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GLAWCAL COMMENT #118

HOW HAS THE APPELLATE BODY OF THE WTO CHANGED SINCE ITS CREATION?

Based on

Gregory Messenger: "Reforming the Law and Institutions of the WTO: The Dangers of Unexpected Consequenc-es"

gLAWcal
Global Law Initiatives for Sustainable Development

A gLAWcal comment on Gregory Messenger's *"Reforming the Law and Institutions of the WTO: The Dangers of Unexpected Consequences"* in Antonio Segura Serrano (Ed.) The Reform of International Economic Governance

From a general, theoretical viewpoint, Professor Messenger's essay seeks to identify the risks involved in expecting reform to produce results coincident with Members' interests or objectives, drawing attention to the dangers of unexpected consequences for Members who may find that their reforms do not lead to the results they originally intended. As a case study, the creation of the new dispute settlement system at the WTO through the conclusion of the Dispute Settlement Understanding (DSU) will be taken into consideration, and more specifically, the role that the Appellate Body has developed for itself. Indeed, despite the expectations of the negotiating parties and the 'constitutional' checks put in place, the Appellate Body has positioned itself at the heart of WTO law, drawing strong criticism for judicial activism. The objective here is not to criticize the Appellate Body's institutional development or interpretative method, but rather to identify the disjoint between expectations and outcomes. Historically speaking, the negotiating indicates that the GATT Contracting Parties expected dispute settlement under the WTO to be an entirely different creature to that found in other areas of international law. Unlike disputes at the International Court of Justice or the European Court of Human rights, trade disputes were to be resolved in a sui generis manner. Indeed, the role of the dispute settlement system was to provide negotiated settlements, conciliation, and where the final resolution 'should not be of a judicial nature'. Alike, during the Uruguay Round, it would seem that the negotiating parties did not expect to create an institution, which is now lauded for its formal and highly legalized nature. Given the complex and wide-ranging negotiations taking place with numerous groups, it may well be that the parties did not see the wider consequences of what was agreed in each specific area. In the documents, there is no mention of a court, no tribunal, and no judges. The number of members is lower than judges at other international courts, and they are part-time. Besides, neither panels nor the Appellate Body issue judgments but rather reports, which must be adapted to have legal effect. What is worth to be emphasized is that, contrary to the expectations of negotiators, the Appellate Body has played the role of an international judicial body, a 'World Trade Court'. This development, by no means inevitable, has had a profound influence on the way that the Appellate Body examines cases before it. The Appellate Body has subsequently sought to maintain its legitimacy, acting as a 'strategic quasi-judicial actor' through decisions of particular 'constitutional' importance (see, e.g., US – Gasoline and US – Shrimp-Turtle amongst others of particular importance). The key point to note here is how the legal instruments constituting the Appellate Body as an institution influence its identity, though not necessarily as expected: the individual actions and priorities of the actors involved have played an important part in its development. Overall, a lesson can be drawn here. This analysis indicates that for reform to produce desired outcomes, a greater appreciation of the complexities and multifaceted nature of law is required. We cannot expect institutions to behave as instructed at a fixed point in time, nor the law to be applied in the way in which it has been in other legal systems.

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