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Questions, Answers and Debate

Mr dr F. Baetens

Addressed to Dr M.D. Prévost

You refer to the 80% compliance rate of the WTO. Last week I had a discussion with Professor Petros C. Mavroidis of Columbia University, whom you probably know, and he claimed that there actually is no evidence of this: real reports are not sufficiently clear or have not been submitted and there are some examples of very notorious compliance and non-compliance, but on the whole we actually do not know where the 80 to 90% compliance comes from; so I was wondering, on what do you base this compliance figure?

Dr. Prévost

It is indeed difficult to make a precise calculation of the rate of compliance with the outcome of WTO dispute settlement. In fact, in our collaboration on the new text book, *Essentials of WTO Law*, we have struggled with this. The Secretariat of the World Trade Organization ("WTO") also struggles with it, and does not publish a precise figure on the rate of compliance, because there is disagreement among Members as to what constitutes 'compliance'. For example, there are cases where a 'roadmap' of several steps towards full compliance has been agreed by the disputing parties and notified to the Dispute Settlement Body, but the steps have not yet been formally completed - is there 'compliance' in such cases? Is there 'compliance' when all but one of the complainants in a particular dispute have reached a mutually agreed solution to the dispute with the respondent? What does one do with cases where there seem to be compliance problems but the complainants have not pursued the matter further? Depending on the assumptions made, the figure on the rate of compliance may vary. Using the Secretariat's data on the outcome of disputes in which the Dispute Settlement Body adopted rulings and recommendations requiring the respondent to bring its measures into conformity with its WTO obligations, and excluding cases of uncertain compliance such as the ones I just mentioned, compliance occurs in almost 85% of disputes.

Mr dr F. Baetens

Addressed to Dr M.D. Prévost

Are these data publicly available?

Dr. Prévost

The WTO Secretariat cannot publish an official figure on the compliance rate, because Members disagree on what constitutes 'compliance'. Calculations can be made, however, on

the basis of the official annual overview of the 'State of Play' of WTO disputes, which is published, and the documents referred to therein.

Mr dr Baetens

I said 'a limited period of time', meaning, for example, 18 months or two years. Six months would indeed be too short.

Prof.dr M.M.T.A.Brus

Addressed to Mr dr F. Baetens and Prof.mr dr M.C.E.J. Bronckers

1. What is the problem with protection of investment between Western Europe and the United States of America/Canada through domestic law? Are there many disputes that are not adequately solved?
2. Are the domestic standards in the United States of America/Canada/Europe insufficient to provide protection to domestic and foreign investors? Is it necessary to give the international standards direct effect in domestic courts? Why not rely on the domestic standards?
3. Why is state-state dispute settlement seen as successful in trade law and is state-state dispute settlement rejected in investment?

Mr dr Baetens

Why do we need Investor-State dispute settlement (“ISDS”)? Firstly, most of the time most domestic courts do a good job, so ISDS, like the ECtHR, provides a safety net for the rare occasions where things do go egregiously wrong, rather than a form for general recourse. As a safety net it is useful, however, because first of all, as Prof. Bronckers said, ten out of the 28 EU Member States, to a varying degree, have problems with respect to independence and impartiality of the judiciary. Several states in the United States of America are also on record for having problems with judicial independence, particularly in cases involving foreign investors and elected (local) judges or juries. Secondly, it is impossible to calculate in a scientifically defensible manner how many investments have not been made because of concerns about the judicial system, but it is a factor that plays a role in deciding whether or not to invest in a certain country. Thirdly, currently eight or nine Bilateral Investment Treaties (“BITs”) are in force between the United States of America and individual EU Member States, but they are very unbalanced because of their strong focus on investor protection and vaguely formulated standards. These are the treaties which should be reformed. Fourthly, do we need TTIP? Well, for the purposes of a study which I co-conducted for the Dutch government,¹ we counted the number of cases brought by EU and US investors. 225 Cases had been brought by EU investors as opposed to only 125 brought by US investors. The country with the highest number of investors bringing cases is The Netherlands (61 cases), followed by the UK (42) and

¹ C. Tietje and F. Baetens, *The impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 2014
<http://tinyurl.com/Tietje-Baetens>.

