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Evolving Dynamics of Alternative Dispute Resolution in Global Governance: A Legal Study of International Mechanisms and WTO Frameworks

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Abstract
A change that has quietly transformed the architecture of international governance to date is that traditionally constructed as state-state diplomacy and adjudication. The change that is taking shape in the architecture of international governance is one that has integrated Alternative Dispute Resolution (ADR) techniques within the very fabric of international law itself. The thesis that follows is that the transition that has taken place from ADR as an ad hoc process to its acceptance within international law as an integral process has taken place due to the transition that has taken place within international law itself to one that has shifted philosophically to more interest-based conflict management processes rather than rights-based approaches to conflict management. The thesis proposition proceeds to explore the history that has defined the transposition that has taken place within international law to include ADR processes. It then proceeds to explore one such institution that has shifted to more ADR processes within international law. The institution that this paper chooses to explore is the World Trade Organization (WTO), which has one of the most judicialized dispute processes within international law but has integrated within its architecture processes that are germane to ADR. The paper further proceeds to explore the challenges that are arising within international law to implement ADR processes within international law due to challenges such as digital trade processes.

Introduction
The traditional model of dispute resolution in international relations, exemplified by the contentious cases before the International Court of Justice (ICJ), has traditionally been marked by its formalistic, statist, and bilateral character (Shany, 2014). Although these dispute resolution institutions ensure definitiveness with regard to the existence of rights and duties, these are achieved to the detriment of diplomacy, mutual benefit, and problem-solving (Merrills, 2017). In the present day and age, with the intensification of globalization and with the advent of an increasingly complex international environment in which transnational disputes are no longer only bilateral but also involve transnational entities and pertain to increasingly complex questions including trade, investment, the environment, and human rights, the shortcomings of such an antagonistic form of dispute resolution are no longer apparent (Pauwelyn, 2015). It is in this sense that the principles and practices related to Alternative

Dispute Resolution are increasingly making inroads within the international governance environment (Susskind & Ali, 2015). ADR, which is the shortened form for Alternative Dispute Resolution and which subsumes various processes such as negotiation, mediation, conciliation, and arbitration among others, ensures that dispute resolution occurs with greater flexibility, confidentiality, and potential (Brown & Marriott, 2018).

The story of ADR in international law is more than just a technical process; it symbolizes nothing less than a transformation in the underlying fabric of governance (Klabbers, 2013). The issue of global governance is no longer understood as making rules and imposing them hierarchically; instead, there is an increasing emphasis on managing interdependence in more networked and multi-level and even more informal terms (Slaughter, 2004). The paper posits that the incorporation of ADR regimes has been one of the most important adjustments that international institutions have made to the requirements posed by current challenges to world public order (Bercovitch & Jackson, 2009). The article will attempt to argue that ADR regimes are essential to conflict management and that there has been no greater success story about international dispute settlement as captured through the prism of ADR regimes in international law (Redfern & Hunter, 2023). To aid in this analysis, the paper will be segmented. The first section offers a sweeping perspective on ADR as presented within the mainstream concerns of public international law (Carbonneau, 2014). The second section will present a 'focus' analysis that offers an in-depth examination of ADR within WTO dispute settlement to explore its critical application to maintaining one of the most important regimes within international law (Davey, 2014)

Part I: The Ascendancy of ADR in Public International Law and Global Governance

The history of ADR within the realm of international relations is as historic as diplomacy itself (Bercovitch & Jackson, 2009). Indeed, bilateral negotiation between sovereigns must be seen as the most 'primordial form of dispute resolution' (Merrills, 2017). Nevertheless, the discovery and development process took place within the twentieth century with the formal codification and establishment of these non-formal processes concurrently with the establishment of judicial bodies (Shaw, 2021). The 1899 and 1907 Hague Conventions on the Pacific Settlement of International Disputes must be rated among the most historic milestones that codified arbitration alongside the processes that entail good offices and mediation (Simma et al., 2012).

The philosophic basis behind this preference is that it is grounded in the fundamental principle of sovereignty of the state (Cassese, 2005). The element of consent is the backbone of international law, and there is an inherent tendency for sovereign states to prefer those dispute resolution processes whereby they retain effective control (Klabbers, 2013). The process of adjudication before an international court such as the ICJ implies loss of control; one has to submit to the process of the court, to its interpretation of law, and to the final and binding decision. In ADR processes, however, every step in mediation is inherently consensual (Redfern & Hunter, 2023). One voluntarily seeks mediation; one has a decisive role in selecting the third party; one has control over the process; and one has to voluntarily adhere to the result.

