of these proxies, a number of contributions have relied on more direct measures, such as the size of countries' WTO delegations in Geneva or actual resources of national missions to the WTO (Horn et al. 1999, Busch et al. 2009, Sattler and Bernauer 2010). The results of this research, thus far, do not offer any robust evidence for a legal capacity bias in WTO dispute initiation (Sattler and Bernauer 2010).

Yet other research has investigated the effects of power and power differentials. In these contributions, the underlying argument for non-entry into litigation has been that small states "abstain from launching disputes due to fear that they either will not be able to enforce rulings in their favor, or will be subjected to some form of revenge from more powerful states" (Francois et al. 2008, 4). Most studies find that power, measured in terms of economic size of countries, existing trade relations or dependence on bilateral aid flows, significantly impacts on the decision to initiate a WTO dispute (e.g., Bown 2005a; Zejan and Bartels 2006). Sattler and Bernauer (2010), for instance, show that there is a substantial power preponderance effect: pairs of countries that differ more in terms of power are less likely to litigate in the WTO. Whether this means that the big powers are able to coerce smaller powers into concessions outside the WTO and small powers do not dare to formally challenge the big powers in the WTO remains to be examined more systematically. Elsig and Stucki (2011) use a qualitative case-study approach to illuminate how power works in highly asymmetrical cases. Their contribution calls for the development of a typological theory as the nature of obstacles to litigation entry vary widely across types of countries (e.g., least developing countries, emerging economies, small industrialized countries, and countries that offer substantial market access).

Dispute escalation

Most quantitative work on WTO dispute settlement conceptualizes the dependent variable in binary terms, measuring whether a pair of countries (dyad) experiences a WTO trade dispute in a given year, or in terms of how many such disputes are observed in a given year or since the WTO DSM was set up. Similarly, research on dispute escalation has also defined the phenomenon to be examined in binary terms (whether a dispute is settled at the consultation stage or escalates to the panel stage), or in terms of three stages (consultation, panel/AB, compliance dispute).

On the explanatory side, existing studies have focused primarily on the implications of the characteristics of trade issues. Guzman and Simmons (2002) code whether the nature of the dispute is "continuous" or "lumpy" (their coding of dispute escalation is also binary). They argue that disputes of the second all-or-nothing type are more likely to escalate to the panel stage (escalation is coded as a two-step process) because it is more difficult to arrange gradual concessions and side-payments in such cases. This argument implies that, for example, disputes about tariff levels are easier to settle than disputes about health and safety regulations. The authors find some empirical support for this argument among democratic countries.

Bernauer and Sattler (2006), defining WTO disputes as a three-step process, examine whether WTO trade disputes over environment, health and safety (EHS) issues are more likely to escalate than other types of disputes. They argue that such disputes should be more likely to escalate because gradual concessions by the defendant to the complainant are more difficult in such cases, and because side-payments to domestic interest groups in the defendant country, which are often used by defendant countries to buy political support for concessions, are more difficult to arrange. They test this argument on 506 WTO conflict dyads in 1995–2003. In contrast to conventional wisdom, they find that EHS disputes are not more likely to escalate from the consultation to the panel stage. However, once they have escalated to that stage, they are more likely than other types of disputes to escalate into compliance disputes.

In a recent paper, Sattler et al. (2010) develop a more generic typology of dispute types and derive the implications of dispute types for dispute escalation. This typology connects to the general perspectives on WTO dispute settlement discussed above. One perspective views the WTO's DSM as an enforcement device (see realist and liberal institutionalist perspectives above), the other argues that the DSM is primarily a complexity-

reducing and rule-clarification device (see law and economics perspective above). Sattler et al. (2010) set up a strategic model that reflects the essential steps in WTO dispute settlement and then estimate the empirical model using statistical backward induction. The results offer more support for the enforcement than the rule clarification argument. More politicized disputes are more prone to escalation throughout the first two stages of dispute settlement (up to the Panel or AB). The same, however, applies to more complex disputes, for which we expected escalation primarily up to the panel ruling stage, but not beyond. The main implication of these results is that the second perspective, which views dispute settlement primarily as a rule clarification and compliance management device, is probably too optimistic, and that the WTO's ability to settle disputes is significantly circumscribed both by domestic economic interests and by the types of countries involved in these disputes.