Germany (39), which clearly indicates for whom these treaties are important. Fifthly, another reason why it is important to have some form of dispute settlement included is the value of the Transatlantic Trade and Investment Partnership (“TTIP”) as a model or template for future treaties. If we omit a dispute settlement mechanism from TTIP, but subsequently include it in treaties with countries like China, it implies a strong signal of distrust towards the latter, which is not a good basis for negotiation. We should work out a dispute settlement system that we believe in and trust and include it in all our treaties, rather than creating lists of countries which we trust or distrust. The latter would often result in an arbitrary exercise and be offensive to many of our international partners.

Prof.mr dr Bronckers

You raise an interesting philosophical question, which is: Are our national standards not good enough? Maybe the counter question should be: Why do we have international standards if everything is considered good enough nationally? There must be added value in international agreements. Indeed, in a number of areas we believe we need complementary protection or we believe we need to change our national rules. Your second point, which I found very interesting, is your provocative question as to why we would need a special mechanism for private investors who believe they have a claim under an international agreement. You state that in respect of international trade commitments it is accepted that State to State dispute settlement has worked so far. So do we really need something special regarding international commitments on investment protection? I would take issue, however, with the idea that in international trade everything works out fine. At some level it is possible to argue that the dispute settlement mechanism of the WTO functions well, that is to say compared to other State to State dispute settlement mechanisms. Yet, if the point is to know whether the WTO dispute settlement mechanism is effective, for instance in respect of the rules that the WTO currently has on domestic regulation, I would say that it is not working well at all. In fact, I encourage those of you who believe that the private remedies that we currently have for investors (ISDS) can be abolished and that all investor-State investment disputes should be replaced by State to State dispute settlement, to read a recent blog post of Professor Joseph Weiler at the European Journal of International Law. He lambasts this proposal that was made about a year ago and argues that the WTO dispute settlement system is really not a model at all for investment protection.² In my view, with State to State dispute settlement to resolve private grievances under international law we go back to a 19th century model. This is really not suited for the 21st century agenda of international economic cooperation, which is notably seeking to establish rules on domestic regulation. You will find more on this in my written contribution.

Prof.dr M.M.T.A.Brus

Addressed to Mr dr F. Baetens

Just very briefly on the first points you made. I understand and largely agree with most of what you have said. The question was meant to be somewhat provocative. However, as to the

² Joseph Weiler, *European Hypocrisy: TTIP and ISDS* (21 January 2015), <http://www.ejiltalk.org/european-hypocrisy-ttip-and-isds/>.

basic point why foreign investors should get priority treatment in international law, I am not completely satisfied. When it comes to why we need international rules on foreign investment (or on many other topics), it is to make sure that States comply with these rules, including through domestic law. That is, of course, the basis of many international rules. The assumption (underlying the need to allow recourse to arbitration in TTIP)

It does not necessarily mean that all of the rules always have to be enforceable directly by parties within the domestic system. International rules are there in order to make sure that they are complied with in the domestic system and therefore they should be able to rely on the domestic courts. That is the case with many international agreements.

Dr Alessandra Arcuri

Addressed Prof.dr G.A. Van Calster

Starting from the assumption that some domestic judicial systems are problematic, I am wondering why we need to protect foreign investors more than other constituencies of society? In other words, I am puzzled about the fundamentally asymmetrical status of BITs and currently negotiated mega-regionals.

Prof. Van Calster

The assumption is that the civil society argument is actually taken up by the government involved in the arbitration. They are the ones who, upon review of the measures, find them to be faulty and in need of amendment.

Prof.mr dr Bronckers

Is it not also the case with these new generation agreements (such as mega-regionals) that we see more and more elaborate rules relating to the environment, sustainable development and social norms? This, I would say, creates a direct interest for environmental non-governmental organisations (“NGOs”) and other private constituencies, such as labour unions to make sure that these international rules are complied with. The recent Urgenda-judgment illustrates how environmental NGOs can make use of international law and remind governments of their intergovernmental commitments.³

Why do we not have more Urgenda-type cases based on these ambitious rules in the EU’s bilateral agreements that feature major economic powers like the United States, Canada, China, etc. I cannot agree more that there is an asymmetry when the only private stakeholder who is allowed to invoke one of the principles in these comprehensive trade agreements is a foreign investor. This situation is unsatisfactory.

