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Review

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(NON)FUNCTIONING OF THE WTO APPELLATE BODY

Abstract: *This paper, by using the structural-functional, comparative, and cause and effect analyses, indicating the facticity in the degree in which it is necessary, explores the status of the system of dispute settlement within the World Trade Organization (WTO), paying particular attention to the blockade in which the Appellate Body has found itself as a part of that system. The function of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) is explored in order to understand whether the Arrangement desires to take over the role of the Appellate Body "through the back door", with certain refinements. A review is given of the viewpoint of the European Union in terms of the status of the dispute settlement system within the WTO and it is indicated that 'new generation' international free trade agreements that the European organisation concludes with third countries are being more and more affirmed after the failed negotiations from Doha. At the end of the analysis, the authors provide their concluding remarks.*

Keywords: *WTO, European Union, Appellate Body, MPIA, free trade*

JEL classification: *K33, K41*

INTRODUCTION

The first decades of the 20th century were characterised by countries entering trade arrangements in order to achieve organisation directed towards facilitating trade relations by regulating them at the multilateral level, primarily by adopting the General Agreement on Tariffs and Trade in 1947 (GATT), which truly inaugurated the system of internationally recognised trade rules. They are international rules that provide equal conditions for all contracting parties, primarily through reduced tariffs and removal of other barriers and elimination of discriminatory treatment in international trade. International trade developed and with time, next to the exchange of goods, it also began to cover the exchange of services so the GATT was overcome and transformed into the WTO, established after the Uruguay Round of trade negotiations in 1995, with trade negotiations previously integrated into its legal framework, such as the GATT 1994 itself, which spawned from the revision of GATT 1947, then the Agreement on Agriculture, Agreement on Textiles and Clothing, and other general agreements, among which General Agreement on Trade in Services (GATS), and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) were crucial. Following the negotiations on trade facilitation launched within the Doha Development Agenda and Ministerial Conference held in Bali in 2013, and more than two decades after the establishment of the WTO, in February 2017, after the ratification by Chad, Jordan, Oman, and Rwanda, thus reaching the determined threshold of 110 members (two-thirds of contracting

parties), the Trade Facilitation Agreement (TFA) entered into force, which is considered as the most important trade agreement of this world organisation. It is expected that the TFA will significantly simplify and modernize customs procedures at the global level and thus lead to increased inclusion of developing countries in global value chains. TFA was followed by the Ministerial Conference held in 2022 in Geneva, where the agreement on fisheries subsidies and amendments of TRIPS in terms of COVID-19 vaccines was reached, but also the need for a basic reform of the WTO in areas such as trade and health, energy, e-commerce, investments and state aid was indicated. As the basic element of the trade system contributing within the WTO to the stability of the economy at the global level, primarily ensuring the reduction of applying unilateral protective measures that countries had resorted to and guaranteeing the equality between stronger and weaker contracting parties, the Dispute Settlement Body (DSB) was first inaugurated and then consolidated.

Below, within separate headings, by using the structural-functional, comparative, and cause and effect analyses, the way of settling disputes in the WTO is explored, where particular attention is paid to the issue of the current status of the Appellate Body found in 1995 under Article 17 of the Dispute Settlement Understanding (DSU), and the function of the alternative mechanism i.e. the Multi-Party Interim Appeal Arbitration Arrangement (MPIA).

1. WTO DISPUTE SETTLEMENT BODY

A multilateral dispute settlement system functions within the WTO because the contracting parties have committed to refrain from taking unilateral measures and respect agreed procedures in case of disputes if a contracting party adopts a trade policy measure or takes actions which one or more contracting parties deem as a violation of the agreement or failure to meet obligations taken within the WTO, where a certain group of countries may declare interest in the dispute and enjoy certain rights.

The dispute settlement procedure was also foreseen by the anthological GATT, but back then it was not characterised by precise deadlines, it was easier to block decisions, procedures were usually long without reached solutions, and rulings were adopted by consensus. It was followed by the introduction of a more structured procedure as a consequence of the agreement reached at the Uruguay Round, in the sense that it determined more precisely the content of the stages of the procedure and introduced greater discipline in terms of deadlines for dispute settlement (it should not take longer than one year for the first ruling, i.e. no longer than 15 months in case of appeals, and in case of perishable goods it is accelerated as much as possible), still with flexible deadlines set in different stages of the procedure and favouring urgent settlement as the most efficient outcome of every dispute. The Uruguay Round made it impossible for the country losing a dispute to block the adoption of a ruling as they are now automatically adopted unless there is a consensus to reject it. However, both then and now, although much of the procedure resembles a court or tribunal, it is preferable to find a solution under an agreement, where the first stage of the procedure is consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still possible.