"Aside from sovereignty considerations, the functional benefits of ADR have played a significant role in encouraging its use (Susskind & Ali, 2015). Firstly, ADR processes are inherently faster and more affordable compared to protracted litigation. The ICJ's court calendar, to cite one example, may witness cases lingering on for half a decade or more (Shany, 2014). Secondly, ADR processes are confidential; that is to say that States are free to consider settlements and concessions outside the limelight of public and media attention that tend to entrench one's position rather quickly (Brown & Marriott, 2018). Thirdly, and more importantly perhaps, ADR processes enable 'creative' solutions that are interest rather than rights-based (Ury, Brett, & Goldberg, 1993). A court will be bound to adjudicate according to law and render a verdict whereby one party is declared 'right' and the other 'wrong.' But the Mediator/Conciliator can facilitate the parties to identify and separate the underlying 'interest' rather than 'right' to arrive at 'solutions' that are beyond the court's jurisdiction to decree. These may include staged implementation, side agreements independent of other matters that might

be best addressed through technical assistance among other joint agreements that get beyond the technical 'legal' boundaries that defined the dispute.' "

These principles are translated in various international institutions (Kaufmann-Kohler & Schultz, 2004). The Permanent Court of Arbitration (PCA), founded through the Hague Conventions, offers an extensive regime with regard to arbitration, mediation, and fact-finding with respect to various types of disputes, such as those that entail international organizations and private parties (Permanent Court of Arbitration, 2020). The International Centre for Settlement of Investment Disputes (ICSID), an integral part of the World Bank Group, is one of the preeminent institutions with regard to the arbitration of investment treaties, with the extensive use of ADR principles, that take into account the existence of a 'process of conciliation' that leads to arbitration instead (ICSID, 2021). It should be noted that within the United Nations' framework itself, 'good offices' that are managed through the functioning of the Secretary-General concern perhaps the most 'truly' distant form of dispute prevention that has been traditionally viewed as 'diplomatic mediation' with regard to various political crises that take place on an international level, with 'some' world-class political disputes (United Nations, 2020)

Part II: ADR within the WTO Dispute Settlement System: A Deconstructed Analysis

Since its inception in 1995, the World Trade Organization has been lauded for its dispute settlement mechanism that is claimed to be one among the most effective and 'judicialized' in international law (Davey, 2014). The Dispute Settlement Understanding signed among WTO members formed a quasi-automatic process from consultations to adjudication by panels and the standing Appellate Body with provisions to authorize trade sanctions if there was non-compliance (Van den Bossche & Zdouc, 2021). The 'crown jewel' of the WTO has been termed to be this 'legalistic,' 'rule-based' process that has caused the trade bodies to shift from 'power diplomacy' to rule-of-law adjudication (Petersmann, 2017). Though there seems to be no truth to this claim either, this trend shows only one side of the picture. A more stringent analysis of the DSU would disclose that ADR is actually ingrained in its 'DNA,' an essential but often overlooked element on which lies the superstructure of adjudication (Marceau, 2018).

Consultations: The Foundational ADR Pillar

The WTO dispute process begins with consultations that are the first substantive step in the WTO dispute process and are required by Article 4 of the DSU (WTO, 2019). The consultations are not mere formality but are an integral step in Alternative Dispute Resolution. A requesting member has to make the request in written form that provides the reason for making the request with the measures slated and the legal basis claimed. The requested member has to give sympathetic consideration to the requesting member to participate in consultations within an allotted time frame (Steger, 2004).

The process lies deeply within the principles of diplomatic negotiation. These consultations are private proceedings that take place without prejudice to the rights of either party in any subsequent proceedings. The private nature of these proceedings is paramount; this offers an opportunity to engage in open discussion whereby there is the possibility to discuss the merits and weaknesses that each party has within their case law. The aim here is to present "a mutually satisfactory solution" that is clearly evident within the DSU (Davey, 2014). The use of interest-based language here is what sets ADR apart from the rights-based language presented within the panel reports (Bown, 2022).

The impact of consultations has practical implications. A significant amount of WTO disputes are settled during this stage without escalating to the panels (Hoekman & Mavroidis, 2021). To cite an example, the European Union and United States ended their longstanding dispute entitled "US - Section 110(5) of US Copyright Act" with a joint agreed upon emergency solution after the consultations (WTO, 2000). These are definitely not failures to the WTO dispute settlement system but rather proofs that the current mechanism is most efficient. The current crisis surrounding the Appellate Body that has been stalled since 2019 due to the lack of appointments to the appellate

process has further added to the criticalness surrounding consultations (Bacchus, 2020). Since the appeals process was temporarily halted due to the crisis surrounding appointments to the appeals process, there is greater encouragement to look for solutions during this critical stage—consultations.