Mr dr Baetens

If there is an obligation, there should be a means of enforcing that obligation. Does that mean that private parties could or should bring claims for every business loss? No, but if there is a

³ The Hague District Court, *Urgenda Foundation v. State of the Netherlands*, judgment of 24 June 2015, <http://deepink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> (on appeal).

treaty of which they are the beneficiary, there should be some way for them to bring a claim when that treaty is violated, either before a national or before an international adjudicatory body. It is unrealistic to think that countries always will comply with their obligations, if there never is any risk of being held to account. In response to what you said, an NGO, at the moment, indeed cannot bring a claim under an investment treaty, because such treaties cover only foreign investors. It is not an environmental treaty or a human rights treaty, it is an investment treaty. You cannot blame the vehicle for the limitations in its scope that were drafted by the Contracting States. From a public international law point of view, it would not be impossible for NGOs to be beneficiaries of treaties as well, but then the drafting States would have to explicitly incorporate this into the treaty. Finally, I agree with you that it is the State that is supposed to represent the public by putting forward public interest arguments. It should not be up to NGO's, but in some cases the participation of NGOs in international dispute settlement could be of added value.

Dr Arcuri

My point is that these agreements afford substantive rights only to one type of actors (i.e. investors), because they are framed as investment agreements. But these agreements influence the shaping of important public issues. The point that I think it is legitimate to make and leads to a great deal of public protest, is that there is a complete indifference for protecting other interests that are affected by trade and investment regimes. Even if other values are referred to as worthy of protection in these agreements, what we have here is at best *defensive* rules to defend public policy. There are no special rights granted to private actors or States to actively challenge the behaviour or investors that negatively affect the protection of environment, public health or human rights; there is no counter claim either. A State can represent certain constituencies, as respondent only. A system where only one actor is granted certain rights remains fundamentally asymmetrical. In the 21st century, when the world is fraught with problems of unequal (re-)distribution of resources and environmental degradation, I think these concerns remain very legitimate.

Mr dr Baetens

I agree with you. Legally, there is no real limit to whom you can recognise as a treaty beneficiary, but what I said is that under the current treaties this has not been done for anyone except foreign investors.

Prof.mr A.V.M. Struycken

Addressed to Mr dr F. Baetens and Prof.mr dr M.C.E.J. Bronckers

1. First of all, I should like to extend my warm compliments to the authors of the preadviezen and to the speakers who presented them here today.
2. Why was the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, D.C., 1965) not mentioned anywhere in your papers?
3. Can the reasoning in the judgment of the European Court of Justice in the 1972 International Fruit case concerning the compatibility of certain rules of the European

Commission and the General Agreement on Tariffs and Trade (“GATT”) be applied now between the EU and the WTO?

Mr dr Baetens

I did not mention the ICSID Convention, because I wanted to focus on the current discussions in the EU regarding TTIP and the EU cannot become a member of the ICSID Convention.

Prof.mr dr Bronckers

I understand what you are getting at. In 1972, in the *International Fruit Company* case, the European Court of Justice did not give private individuals the right to rely on the WTO’s predecessor agreement, the GATT.⁴ Why was that? The argument at the time was that the European Economic Community (“EEC”) was not a party to the GATT, the GATT had not been ratified by the Member States, it was provisionally applied and there seemed to be a great deal of flexibility in its rules. So there were a number of reasons why the GATT did not appear to be a fully fledged treaty in respect of which the EEC could be held to account by a private claimant. That changed with the WTO. In the WTO not only the Member States, but also the EU formally became a member. The WTO is an international organisation. The WTO is no longer provisionally applied; its obligations are more robust. Nevertheless, the Court still has denied direct effect to the WTO.⁵

Mr. K.H. Ameli

Addressed to Mr dr F. Baetens

With regard to the question of fork-in-the-road, have we considered the limited jurisdiction and remedies that local courts have? The Fork-in-the-road provision, remnant of the inapplicable exhaustion of local remedies rule, may actually not be helpful due to limitations of local court jurisdiction or remedies.

Mr dr Baetens

I do not think that it would be a problem of jurisdiction. A foreign investor in The Netherlands can sue The Netherlands before the appropriate domestic court that deals with claims against the government. This would be an option in virtually every country in the world. A country could not invoke sovereign immunity before its own competent domestic court. A domestic court would not necessarily be allowed to apply international law, however. In terms of limited remedies, there might be differences in the manner in which domestic courts and international tribunals calculate damages. In most cases those differences would not be extreme – leaving aside the US punitive damages system, which could make the US courts more attractive than international tribunals which are not allowed to award punitive damages. But my point regarding the exhaustion of local remedies relates to the valid claim that a State

⁴ Case 21 to 24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit*, judgment of 12 December 1972, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0021>.