Since 1995, according to the data from the WTO's official website, 616 disputes have been submitted to this organisation for resolution and 350 rulings have been made, so it is considered that the WTO has one of the most active international mechanisms for settling disputes in the world that covers all multilateral trade agreements and whose basis are the provisions of Articles XXII and XXIII of the GATT 1994 supplemented by subsequently formulated rules and procedures agreed between the contracting parties.

The first stage of the dispute settlement procedure includes one contracting party submitting to the other a request for consultations on a specific subject that needs to start within 30 days from the date of sending the request, and last 60 days in total because the countries in the dispute must talk

to see if they can settle a mutual disagreement, and if that is not possible, they can ask the Director-General of the WTO to mediate or try to help in some other way. Essentially, if a dispute is not solved through consultation, the second stage of the procedure is initiated by a contracting party (the complaining country) addressing the DSB (Dispute Settlement Body) to create a panel, usually consisting of three independent experts, to try and solve the problem. The contracting parties, as noted, can at any time voluntarily use other methods of dispute settlement, including mediation, conciliation and good offices. The second stage lasts up to 45 days for a panel to be appointed, plus six months for the panel to make a conclusion. The responding party can block the creation of a panel once, but when the DSB meets the second time it can no longer be blocked unless a consensus is reached on the matter. Essentially, panels act as a court, the only difference being that panellists are usually chosen after consulting the parties to the dispute. Only if two parties cannot reach an agreement, they are appointed by the Director-General of the WTO. They consist of three (possibly five) experts from different countries that examine evidence and decide who is right and who is wrong, and they cannot be instructed by any government. Panel reports are passed to the DSB which can refuse a report only by a consensus. The DSB supervises the application of rulings and recommendations and it is authorised to determine reprisals when a state does not act in accordance with a ruling.

Therefore, the DSB creates a panel of experts that considers the case, and the DSB accepts or refuses the findings of the panel. Officially speaking, the panel helps the DSB to make rulings or recommendations, but as a panel report can be refused only by consensus within the DSB, its conclusions are hard to overturn. The findings of panels must be based on agreements whose violation is implicated. The final report of a panel should be delivered to the parties in the dispute within six months, and in case of urgency, including those concerning perishable goods, the final deadline is shortened to three months. The DSB prescribes in detail how panels work. The first stage is implemented before the first hearing implying that each side in the dispute presents its case in writing to the panel. It is followed by the first hearing meaning that the complaining country, the responding country, and those countries that have announced they have an interest in the dispute, make their case at the panel's first hearing. It is then followed by the second meeting of the panel where the parties in the dispute refute the evidence and submit written rebuttals and present oral arguments. Also, when one party initiates scientific or other technical issues, the panel may consult experts or establish an expert review group to prepare an expert report. In the stage in which the first draft of the report is prepared, the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment, but this report does not include findings and conclusions. In the stage in which an interim report is drafted, the panel submits it to the parties, including its findings and conclusions, giving them one week to ask for a review, but the review cannot last longer than two weeks, and in that time the panel may have additional meetings with the parties. The final report is submitted to the parties in the dispute and three weeks later, it is distributed to all the members of the WTO. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends the measure to conform to WTO rules and may suggest how it could be done. The report becomes a DBS ruling or recommendation within 60 days unless rejected by a consensus. Both sides can appeal the report, and in some cases, they do.

2. APPELLATE BODY

The Appellate Body, as an integral part of the international system of economic management (Yang 2021, 104), has a seat in Geneva and it is a permanent body where each appeal is considered by three members of the seven-member appeal body created by the DBS and broadly representing a whole range of WTO members. The members of the Appellate Body have a mandate of four years and can be re-appointed once, and they are individuals with recognised authority, with

demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally, and are not affiliated with any government. They cannot participate in disputes that would cause a direct or indirect conflict of interest and must be available whenever needed. Decisions of the Appellate Body can uphold, modify or reverse legal findings and conclusions of the panel (Zwolankiewicz 2022, 33). The appeal procedure should not last longer than 60 days, with an absolute maximum of 90 days. When the Body considers that it cannot provide its report within 60 days, it informs the DSB in writing, whereby it is obliged to note the reasons for it as well as the reasons for why it will not be possible to do so even after the maximum of 90 days. An appeal refers to issues covered in the panel report and legal interpretations developed by the panel. The procedure before the Appellate Body happens in consultation with the Chairman of the DSB and Director-General. Proceedings of the Appellate Body are confidential, and reports of the Body are drafted without the presence of the parties to the dispute and in the light of obtained information and given statements. Opinions expressed in the Appellate Body report by its individual members are anonymous. An Appellate Body report is adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by a consensus not to adopt it within 30 days following its circulation to the Members of the WTO. When it comes to communication with the panel or Appellate Body, there is no *ex parte* communication concerning matters under consideration by those bodies. Written submissions to the panel or the Appellate Body are treated as confidential but are made available to the parties in the dispute.