Third parties in litigation

Some research has also looked at the conditions under which other WTO Members influence dispute settlement. In terms of participation in DSM proceedings, the WTO creates the possibility for interested Members to invoke their right as a third party. Third parties receive other parties' first written submissions and are invited during panel or AB hearings to express their views. Third parties have, however, no right to appeal a panel ruling, nor can they retaliate against a defendant who was found guilty (only the complainant(s) can suspend trade concessions).

WTO Members use their third party rights for different reasons (e.g., signalling interests, supporting the complainant or the defendant). Some large economies have become third parties in almost every case (e.g. China, the US and the EU). Others have selectively chosen this status. Third party rights can easily be invoked and offer WTO Members partial participation during the litigation process. Bown (2005) argues that, in statistical terms, there is no significant evidence that the decision to participate as third party differs from complainant status. Elsig and Stucki (2011) find, however, that the weakest countries in the system are more likely to become third parties, rather than complainants. Third party status allows for a form of strategic signalling of some legitimate interests to the involved parties and amounts to partial free-riding. Busch and Reinhardt (2006) find evidence that more participation of third parties is associated with a lower probability of early settlement. They argue that audience costs lower the prospects for success in pre-trial negotiations. By

extension they argue that the higher the number of third parties the greater the likelihood that the dispute will end in a ruling.

Implementation

Research on the implementation of WTO dispute verdicts is, arguably, least advanced. This is not surprising, however, because measuring implementation of WTO rulings is far from easy. Data coding of dispute initiation and escalation is able to follow the procedural steps of the WTO DSM, from requests for consultations up to the level of disputes over compliance with WTO verdicts. Using such data to measure implementation (or compliance with) WTO DSM verdicts is useful as a rough approximation. With this approach, the empirical findings in the existing literature are equivalent to what is observed in studies that conceptualize trade dispute escalation in terms of three stages. As noted above, for instance, Bernauer and Sattler (2006) find that EHS disputes are particularly likely to run into implementation problems after they have made it through the consultation and panel/AB stages. Sattler et al. (2010) also find that disputes over complex trade issues and disputes over issues involving politically important domestic sectors are more likely to run into implementation problems.

Based on data for 181 disputes between 1995 and July 2002, and using a more direct coding of implementation, Davey (2007) observes a successful implementation rate of adopted panel and AB reports of 83%. He finds prompt implementation especially in safeguards and TRIPS cases, but more problems in disputes over trade remedies, sanitary and phytosanitary (SPS) measures, agriculture, and subsidies. Implementation that requires a legislative act also appears to be more difficult than implementation in cases where compliance can be achieved by executive decree.

Outside-in and inside-out effects

A new literature on overlapping jurisdictions and the politics of fuzzy borders has emerged in recent years (see Pauwelyn 2003, Raustiala and Victor 2004, Alter and Meunier 2007, Dupont and Elsig 2010, Shaffer and Pollack 2010). In the WTO context, such research has focused on the interaction between the multilateral trading regime and preferential trade agreements (PTAs) as well as the interplay between trade law and public international law. One key question has been how the relationship between GATT/WTO law and public international law has transformed the formerly self-contained GATT-regime into a WTO system that is more

firmly embedded in the broader landscape of international law. More so than the GATT, the WTO DSM is placed within the context of public international law (Art. 3.2 DSU). Whereas GATT dispute settlement panels limited themselves to the four corners of the GATT agreement, WTO panels and the AB increasingly refer to other rules of international law. Such other rules can be of a procedural nature (burden of proof, due process, good faith) or substantive content (rules set out in environmental treaties, bilateral agreements, customary international law and other non-WTO documents). Normative debates have focused on how far such references to "outside" international law should go. Some stakeholders in this debate have taken the position that outside rules can only be referred to in the interpretation of ambiguous WTO provisions, and, in the end, unambiguous WTO rules always prevail (Trachtman 1999). Others have expressed the view that panels and the AB can apply outside norms more broadly and that, on occasion, WTO rules must give way to provisions in other treaties (Pauwelyn 2001).