⁵ For the first in a series of judgments, see Case C-149/96, *Portugal v. Council*, judgment of 23 November 1999, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61996CJ0149>.

'deserves' the opportunity to remedy a situation itself. It might happen that a local town council disregarded (or was not even aware of) international treaty obligations when it unlawfully withdrew a concession from a foreign investor. Do you really need to immediately bring this to the international level? By allowing domestic courts to apply international (investment) law, this could be dealt with in a satisfactory manner before a domestic court. States are aware of the stains on their reputation that international court cases cause, so it may serve as an incentive to improve their domestic legal system.

Mr Ameli

The six months of negotiation will take care of the issue if a government has good intentions to resolve the problem.

Mr dr Baetens

If you negotiate for six months, which is what many of the investment treaties require at the moment, you would still negotiate with the entity that took the decision to which you are opposed. But if a state entity is full-heartedly continuing to breach the law, refusing to negotiate, it could well be that a domestic court might put a stop to that. Negotiation is not equivalent to going to a domestic court.

Comment Mr Ameli

State courts are no more than state organs under international law. Where the State violates the treaty rights of the foreign investor, the sixteen months domestic litigation provision of the fork-in-the-road clause is more often used by the State either to aggravate the harm, to remove incriminating evidence or to extract undue advantage and to neutralise the later arbitration. As Prof. Schreuer has observed: Clauses of this kind "create [...] a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute," and "the most likely effect of a clause of this kind is delay and additional cost".⁶ This observation was endorsed by the United States Supreme Court in the recent *BG v. Argentina*-case.⁷ In the same decision, regarding the fork-in-the-road clause, the US Supreme Court stated that the local litigation provision in a BIT "functions as a purely procedural precondition to arbitrate" and that "the interpretation and application of procedural provisions such as the provision before us are primarily for the arbitrators."⁸

Further, pleas of federal and state sovereign immunity in the United States and in particular acts of state doctrine in many countries are not limited to foreign sovereigns. Such pleas remain serious barriers in domestic litigation for foreign investors. For sovereign immunity in domestic litigation, see, for example, *United States v. Mitchell*,⁹ in which it was stated that the

⁶ C. Schreuer, 'Consent to Arbitration', in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 830-867 at pp. 846-848.

⁷ *BG Group PLC v. Republic of Argentina*, US Supreme Court 5 March 2014, 572 U.S. ____ (2014) Slip opinion at pp. 16-17.

⁸ *Ibid.* at p. 16 and p 13 respectively.

⁹ US Supreme Court, 15 April 1980, 445 U.S. 535 at p.538.

United States as a sovereign is immune from suit unless it unequivocally consents to being sued; and *Price v. United States*,¹⁰, where the Court said: “It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorising it.” It is no wonder that the US has lost no investment arbitration case to date. Moreover, most national courts do not recognise the supremacy of international law and treaties, especially where their own government is sued, and therefore invoking the treaty may not necessarily help the foreign investor regarding direct claims and particularly indirect claims.

Ms N.R. Okany

Addressed to Mr dr F. Baetens and Prof.mr dr M.C.E.J. Bronckers

My question relates to Prof. Bronckers’ earlier comment that ISDS exists because we need complementary rules (complementary to the domestic legal system) for the enforcement of investment rights. You include in your list of proposals for improvement of the investment treaty system a proposal for the exclusion of umbrella clauses from investment treaties. Considering that umbrella clauses provide supplementary protection for investor-State agreements whose breach may not rise to the level of a breach of international law, I am curious to know in what respect you see the exclusion of umbrella clauses as a bonus for the investment treaty system. Is this proposal motivated by the desire to ensure a balance between national and international jurisdiction over investment disputes (a preservation at some level of domestic jurisdiction over investment disputes) or are there wider concerns this proposal is intended to address?

