THE RELATIVE SUCCESS OF WTO DISPUTE SETTLEMENT AND WHAT PLANET WOULD THE EU INVESTMENT COURT SYSTEM BE ON? A REJOINDER TO AJIL UNBOUND COMMENTS

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I am extremely grateful, and humbled, by the wealth of comments received on my AJIL article[1] through this AJIL Unbound Symposium. One of the many points I take away from these reactions is, indeed, that my analysis offers a snapshot and that many of the critiques now leveled against Investor-State Dispute Settlement (ISDS) are, in Catherine Rogers's words, "effectively recycled versions of criticisms that were originally leveled against the WTO and its decision-makers."[2] (Freya Baetens makes a similar point.[3])

In this rejoinder, I would only like to make two points. Firstly, many commentators seem to think that in this article I took the normative position that World Trade Organization (WTO) dispute settlement is "better" than ISDS. Although I did point to the current discrepancy in *public perception* of the respective regimes, I purposefully avoided expressing any personal, *normative* position on one being "better" than the other (but apparently not explicitly enough).

As Giorgio Sacerdoti put it, "[i]t cannot be said in abstract that one system is better than the other."[4] Or as Donald McRae implies: there is no "model of an '*ideal*' arbitrator."[5] Indeed, in my article, there is a lot on WTO dispute settlement that could be read as less than glowing: the prevalence, as WTO panelists, of low key diplomats, with little dispute settlement experience and no law degree, consensus appointments of WTO adjudicators making it difficult to appoint experienced jurists with prior, disclosed views (be it in academic work or earlier dispute settlement functions), and, most importantly, as Rogers rightly underlines, the "not overly ambitious"[6] reach of the WTO legal system itself (no private standing, weak remedies, Member- and settlement-driven process, etc.), dubbed by Baetens as "a regrettable state of affairs from a legal point of view."[7] On top of this, Sacerdoti also points to "other signs of stress" in WTO dispute settlement, in particular, "delays in the process at the panel stage."[8]

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[1] Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109 AJIL 761, 761 (2015).

[2] Catherine A. Rogers, *Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 294, 298 (2016).

[3] Freya Baetens, *The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators are under Fire and Trade Adjudicators are not: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 302, 302-303 (2016).

[4] Giorgio Sacerdoti, *Panelists, Arbitrators, Judges: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 283, 287 (2016).

[5] Donald McRae, *Introduction to Symposium on Joost Pauwelyn, "The Rule of Law Without the Rule ff Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus"*, 109 AJIL UNBOUND 277, 278 (2016) (emphasis added).

[6] Rogers, *supra* note 2, at 301.

[7] Baetens, *supra* note 3, at 308.

[8] Sacerdoti, *supra* note 4, at 285.

In other words, WTO dispute settlement is far from ideal; it is not a fully-fledged "international rule of law." It has *elements of* a rule of law and is relatively successful *because* it continues to involve diplomats and to offer political control, voice, and exit options to WTO Members. At the global level, that may be "as good as it gets." WTO dispute settlement survives and to some extent thrives because it offers checks and balances: relatively weak but politically connected panelists, a tradition which goes back to the early General Agreement on Tariffs and Trade years, as Gabrielle Marceau et al. explain[9]; supplemented/compensated by an Appellate Body and a strong Secretariat; embedded in a dense political community and scrutinized by what Robert Howse calls "an interpretive community of scholars and experts" which is "sufficiently critical" and, in his view, largely absent from ISDS.[10]

ISDS may have more sophisticated legal features (private standing, stricter remedies, enforcement, fact-finding powers, etc.) as well as more experienced, elite arbitrators. But without a broader political base and interpretative community (member state voice, public support, etc.), it is currently at risk and being substantively reformed.

Secondly, what do I make of the European Union's recent proposal (included in the Comprehensive Economic and Trade Agreement (CETA) and the European Union-Vietnam Free Trade Agreement and submitted also for the Transatlantic Trade and Investment Partnership) for an Investment Court System that includes an Appellate Tribunal? Howse implies that, on my view, the EU proposal "may not be on the right track in thinking that an adjudication approach is the answer" and that it is "at odds with [my] suggestion that a system composed of a large number of nonlegal experts who rarely are repeat panelists generates greater legitimacy on balance."[11] Rogers as well makes the point that "[i]n advocating a 'WTO-style court,' the European Union does not want diplomats without legal training as decision-makers."[12] These comments misread my position. I am not saying that having diplomats with little experience in dispute settlement is in and of itself a good thing or necessary element of a performing dispute settlement system. What I am saying is that this feature of WTO dispute settlement, combined as it is with an Appellate Body, strong Secretariat, and broader interactive interpretative community and appearing in the context of a relatively low-ambition legal regime, is a plus and partly explains (rather than blocks) the WTO's success. It is an element of voice (representativeness, inclusiveness) that helps digest the impact of WTO dispute settlement. From this perspective, the EU Investment Court System may go in the right direction. Firstly, it reduces the role of (ideologically polarized) "private judges" (the "rule of lawyers" EU Commissioner Malmström referred to, as in private, corporate lawyers or elite arbitrators repeatedly acting as both counsel and judge) by neutrally and ex ante appointing the members of both the first instance and appellate tribunal and prohibiting them "from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute" (CETA, Article 8.30.1) and making awards subject to appeal (the kind of checks and balances provided also in WTO dispute settlement). Secondly, and equally important, ISDS reforms pursued by the European Union and many other countries inject the voice, member control, and exit options that have proven so fundamental in WTO dispute settlement. This may not be in the form of diplomat-adjudicators (although under the EU proposal adjudicators must now be appointed by agreement of both state parties, excluding private investors, so one could expect adjudicators more akin to those "neutrally" appointed on WTO panels or the WTO Appellate Body), but through more detailed and limited substantive

[9] Gabrielle Marceau et al., *Judging from Venus: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 288, 288-289 (2016).

[10] Robert Howse, *Venus, Mars, and Brussels: Legitimacy and Dispute Settlement Culture in Investment Law and WTO Law: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 309, 314 (2016).

[11] *Id.* at 310.

[12] Rogers, *supra* note 2, at 299.

provisions (such as fair and equitable treatment, specified and narrowed down in CETA, Article 8.10), an increased role for state-run interpretative/implementing committees, carve-outs, exceptions, and denial of benefits clauses, open and transparent ISDS proceedings, etc. The EU Investment Court System would, however, go against my proposed balance between voice and exit, legalization/law and diplomacy/politics, if it were set up as a fully-fledged international court, whose legitimacy rests solely on the individual expertise and experience of adjudicators, delinked as much as possible from the preferences of states, investors, and the broader public. The days that, as Sacerdoti puts it, "within ISDS respect for ad hoc awards is grounded in the persuasiveness of the reasoning underpinning the award"[13] are over. For it to survive, ISDS needs legitimacy from sources other than the individual expertise and experience—as solid and persuasive as these may be—of a small group of elite lawyers.

[13] Sacerdoti, *supra* note 4, at 287.