Forum-shopping

In view of the increased number of PTAs in recent years and the existence of multiple fora for dispute settlement, research has also focused on the interaction between courts and on the strategic choice of fora. Busch (2007) looked at forum shopping and argues that this practice concerns not only the likelihood of success of the complainant, but also where to set a precedent that is useful for case-law development. Drezner (2006) argues that more powerful states are better able to cope with overlapping jurisdictions, and that increased legalization empowers stronger states that were meant to be controlled by legalization in the first place. Pauwelyn (2009) describes how the WTO and regional DSM mechanisms increasingly overlap and offers rules on how to address sequencing and conflict arguing that the WTO cannot remain indifferent to forum exclusion clauses in PTAs.

5. Research Gaps

The preceding sections show that existing research offers a wealth of insights into the causes and implications of a wide range of phenomena within the realm of WTO dispute settlement. In this penultimate section we touch upon some of the research gaps that remain, some refer to specific measurement issues, others are more conceptual in nature.

The "non-cases". When studying the disputes that have been filed at the WTO, it remains difficult to set the benchmark in terms of how many cases should have been filed. Why does a country violate WTO law? What makes other countries file a case or not file a case? Specifically, of all WTO cases filed, why do only 3% concern the TRIPS agreement and 2% GATS, even though both agreements (and in particular TRIPS) cover a broad range of regulatory policies (see Pauwelyn 2010)?[14] Similarly, in view of the hundreds of bilateral or regional PTAs involving (in varying compositions) almost every one of the 153 WTO Members, why, after 15 years, has there been only one single AB ruling that focuses on whether a PTA meets GATT Article XXIV (see Mavroidis 2006)?

Who won the case? While some important advances in research have been made by counting (and defining outcomes of) all individual claims (Hoekman et al. 2008),[15] we lack a convincing set of measures that define overall "success" in the WTO litigation process. In particular, the increasing tendency by disputing parties to provide panels with a "shopping list" of claims in the hope that some of these claims (and the corresponding articles) will be interpreted in their favour creates difficulties in analysing the success of disputing parties.

Interaction between Panels and AB. In the context of the WTO, the two litigation stages display some clear differences. While panels address issues of facts, the review by the AB is (meant to be) restricted to legal questions applied to those facts. The ways panels deal with cases therefore create certain path-dependent effects as to the development of AB case-law. Put differently, this sequential game (without the possibility for the AB to send the dispute back to the panel), impacts on the direction of legal interpretation. In addition, panellists are cognizant that their rulings can be overturned and AB members presume they are not selected simply to rubber-stamp panel decisions. Anecdotal evidence suggests that this creates strategic interaction between the judicial bodies that has not been studied systematically.

How to measure implementation? Another measurement problem concerns implementation. As noted above, the existing literature views escalation into compliance disputes as a sign of implementation problems. However, this approach creates the potential for false positives or false negatives. In a number of disputes the parties notify the WTO that the dispute has been resolved. It is possible, however, that there has been some "horse-trading" outside the WTO

[14] On trade remedies, see Bown (2005b).
[15] They do not weigh claims, but treat them all equally notwithstanding whether it is a procedural or substantial matter (there is no hierarchy).

process; if so, this could implicate a false negative, in the sense that we do not record an implementation problem when there is in fact such a problem. False positives (where disputing countries formally escalate the dispute further, even though the defendant has made the requested trade concessions) are also possible, though arguably less likely. In any event, reliable measurement of implementation and thus of successful dispute resolution will ultimately require an assessment of whether the defendant has implemented what the applicable DSM ruling has asked for.