Mr dr Baetens

Umbrella clauses provide that any breach of a contract between a state and an investor will also be seen as a treaty breach. They entail the risk that a relatively minor breach of contract may be extrapolated into a really complex international case. Treaties, like legislation, should provide rules on general protection for all investors from the Contracting Parties that have cross-border activities for a long period of time. This is a different level of rules than those set out by an individual contract between one particular State and one particular investor for one particular project. If there is a serious breach of contract, it will usually already be a breach of the treaty itself, so you do not need an umbrella clause in that case, particularly because these contracts between States and investors often contain a forum clause which would become completely useless if every contract breach is also considered a breach of the treaty.

Ms Okany

There must be a reason why treaties provide umbrella clauses. Do you have any other proposals? What other purpose could they serve?

¹⁰ US Supreme Court, 16 May 1899, 174 U.S. 373 at p.376.

Mr dr Baetens

I cannot speak for each and every State that has ever included an umbrella clause in its treaties. It is an example of a treaty provision where the emphasis is too much on protecting the investor. Abolishing umbrella clauses would contribute to restoring the balance between protecting the investor, while not losing sight of the other goal of investment treaties, namely promoting the development of the host State.

Prof.dr C.M.J. Ryngaert

Addressed to Prof.dr G.A. Van Calster and Dr M.D. Prévost

What is your view regarding the invocability of Regional Trade Agreements (“RTAs”) before the WTO’ dispute settlement mechanism?

Dr Prévost

In the recent Peru - Agricultural Products case¹¹ this issue arose before the WTO Appellate Body. Peru and Guatemala had concluded an RTA which provided that Peru 'may maintain' the measure at issue (its price range system) whereas, according to WTO law, Members 'may not maintain' such measures. Peru tried to invoke the RTA in this dispute, arguing that it was an interpretative tool relevant under the Vienna Convention on the Law of Treaties. The Appellate Body noted that the other international agreements used as context within the interpretative exercise cannot be used to subvert the common intention of the parties as reflected in the text. To read 'may not maintain' to mean 'may maintain' would amount, not to interpretation but to a modification of Peru's WTO obligations. The Appellate Body in that case said quite clearly that the proper route for assessing whether a provision in an RTA that deviates from WTO obligations is nevertheless consistent with WTO law is to examine its compliance with the exceptions for RTAs in WTO law (including Article XXIV of the GATT 1994). It did not apply the RTA itself as applicable law in that dispute. The idea behind the exceptions that allow otherwise GATT-inconsistent measures under RTAs is to make possible RTAs that go further in liberalising trade between their parties, not to allow Members to roll back existing WTO obligations through their RTAs. The Appellate Body would therefore be willing to examine an RTA in terms of its compliance with the relevant WTO disciplines for RTAs. This is not the same as applying the rules of the RTA to modify WTO obligations or examining whether the RTA itself has been complied with. When I spoke of the WTO still being the 'forum of choice' for Members despite the proliferation of RTAs with their own dispute settlement systems, I was referring to trade disputes in which Members that are parties to an RTA choose to challenge the measures of other RTA parties in terms of their violation of WTO obligations (i.e. not in terms of violations of the relevant RTAs). The Appellate Body made clear in Mexico-Soft Drinks¹² that there is no basis in the WTO Dispute Settlement Understanding for adjudicating non-WTO disputes (i.e. disputes under other agreements such as RTAs). In addition, the scope for the WTO adjudicatory bodies to look outside the WTO

¹¹ Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/DB/R and Add.1, adopted 31 July 2015.

¹² Appellate Body Report, *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p.3.

agreements, for example at RTAs, in resolving WTO disputes is rather limited. This is because of the expressly limited mandate of panels and the Appellate Body under the WTO Dispute Settlement Understanding. In interpreting WTO agreements, they may not add to or diminish the rights and obligations of WTO Members as laid down in the WTO agreements. This limitation indicates that WTO Members clearly did not want an activist court, such as the European Court of Justice at that time. They want a court that sticks to the rights and obligations they have negotiated in the WTO agreements when resolving disputes. As a result of this clearly limited mandate, one can see an interpretative approach of the Appellate Body that has been called 'conservative' by some. It follows a 'text-first' approach in most cases to avoid coming to 'surprising' interpretations that may undermine the legitimacy of the system. In terms of looking outside the WTO for applicable law, they have limited themselves to using other international law as an interpretative tool, for instance as part of the context for interpretation to clarify vague or ambiguous WTO provisions. They have not allowed parties to rely on international law to override their WTO obligations, as shown in the Peru-Agricultural products case.

