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Does the WTO Rely on Investment Arbitration Awards as Persuasive Authority?

Roger Alford (General Editor) (Notre Dame Law School) · Thursday, September 27th, 2012

So we all know that investment arbitration tribunals have relied on WTO precedent for persuasive authority as to the meaning of various terms in bilateral investment treaties. (Think the emergency exception in the Argentina arbitrations and references to WTO Article XXI). But does the reverse also happen? Do WTO panels or the WTO Appellate Body reference investment arbitration awards as persuasive authority?

The short answer is almost never. The only significant example was four years ago when the WTO Appellate Body addressed the question of what to do about past precedent. A crisis was brewing within the WTO because a WTO panel had openly disagreed with an earlier Appellate Body ruling on the same question. What's the point of Appellate Body rulings to promote uniformity if subsequent panels openly ignore them? Here's what the WTO Appellate Body in United States—Final Antidumping Measures on Stainless Steel From Mexico had to say:

> Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. [¶ 160]

It then dropped a footnote and quoted, inter alia, the ICSID case of Saipem S.p.A. v. The People Republic of Bangladesh, for the proposition that:

> "[t]he Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law." [Saipem Award at ¶ 67]

The Appellate Body then issued a much-quoted smack down of the WTO panel for defying past precedent:

> "We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above. Nevertheless, we consider that the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue. [¶ 162]"

Trade scholars have wrestled with the meaning of this decision. It seemed to suggest that Appellate Body jurisprudence has a degree of precedential value beyond simply persuasive authority. Perhaps it does not rise to the level of *stare decisis*, but it is close.

What trade scholars have not done is second-guessed the authority cited by the WTO to support this proposition. Is it just me, or does it seem odd that the WTO Appellate Body would cite an ICSID award for a proposition about the value of past precedent? Its reliance on *Saipem* is hardly representative of the true state of affairs in investment arbitration, which is famous for its struggles with conflicting awards. Indeed, it is a frequent lament that investment arbitration does not have a method similar to the WTO to ensure greater uniformity.

That's it. One major reference to one ICSID Award to support a proposition that is of doubtful validity in investment arbitration. To be sure, WTO jurisprudence has the occasional reference to the practice of international tribunals, including ICSID, the PCA, the Iran-United States Claims Tribunal, and various mixed claims commissions. (See, for example, United States- Antidumping Act of 1916 at paragraph 54.) But in such cases they are not citing investment arbitration awards to support their propositions. And these passing references pale in comparison to the frequency with which the WTO cites the International Court of Justice.

Given the growing importance of investment arbitration, it is surprising that the WTO does not rely on arbitration precedent as persuasive authority in appropriate circumstances. What does it say about investment arbitration awards that other international tribunals do not give them greater persuasive authority?

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