The mandate of the last configuration of the Appellate Body expired on 30 November 2020, and it has been practically paralysed because the United States of America (US) refused to appoint a member of the body (Bronckers 2020, 221-244), thus making the consideration of appeals against rulings of the WTO panels impossible, and marginalising the WTO as a forum and degrading its dispute settlement system (Vidigal 2023, 1-12). The US has primarily decided not to re-appoint its previous representative in the Appellate Body but proposed a new one, then opposed to the re-appointment of the Korean member and insisted on replacing them, and finally refused to accept the re-appointment of any member of the Appellate Body whose mandate had terminated. Such actions are based on claims that the body is non-operational and as the key reason it is stated that within the DSB there is no balance between using the "litigation system" and using settlement as an option, even though consultations foreseen within the DSB should primarily act *in favorem* of settlements. The dispute settlement system itself, according to the US, should strengthen and facilitate the functioning of other aspects of the WTO, the negotiation function, as well as the monitoring function in the WTO, instead of "stifling" them. According to this argument, it is less likely that the governments will negotiate seriously if they believe they can achieve their objectives through a dispute resulting in a favourable interpretation of the existing WTO provisions. However, not all failed negotiations can be blamed on this argument because it is a global organisation with 164 members, so it has a wide spectrum of different points of view, which makes reaching a consensus more difficult.

3. MULTI-PARTY INTERIM APPEAL ARBITRATION ARRANGEMENT

As a response to the problem of the non-functioning of the Appellate Body, a group of WTO members has developed the Multi-Party Interim Appeal Arbitration Arrangement as a temporary mechanism for preserving the appeal function within the WTO for disputes between the participants to the Arrangement. This interim mechanism, consisting of ten arbitrators, has its starting point in the draft text distributed by the European Union itself in May 2019, when it became clear that it was not very likely that the members of the global organisation would prevent the blockade of the Appellate Body. This interim mechanism that is based on Article 24 of the Dispute Settlement Understanding (DSU) enables the members of the global organisation to agree to settle disputes by arbitration through a flexible procedure that in the past was used very rarely to create

conditions that would enable the arbitration panel to perform the function similar to the one performed by the Appellate Body. So, the interim mechanism enables the appeal function within the world organisation, though in a modified form, until the Appellate Body starts functioning again. The European Union has taken the position that it has no intention of affirming the replacement of the Appellate Body and that appeals should be submitted to it as soon as it becomes fully operational. A significant number of WTO members participate in the interim mechanism: Australia, Benin, Brazil, Montenegro, Canada, Chile, Colombia, Costa Rica, European Union, Guatemala, Hong Kong, China, Iceland, Macao, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, Peru and Uruguay, and since 2020 Ecuador and Nicaragua. Japan joined the MPIA on March 10, 2023, and currently 26 countries participate in this mechanism. However, the majority of the WTO members (including the US and India) have not yet agreed to participate.

In July 2022 the WTO issued the arbitration award under Article 25 of the DSU on the appeal from the panel report in the case Turkey-Pharmaceuticals, and it was the first time that such an arbitration procedure was used. Since Turkey has not acceded to the MPIA, it is an *ad hoc* agreement between the European Union and Turkey, and the procedures of that agreement are very similar to those of the MPIA. The significance of this appeal arbitration procedures therefore goes far beyond the specific case, which is important as it shows that the alternative mechanism for dispute settlement can be used successfully for meeting the function of appellate review, and according to some authors (Ya Quin 2022, 415-430), this innovative use of arbitration from Article 25 can be proposed as a long-term solution in the reform of the WTO for dispute settlement. In December of the same year, the arbitrators ruled in favour of the European Union in the dispute that this organization led against Columbia due to the fact that this country introduced anti-damping tariffs on frozen potatoes from Belgium, Germany and Holland. It was the first case of filing an appeal under the MPIA. For sure, it is too early to predict the course of development of the appellate arbitration arrangement only on the basis of its first use, but certainly the early practices will largely determine the working matrix in accordance with which it will act.