Prof.dr Van Calster

RTAs should be allowed to be invoked before, and applied by, the WTO dispute settlement system. Of course, Article XXIV GATT in its application is not properly enforced, yet in substance, through Article XXIV, RTAs form part of the WTO. Therefore, when Panels and the Appellate Body apply RTAs, they effectively apply WTO law.

Prof.dr C.M.J. Ryngaert

Addressed to Mr dr F. Baetens

Mixed agreements- who is respondent? The EU or Member States? Is joint responsibility not a better solution in the interest of legal certainty?

Mr dr Baetens

So, are these treaties mixed agreements? Article 207 of the Treaty on the Functioning of the EU says that foreign direct investment now falls under the common commercial policy, that is to say an exclusive EU competence. Investment treaties not only cover foreign direct investment, however, but also indirect investment or portfolio investment. For example, under certain conditions a controlling shareholder can bring a claim as well. The European Commission seems to interpret Article 207 as stating that all foreign investment is now covered by the exclusive EU competence, but Member States claim that was not what they agreed upon in the treaty. This would mean that when the Commission has finished the negotiations and a finalised treaty text lies on the table, the entry into force of the treaty for the entire EU and its Contracting Party could be blocked if there is only one Member State that refuses to ratify. The Commission has submitted a question to the Court of Justice of the European Union in this respect (whether the EU-Singapore Free Trade Agreement falls under the exclusive or shared competence) and we are now awaiting the answer.

Who will be a respondent in these cases? Well, if it is not a mixed agreement, it would be straightforward who the respondent is on 'our' side – the EU. If the agreement was mixed, the respondent could either be the EU or one or more Member States. Regulation 912/2014¹³ sets out a rather complex system to determine who the respondent should be depending on the entity that enacted the allegedly wrongful measure, the overarching importance of the issue for the Union, etc. - as I have analysed and criticised in a recently published article.¹⁴ The problem for the EU is, of course, that its Regulations are only binding for its Members, not for other States, so the content of the Regulation would have to be incorporated in its treaties, with the agreement of all Contracting Parties. And, indeed, if you now look at the text of CETA, the Comprehensive Economic and Trade Agreement between the EU and Canada, Article X-20 addresses the determination of the respondent for disputes with the European Union or its Member States, which is an amended version of the rules in Regulation 912/2014.

What about legal certainty? Well, for me legal certainty relates to the application of the law, but not necessarily to the identity of your respondent. What claimants want is compensation for injury; it is of lesser importance against whom they are arguing their case.

Mr S. van Hoogstraten

Addressed to Dr M.D. Prévost

Some issues are believed to be trade matters but they go beyond trade, like strongly felt consumer concerns, such as hormones or genetically modified organisms ("GMOs"). Should these issues be the domain of WTO? Should we not consider some subjects to be deeply held national views or convictions? Is there a role] for International Court of Justice ("ICJ") in such matters?

Dr Prévost

Disputes such as the ones about GMOs and other social policy issues are among the most controversial WTO disputes. There has been a great deal of debate on whether panels and the Appellate Body are best suited to resolve these disputes, particularly because they touch upon such sensitive issues as how much scope there is for governments to protect the health of citizens or the environment, and they require the assessment of a large amount of scientific or other technical evidence. Some question whether it is really within the competence of the adjudicatory bodies to decide trade disputes that touch upon these non-trade concerns. The problem is, if not, who should decide on these issues? Regulations on issues of public policy unfortunately may be misused for protectionist purposes, to protect domestic industries from competition by imports. WTO Members have therefore chosen to set disciplines for such regulations, e.g. regulations dealing with GMOs, through specific WTO agreements that aim to

¹³ Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is a party, O.J. (L 257) 121-34 (28 Aug. 2014).