Do WTO dispute rulings foster trade? One of the criteria for determining how well the DSM works could, arguably, be whether dispute rulings have a trade-increasing effect. Assuming that the DSM helps in removing trade restrictions we should assume that judicial verdicts by the WTO increase trade flows, particularly between those countries involved in a dispute. There has been very litle research on this issue (Bown 2004a, 2004b). In a recent paper, Bechtel and Sattler (2010) examine the effect of WTO rulings on sectoral trade flows. They find that WTO verdicts have a delayed positive effect on sectoral exports of those countries that initiated a dispute. Third parties tend to benefit as well.

The role of panellists/the role of the judge. How are panellists or members of the AB selected and how do they behave? What does this tell us about how the court system addresses incomplete contracts? There has been very little research on internal decision-making in the various WTO judicial bodies (Alvarez-Jimenez 2009), notably on whether the type of deliberation, discourse and the preferences of judicial appointees matter. The main obstacle is lack of data. From the insights of past AB members (Ehlermann 2002, 2003; Bacchus 2004) we know that the first seven persons appointed to the AB built some buffers against member governments' attempts to influence their work (e.g. working towards collegiality in decision-making to pre-empt division). But generally, scholars have to second-guess causal processes based on observable outcomes. For example, for the heated amicus curiae debate (Mavroidis 2001), we can observe over time how the AB steered a course between maintaining its original position and allowing for some flexibility.[16] Some research on these issues is beginning to emerge. Busch and Pelc (2009), for example, show that the experience of the chair of the panel has a significant effect on whether panel decisions are appealed. They also investigate the conditions under which the AB uses specific legal tools to abstain from ruling

[16] "Amicus curiae briefs" are submissions by actors that are not a party to the case. There was a debate in the WTO on whether panels or the AB can or should accept such briefs.

(e.g. relying on judicial economy) (Busch and Pelc 2010).[17] Other work attempts to trace the ways in which appointment procedures in the WTO potentially affect the preferences of court members and subsequently the rulings (Elsig and Pollack 2010). Again, the major challenge pertains to missing data on the behaviour of individual panellists or AB members; only dissenting views offer partial indications as to important disagreements amongst adjudicators, blocking ways to reach a compromise and affecting outcomes (Flett 2010).

What is the influence of private actors? The dispute settlement system is intergovernmental and private actors have no standing before the "court". However, there is plenty of anecdotal evidence that the influence and participation of interest groups is important. The lack of more systematic empirical work on the role of private actors, in particular firms, and their participation throughout the process of settling disputes in the WTO is puzzling (Bown 2009). There is very little research beyond a small number of case studies that look at the firm level and study how companies and associations lobby and gain access to decision-makers. Few contributions stand out. For instance, Shaffer (2003, 2008) focused on the ways private and public authorities work in a type of public–private partnership approach in WTO litigation, studying the US, the EU, and Brazil. In addition, we know little about the way firms affect implementation. In sum, more research is needed on the conditions under which firms participate; how the institutional set-up affects interest aggregation (through access points for business groups to governments), what determines firms' relative influence on decisions to file, and how firms react to demands by the WTO system (and through domestic public authorities) to change established practice.

The role of information. We lack theoretical and empirical work on how information affects dispute settlement; this is surprising given the key role information plays in politics. Systematic studies could yield promising new insights and help us to accumulate knowledge on the functioning of courts. This debate is only in its initial stages (Elsig 2010). Information has different facets, such as how courts deal with submissions by interest groups (amicus curiae briefs), how transparent litigation procedures are and to what degree information provided by the parties is shared, or under what conditions dissenting views are articulated in panel or AB reports.[18] In relation to the AB, Steinberg (2004) conjectures that the AB pushed

[17] "Judicial economy" refers to a court's refusal to decide on specific claims raised by any of parties. This is mostly done on the grounds that deciding on a particular claim is not necessary to rule on a case.

[18] In a move towards more transparency, hearings have been made public to a wider audience through an ad hoc decision by the parties to a dispute (Ehring 2008).

to open up the proceedings to other players and to improve their access (in particular to provide easier access for developing countries, invite expert testimony, and allow private lawyers to represent the litigating party), also as a potential way to gather more information.[19] Yet, the proper role of information poses some normative questions, such as protecting courts from too much public scrutiny and politicization and addressing a potential trade-off between transparency and performance (Stasavage 2004).