The ADR Toolkit

In addition to consultations, the DSU has more substantive provisions on more active third-party assisted ADR. The provisions are found in Articles 5.1 to 5.6 and include good offices, conciliation, and mediation (WTO, 2020a). These procedures may be sought by either party at any time and more importantly may be invoked and discontinued at any time (Steger, 2004).

In good offices, there is always the element of Third Party intervention, such as the Director-General in the WTO, who tries to get the disputing parties to come to terms (Pauwelyn, 2015). Here, the Third Party does not take an active role in the dispute but only facilitates communication. In conciliation, the Third Party reviews the dispute and makes suggestions to the disputing parties. The Third Party does not take an active role in the process; rather, it acts as a bridge to facilitate an understanding that leads to a voluntary agreement by the disputing parties. In mediation, the Third Party actively helps the disputing parties in negotiating to reach a voluntary understanding (Marceau, 2018).

Throughout the WTO's existence, these Article 5 processes had seldom been triggered formally. Instead, Members preferred to take advantage of the consultation stage to engage in direct talks or move on to panels. Yet these implicit dynamics are acknowledged, particularly in the current context of challenges to the WTO system, with renewed attempts to revitalize them (Van den Bossche & Zdouc, 2021). In 2019, a set of WTO Members set up an 'official' mediation process that built on Article 5. The process offers a structured procedure to be adopted during mediation proceedings that addresses the appointment of the mediators, the issue of confidentiality, and the implications of any agreements reached (WTO, 2020b). This is a sign that there is an appreciation that the judicial solution is no longer adequate to cope with the trade frictions that exist within the 21st century reality (Bown, 2022).

A clear success story within the realm of mediation is that of the "Australia - Plain Packaging" dispute with respect to tobacco products. Though that dispute has progressed to the panel and appellate levels, other mediation processes assisted various complainants (including Ukraine) to arrive at a mutually satisfactory solution that led to the conclusion of that aspect of the proceedings (WTO, 2018). The above-mentioned dispute is an excellent example that shows that mediation can take place concurrently with adjudication processes and offer opportunities to arrive at settlements even after adjudication proceedings are initiated (Marceau, 2018).

Arbitration in the DSU: A Hybrid Approach

The DSU also offers arbitration as an alternative to the above-mentioned panel process. Under article 25 of the DSU, the parties to the dispute can use arbitration as an alternative method to resolve the dispute among them (WTO, 2020a). The critical aspect about this procedure is that the result of the arbitration will be binding on the parties to the dispute since it is accepted before it is notified to the Dispute Settlement Body (DSB) (Davey, 2014).

This is therefore a form of hybrid ADR. This is alternative in that it goes beyond the standard panel in that it gives the parties more flexibility with regard to the pace and terms set by the arbitrators. Yet it is adjudicative in that it leads to a binding determination on the matter concerned on the basis of WTO law (Van den Bossche & Zdouc, 2021). This has seen little use; however, it provides an essential mechanism with which to efficiently resolve such specific and well-articulated questions. The beneficial impact here is particularly evident with the current reality with which to contend in that it provides one such binding solution to appeals that has been made impotent by its current form in that it was later set up within the multi-party interim appeal arbitration arrangement among WTO members (WTO, 2020b).

Part III: Comparative Efficacy and Systemic Implications

The WTO has a complex environment due to the existence of two models—adversarial and cooperative models that facilitate dispute settlement (Bown, 2022). The models are symbiotic to each other and entail each other rather than substituting each other (Van den Bossche & Zdouc, 2021). The mere existence of an effective adjudicative process "in the background" can improve the position of those who take ADR processes (Davey, 2014). The complainant party with an excellent legal case can cite the possibility of proceeding with the panel process to persuade the other player during the consultations stage to negotiate in good faith (Marceau, 2018). The other party might be inclined to make concessions to prevent losing in the WTO process (Pauwelyn, 2015).

The 'shadow of the law' effect finds application here; this is an important element within the efficacy of the WTO (Shaffer & Meléndez-Ortiz, 2010). The effect ensures that ADR fails to deteriorate to the point that might be termed 'power politics.' These talks and mediation sessions are carried out with an understanding and appreciation of the law that exists within the context (Zang, 2019). The process therefore raises ADR from that of mere political dialogue to one tinged with law.