¹⁴ F. Baetens, G. Kreijen and A. Varga, *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 *Vanderbilt Journal of Transnational Law* 5 (2014), pp. 1203-1260.

balance trade liberalisation with non-trade concerns. One of these is the Agreement on Sanitary and Phytosanitary Measures (known as the SPS Agreement), where Members have laid down a requirement of scientific justification for health regulations. They considered science to provide a neutral, objective benchmark to distinguish legitimate health protection measures from disguised protectionist measures. So, science is used as the benchmark for legitimate regulation in this agreement. We know, however, that health regulations are not based purely on science, they also reflect economic considerations and policy preferences, such as what level of risk is considered acceptable in a particular society. Initially there was concern as to whether the SPS Agreement leaves sufficient room for Members to regulate in response to consumer preferences regarding health risks due to its strict scientific requirements. The Appellate Body has clarified, however, that while there are strict scientific requirements for the risk assessment underlying health regulations, once a risk has been proven there is much flexibility in the rules for Members to choose between different risk management options in response to national policy priorities. They are free to choose the level of protection they deem appropriate against particular risks. In addition, their choice of a regulatory measure to achieve the chosen level of protection is subject to much less rigorous disciplines than those applicable to the initial question of whether there is a risk. Even so, panels have initially struggled with applying this system of disciplines and have sometimes overstepped the mark, conducting a too-invasive review of the scientific assessments of Members and limiting their regulatory autonomy too much. The Appellate Body has corrected this situation, for instance in the *US/Canada - Continued Suspension disputes*¹⁵ and has made it clear to panels that this is not their task. So I think in future dispute settlement panels will be more conscious of the limits to their competence in their reviews of Members' regulatory measures under WTO disciplines. Achieving an appropriate balance between trade and non-trade concerns in WTO adjudication is essential to ensure the legitimacy of the outcome of disputes. Otherwise, compliance with the outcome of these sensitive disputes will remain problematic. Your question raises the issue where else should these cases involving consumer concerns be decided? Does the ICJ have better tools than WTO adjudicatory bodies to balance trade and non-trade objectives, or is there any other mechanism where these issues could be more effectively discussed? WTO Members have chosen to bring these issues within the ambit of the WTO dispute settlement system by negotiating the relevant WTO Agreements that impose disciplines on domestic public policy regulations to prevent disguised protectionism. It is therefore up to the WTO adjudicatory bodies to seek an appropriate balance between trade and non-trade concerns in applying the negotiated rules, and not to intrude too far into the regulatory competence of Members. The Appellate Body has shown itself willing to police these limits.

Mr Van Hoogstraten

I think the ICJ would not exclusively look at the matter as a trade matter. It would take other relevant factors into account more than perhaps the predominant trade factor.

¹⁵ Appellate Body Report, *U.S. - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS320/AB/R, adopted 16 October 2008; Appellate Body Report, *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS321/AB/R, adopted 16 October 2008.

Prof. Van Calster

If you look, for instance, at the way the ICJ dealt with the recent Whaling case,¹⁶ they talk about science and try to define what objective science is. That brings them into uncomfortable territory. Looking at it purely from a trade point of view is more comfortable for the dispute settlement system. Of course, the dispute settlement panels, in these kinds of cases, appreciate the consumer concerns or ethical concerns, so clearly it is not just a trade concern. From the point of view of the adjudicator, however, it is actually more comfortable to say “we are going to limit ourselves to the trade concern”. In a way, even if they are aware that it is much more than trade, retreating into trade is much more comfortable, because it makes the judgment easier to accept even by the party who loses the case.

Ms Hu Yi

Addressed to Dr M.D. Prévost

Faced with a growing caseload with increasing technical complexity and political sensitivity, how should the WTO Dispute Settlement Body adjudicate disputes? Is there an inevitable trend in the WTO Dispute Settlement Body to risk being a forum in which its members discuss domestic policy considerations?

Dr Prévost

The main threat to the system is its being overloaded, not only by the number of cases, but also by the political sensitivity of the cases. These kinds of issues should be decided by the Members themselves through political negotiation to resolve new issues that arise in disputes, such as the scope in WTO law for subsidies to be provided to renewable energy producers, to which you refer in your question. In the absence of negotiated solutions, the developments in WTO law to address new issues involving important matters of domestic policy such as this one will happen through the case law. If we had, as is the case for domestic courts or even for the EU Court of Justice, a system where there is rule making capacity hand in hand with an adjudicatory body, this would not be so problematic. Because we do not have that at the WTO due to the paralysis in its rule-making function, Members do not have the opportunity to correct mistakes or reverse legal developments in adjudication with which they do not agree. The problems hindering the negotiation of new WTO rules were discussed by professor Peter Van den Bossche in his contribution. Some doubts have been raised as to whether the interpretation of the Appellate Body in the dispute you mention (Canada-Renewable Energy¹⁷) is the correct one, while many agree with the outcome of the dispute allowing Members to provide support to the renewable energy sector. The issue of the scope for Members to provide renewable energy subsidies would be more appropriately addressed through negotiated solutions, but the Members are not able to reach agreement on this and other sensitive issues. That is why the Appellate Body tries to find what you have called

¹⁶ *Australia v. Japan (New Zealand Intervening), Whaling in the Antarctic*, ICJ 31 March 2014, <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=148&p3=4>.