The negotiation–litigation nexus. Our understanding is also wanting as to the dynamic interaction between negotiations and dispute settlement. Most research overlooks subtle spill-over effects between these functions of the WTO. Dispute settlement not only takes into account a growing body of existing case law,[20] it also strategically interacts with current or future negotiations. Some limited judicial law-making may well impact on the scope and direction of negotiations allowing for particular focal points to emerge. Yet, the causal story is still not adequately theorized and we have not yet seen much empirical work. Some clues have been offered by Fearon (1998) about how the strength of the dispute settlement system (the existence of binding laws with long-term distributional effects) may impact negatively on the search for common zones of agreement.

Cultural or regional aspects? A brief look at the empirical evidence on who launches cases also suggests important variance across regions. This could be explained by differing attitudes as to "how to settle disputes" rooted in domestic traditions of resolving disputes or variance in foreign policy traditions. Some states are more inclined to use legal means of dispute settlement while others prefer conciliatory approaches (Porges 2003). Insight from anthropology, psychology or classical foreign policy analysis might inspire new research on the cultural barriers to litigation. In addition, we might ask whether we will observe more convergence over time (also linked to outside-in effects through participation in international organizations, allowing for certain types of diffusion processes to occur).

6. Conclusions

[19] The decision to allow private lawyers to represent governments, while changing established GATT practice, also helped to empower developing countries (Goldstein and Steinberg 2008, 268-9).
[20] On the role of precedence, see for example Bhala (2001).

This chapter has addressed past and present scholarly work on the WTO DSM including a mapping of gaps that might be of interest for future research in this area. The literature is already quite developed and research is venturing into areas that are empirically and conceptually more challenging. Yet, much of the research also has important stories to tell in terms of policy implications, and research into the politics and law of WTO dispute settlement will also be beneficial for current reform debates. Research on least developed countries shows that the legal and financial constraints are not pivotal in explaining the reluctance to launch dipsutes absence; therefore a fund for the poorest countries is likely to have little effect on actual usage of the system (Elsig and Stucki 2011). Busch and Pelc (2009) address the proposal by the European Union to create a permanent body of panellists and discuss the implications of such a change. Another example is a proposal by Mexico for an auctioning system for allocating the right to sanction. This idea was largely inspired by research on tradable remedies (Bagwell et al. 2006).

And the question of reform will not go away. Members of the WTO are constantly discussing and negotiating potential changes to the exisiting dispute settlement mechanism. A review of the functioning of the DSU was part of the final deal during the UR negotiations and was started in 1998 (but continues to this day without any amendment of the DSU). There is a general view that the system has worked well, and proposals are largely of a procedural nature. Yet, it quickly became clear that finding consensus among the Membership to reform the DSU would be very tricky (in the absence of any trade-offs across negotiation areas). The most recent attempt was launched with – but separate from – the Doha round negotiations. Given the consensus-rule and substantial support for the current system, it is unlikely that WTO Members will agree on any grand reform. Very active in this debate has been the US, which advocated reform in the direction of constraining the overall legal nature (e.g. limiting gap-filling, defining how panels and the AB should use interpretative methods, and partial acceptance of recommendations) and giving more support to AB members (as a reaction to criticism of too much influence by the AB Secretariat) by allowing for individual legal assistance (e.g. clerks). In recent years, we have witnessed some potential agreement on procedural issues (e.g., sequencing, remand option) and on strengthening third party rights and developing countries' participation. Yet, other issues remain stalled (e.g. increased control by Members over the process, monetary or collective retaliation, list of permanent panellists).[21] A particularly thorny issue is how to deal with hit-and-run practices where a Member enacts an inconsistent measure, goes through the entire DSU proceeding and then

[21] See for instance Zimmermann (2006).

removes the measure, without having to pay any compensation or suffer any retaliation given that the WTO remedy of last resort is prospective retaliation only. In this respect, a balance needs to be found between increasing the cost of violation and leaving the DSU enough flexibility to allow it to continue to muster high levels of support and implementation.

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