4. VIEW FROM BRUSSELS

The European Union finds a close associate for their regulatory and material enrichment in the trade policy, which this international organisation has been continuously developing for the past seven decades. The Union's trade policy has been pretty integrated at the international level and it has been deeply rooted into its every pore as the most prominent and important one (Dragišić 2022, 103-126). The European Union uses soft law to present different proposals for the WTO's reform, joining the viewpoints of a part of the doctrine believing that the US, along with recognising and indicating the difficulties in the functioning of the dispute settlement system within the WTO, should also step forward with suggestions for resolving the current crisis, i.e. proposals for reforming the WTO. In that sense the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 February 2021 is annexed by the Proposal for Reforming the WTO: Towards a sustainable and effective multilateral trading system, in which it is stated that since the foundation of the multilateral trading system, world trade has expanded 300-fold, and today makes up more than 60% of global GDP, supporting jobs, growth and investment around the world. The European organisation points out in its documents that the WTO has also contributed to global sustainable development and that the economic openness that the WTO guarantees has helped integrate many developing countries into the world economy, lifting hundreds of millions of people out of poverty and decreasing inequalities between countries. However, according to the Commission's findings, the current crisis affects all three functions of the WTO: negotiations have failed to modernise the rules, the dispute settlement system has reverted to the days of the GATT, and the monitoring of

trade policies is ineffective. Nevertheless, on a general level, when it comes to the Appellate Body, one gets the impression that the European organization does not support the criticisms of the USA and that it even expresses a kind of indignation about them.

On one hand, the European organisation believes in and supports multilateralism (De Ville 2014, 269), while on the other hand, it cannot be ignored that the slowness of negotiations that took place in Doha under the auspices of the WTO created a space for the European Union to redirect its international trade strategy to bilateral free trade agreements (Svoboda 2019, 189-214), even though certain authors (Athukorala 2020, 13-20) believe that the failure and slowness in negotiations under the auspices of the WTO do not make a solid argument for prioritising free trade agreements concluded by the European organisation at the bilateral level, because in the past three decades, they have been guided mostly by non-economic factors. However, institutional changes that occurred under the current application of the Lisbon Treaty have additionally encouraged the initiation of bilateral agreements of different type and domination, representing "the second best solution", after a quite controversial affirmation of multilateral activities in the international trade sphere (Breuss 2022, 653-674). We are talking about agreements that go beyond the simplified removal of import tariffs and other trade barriers and include measures that are not related solely to trade. It is more than clear that the Union's inclusion in different free trade agreements to achieve a clear economic relationship embodied in a real increase of market access is the general link with the international trade actions, where the Union, at least formally, does not give up on the possibility of reaching a multilateral agreement – in the WTO. Therefore, a step forward is made in the international trade law under which free trade agreements are considered a means for strengthening the implementation of international trade rules. Namely, the Commission's position is that bilateral agreements serve to support the return of the WTO to the centre of global trade.

CONCLUSION

Today, the WTO faces the biggest crisis since its establishment, which, *inter alia*, is induced by certain considerations that the dispute settlement system applied in this global organisation is not efficient enough and that it relies too much on the litigation system instead of focusing on settlement as the best option. However, instead of finding the best possible solution for achieving more efficient results in dispute settlement, the work of the Appellate Body has been blocked completely, which caused some of the members of the WTO to reach for an alternative foreseen by the WTO regulations, i.e. to agree to have Multi-Party Interim Appeal Arbitration Arrangement applied to their disputes. In the doctrine and practice, opinions are divided on whether the temporary mechanism is truly temporary or it is a basis for building certain solutions that will completely replace the solutions according to which the Appellate Body functions. In any case, the way things are, the Interim Appeal Arbitration Arrangement serves to preserve the appellate function within the WTO for disputes between the participants of the Arrangement.

At the international level, the Calvinist approach towards bilateral free trade agreements concluded by the European Union with third countries is increasingly being affirmed, in the sense that the European organisation favours them. It is logical to pose the question of justifying such affirmation, in the situation in which the multilateral trade system exists and acts under the auspices of the WTO, however, in comparison to multilateral trade negotiations, bilateral negotiations are much easier to conduct, and agreements arising from them can have the effect of expanding free trade beyond what can be currently agreed in the multilateral trade system. It can all lead to the conclusion that, regardless of the soft law instruments used to support the continuation of the functioning of the WTO in its full capacity and call for its reform, institutions of the European Union primarily provide such support only declaratively. In the scale of all the needs for the WTO's reform to which both practice and doctrine indicate, it seems that the most important is the one

directed towards the most urgent reform of the dispute settlement system within this global organisation.

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