¹⁷ Appellate Body Reports, *Canada - Certain Measures Affecting the Renewable Energy Generation Sector / Canada - Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013.

'technocratic' solutions to disputes on these issues, relying strongly on the Vienna Convention rules on treaty interpretation and giving lengthy, technical legal reasoning, even when coming to new and sometimes unexpected interpretations (as in the Canada-Renewable Energy case) in the progressive development of its case law, within the boundaries of its own limits. I would not say that the dispute settlement system is on the verge on imminent collapse, but its legitimacy is increasingly brought into question by the fact that Members seek to pursue their trade objectives with regard to sensitive domestic policy issues through legal developments in adjudication rather than through political negotiation. The dispute settlement system needs to come to legitimate decisions in order to promote compliance by WTO Members. The high rate of compliance so far, I think, is an indication that the system still works quite well and is viewed as legitimate by Members. But as more and more these kinds of politically sensitive questions come before the Appellate Body, controversial decisions are more likely, increasing the risks to the system.

W. van Reenen

Addressed to Dr M.D. Prévost

Prof. Van den Bossche writes in his excellent contribution that in terms of enforcement of compliance with adverse rulings the WTO compares favourably with other dispute settlement mechanisms, but he then goes on to state that the ICJ has no enforcement mechanism at all. However, the UN Charter provides for recourse to the Security Council in order to ensure compliance with adverse rulings of the ICJ. The mechanism is not perfect, because the permanent members of the Security Council may exercise their veto right, but still the mechanism is there.

Dr Prévost

I agree that there is, of course, a mechanism under the UN Charter to promote compliance with the rulings of the ICJ. Prof. Van den Bossche's point was rather that there is no specific enforcement mechanism, comparable to that of the WTO. The WTO dispute settlement system itself makes provision for specific temporary remedies that a complaining party can use in case of non-compliance, namely compensation or retaliation in the form of suspension of concessions or other obligations. This is not the case for the ICJ. You are of course correct, however, that there is an enforcement mechanism under the UN Charter for ICJ rulings.

At this point the Chairman, Prof. mr dr W.J.M. van Genugten, invites the speakers to make a closing statement.

Mr dr Baetens

I would like to invite those who, on good grounds, criticise the existing investment law and its dispute settlement system to now move beyond mere criticism and start putting forward reform proposals as specifically and as detailed as possible with regard to the different provisions that we discussed. The Trans-Pacific Partnership has recently been concluded so the train of reform has left the station. If the EU wants to remain relevant as a law maker, rather than a law taker and ensure that its values are reflected in the new generation of investment treaties, we have to create a valid model that has the potential of inspiring the improvement of the entire international investment law system.

Dr. Prévost

Many people are concerned that the new mega-regional trade agreements, such as the Trans-Pacific Partnership, will undermine the multilateral trading system. These agreements do create the possibility of trade diversion and overlapping regulation of trade relationships. On the other hand, they also allow their parties to achieve deeper levels of integration that are not achievable through the WTO system today, yet are crucial to trade in a world of global value chains. It would be more interesting for the WTO system to embrace these mega-regional trade agreements, to learn from them by improving their transparency and increasing the possibilities for co-ordination, so that in the long run they can have a positive influence on the WTO system itself.

Prof.mr dr Bronckers

There still are people out there who believe that international agreements can produce great things for our society and produce substantial improvements in the areas of economic welfare, environmental protection and so on. To them I would say: Ask yourself how these agreements can be effectively implemented? In my view, if we only accept State to State dispute settlement, we are doing a disservice to the idea of effective implementation. I am concerned that we will then be left with increasingly ineffective agreements.

Prof.dr Van Calster

Look at everything critically, I would also say: Do not ever blindly trust arguments pro or contra a proposition, and, especially, with respect to the TTIP negotiations, I might add: With friends like these, who needs enemies?

After these final comments Prof. Van Genugten thanks the speakers and the audience for their contributions to the discussion and closes the meeting.