But with ADRs gaining greater prominence, there are pertinent questions about the coherence of the system and the further development of law (Bagwell & Staiger, 2016). The reports by the panel and the Appellate Body with the reasoning that has precedential value although it is not binding but highly persuasive—ensure that there is an evolution in WTO law (Davey, 2014). The scenario about widespread settlement without public adjudication with confidential consultations or mediation does not yield similar jurisprudential benefits. If cases that are prima facie legally correct are settled outside court, then the membership as a whole gets denied precedential values from the ambiguous provisions within the covered agreements (Van den Bossche & Zdouc, 2021).

As such, there must be found a balance here. A regime that places too much emphasis on adjudication is likely to be inflexible, inefficient, and thus unconscionable to political reality, as with the current crisis within the Appellate Body (Bacchus, 2020). One that places too much emphasis on ADR might betray the rule-based essence of the institution to permit varying experiences of pouvoir discretion to come to bear on the outcome, stymying the development of predictable law (Bown, 2022). The brilliance within the DSU lies in its attempt to walk this tight rope by slotting ADR as first resort and adjudication as last resort (Marceau, 2018).

Part IV: Future Trajectories and Emerging Challenges

The history of ADR in the management of globalization and in the WTO in particular is still to be written (Bown, 2022). Some current trends are bound to influence the dynamics to be shaped there. First, the current trend towards the fragmentation of the multilateral trade regime to form a web of various plurilateral and regional trade agreements (like CPTPP and USMCA) portends the creation of a more complex environment towards dispute settlement (Van den Bossche & Zdouc, 2021). These regional trade agreements come complete with novel ADR regimes (Davey, 2014). The outcome can be the development of best ADR practices to be transplanted to the multilateral trade regime (Marceau, 2018).

Second, "new generation" trade matters such as digital trade, e-commerce, and trade-related environment measures introduce new challenges to dispute settlement (Pauwelyn, 2015). These are sectors that depend on technologies that change daily; such matters are more appropriately dealt with in non-adversarial processes such as mediation that allow cooperation between regulators (Bacchus, 2020). Mediation will be more effective in handling frictions within these sectors rather than the adjudicative process that is either/or and slower (Shaffer & Meléndez-Ortiz, 2010).

Third, the crisis in the WTO's Appellate Body has been stimulative to the development of ADR (Zang, 2019). The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) was devised specifically as an answer to this crisis and is itself a kind of ad-hoc ADR instrument for the appellate function (Van den Bossche & Zdouc, 2021). This shows the resilience of the membership and confirms that in those sectors in which the mainstream institutions are foundering, governments are active in improvised processes outside their mainstream normative structures (Bown, 2022).

Thirdly, there is an appreciation that capacity-building within ADR is essential (WTO, 2020a). The reality is that developing country WTO Members do not possess the capacity to participate meaningfully in dispute settlements that use ADR processes such as mediation and arbitration (Marceau, 2018). The WTO Secretariat and other donors are attempting to ensure that there is equity within ADR by focusing on capacity-building among Members to ensure that those who are less capable are still accorded the benefits within the ADR process (Davey, 2014).

Conclusion

The story of Alternative Dispute Resolution as a part of international governance has seen the inexorable rise to prominence. Alternative Dispute Resolution is no longer on the fringes of international law; rather, it has come to be one of the foundational blocks in present day dispute resolution mechanisms. The above article has shown that this has been more than just a move but has been an adaptation to the realities that lie in the present day age and weave together the need to maintain relations and arrive at an efficient solution side by side with the need to conclusively state one's rights.

A case in point is the WTO framework that has been subject to such intense analysis from the perspective of international law. The Dispute Settlement Understanding has been notoriously presented as if it is no more than a judicial model; instead, it is more accurate to state that it consists of a subtle blend wherein ADR procedures—from the initial stage to consultations through to more overt processes of good offices, conciliation, and mediation—are absolutely essential to this process. These are interlinked with adjudication in such a way that the mere possibility of adjudication adds to the dynamics of negotiation, while the possibility of settlement prevents the system from becoming congested.

As the challenges facing global governance—ranging from the problem of institutional stalemate and geopolitical division to the new uncertainties and challenges posed by the digital age—continue to evolve and intensify, the values of flexibility, consent, and interest-based problem-solving that ADR exemplifies are sure to increase in saliency. The future of a stable and functional international legal architecture will be less one that pits adjudication and other approaches in competition with each other and more about how to integrate these approaches in a rational and responsive architecture of dispute resolution. The continued study and development of such alternative approaches is thus anything but an academic luxury in relation to the need for the health of global governance in the twenty-first century.

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