FEATURES OF WTO DISPUTE SETTLEMENT. THE STANDING OF THE EU

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***Abstract**: The WTO has an innovative system of dispute settlement, with the following features: sui-generis, integrated, resolving the disputes according to the WTO agreements, excluding unilateral solutions, interstate system. These features are detailed in the present article. Another level of analysis concerns the standing of the EU in the WTO, in general, and in the Geneva proceedings for dispute settlement, in particular. Generated by the quality of the European Communities statute as an original member of the Organisation, the EU has become one of the main users of the WTO dispute settlement system. One of the main challenges of the WTO dispute settlement mechanism is the implementation of decisions. In view of the cases assessed, while the execution record of the EU is a quite satisfactory one, it is apparent that implementation of decisions in more intricate cases creates difficulties at the Union level.*

***Keywords:** World Trade Organisation (WTO), European Union, Lisbon Treaty, competencies*

Established in 1995, the World Trade Organisation (WTO) has an enhanced system of dispute settlement as compared to the previous GATT-1947. It is based on the "Memorandum of Understanding Governing Dispute Settlement" (hereunder, MoU), which is the 2nd Annex to the GATT 1994.

I. Characteristics of the settlement system

The new system of dispute settlement displays the following main features: sui-generis, integrated, resolving the disputes according to the WTO agreements, excluding unilateral solutions, interstate system.

a) A sui-generis system

According to reputed authors, this feature stands as proof of the fact that "(the system) is about procedures found at the midway between diplomatic negotiation and jurisdictional settlement"[1].

Thus, at each procedural stage, the Dispute Settlement Body (DSB), which is composed by the WTO Member States, has a say. At the DSB level, it is rather a procedure of a diplomatic nature.

Still, a tendency of enhancement of the WTO jurisdictional character is noticeable, in view of the creation of the permanent Appellate Body and of the enforcement of constrictive proceedings to implement the opinions of the panels or the organ of appeal[2].

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[1] Thiebaut Flory, *L'Organisation mondiale du commerce,* Bruylant, Bruxelles, 1999, p. 21

[2] *Ibidem*

b) A legally integrated system

The post-War proliferation of different international jurisdictional mechanisms entailed the so-called forum-shopping phenomenon, consisting in the states' choice of selecting the most favourable jurisdiction to settle a particular dispute[3].

In connection to the settlement of interstate trade disputes, the forum-shopping phenomenon meant that the applicant state had a choice between different dispute settlement mechanisms, regulated either by the GATT 1947 or the various codes adopted during the Tokyo Round of GATT. Differentiating from the system in place before the Uruguay Round, the present system is becoming an integrated one, as it applies to all the understandings agreed in the margins of the WTO Agreement, listed in Annex 1 to the MoU[4].

From a procedural standpoint, WTO dispute settlement system is a unified one, as it stands under the aegis of a single Dispute Settlement Body and regulated by a distinct set of rules, contained in the MoU, as stated in the very first article of this legal instrument. It has also been expressed another view, which stems from the fact that the WTO agreements in Annex 2 to the MoU contain special rules which, in case of incompatibility, would prevail to the general rules of the Memorandum. Still, according to the Appellate Body, the procedural norms of the MoU and of the special agreements should be read in a systemic way, as they are complementary and not mutually exclusive[5]. An author thinks that those norms cannot be substituted to the whole MoU, opinion which involves the unity of the system[6].

c) *A system of settling disputes according to the agreements*

The main aim of the WTO settlement system is the resolution of the dispute using the provisions of the relevant agreements[7].

According to art. 3 para. 2 of the MoU, the recommendations and the decisions of the DSB can neither enhance, nor lower the rights and obligations in the relevant agreements. Therefore, according to the MoU, the conclusions of the panels or of the Appellate Body, subsequently adopted by the DSB, cannot affect the norms contained in the agreements.

The influence which the Common Law has over most of the international jurisdictional mechanisms entailed the questioning the status the adopted panel reports of GATT-1947 have within the WTO case-law. In the case Japan-Alcoholic Beverages II, the Appellate Body indicated that the GATT-1947 reports, even when adopted, cannot be ascribed the rank of a decision. This explanation of the Appellate Body reflected the reticence to the idea that the judicial precedent can be accepted, thus stiffing the WTO law. However, the Appellate Body also concluded that the adopted reports create legitimate expectations between the WTO members, therefore being relevant to any dispute, while stressing that those reports are mandatory only between the parties to a certain dispute.

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[3] Bogdan Aurescu, *Sistemul jurisdicţiilor internaţionale*, All Beck, 2005, p. 364

[4] Eric Canal-Forgues, *Le reglement des differends à l'OMC*, 2nd Ed, Bruylant, 2004, p. 12

[5] Guatemala-Anti-Dumping Investigation regarding Portland Cement from Mexico, report of the Appeal Organ of 25 November 1998, para 65

[6] Eric Canal-Forgues (above), p. 13

[7] Eric Canal-Forgues (above), p. 17

In the case *US-Wool Shirts and Blouses*[8], the Appellate Body indicated that panels and even the Appellate Body itself are not allowed to regulate outside the scope of a specific dispute, even under the cover of clarification the existing provisions of the WTO Agreement. The panel in *India-Patents*[9] was in favour of the interpretation that previous reports and even the decisions of the Appellate Body are not precedents. Notwithstanding this, the panel indicated it would take into consideration the logic of the panels or of the Appellate Body as reflected in earlier decisions.

Therefore, one might infer that the status of panel or of the Appellate Body adopted reports is not *stare decisis* in its Common Law understanding. However, the reports adopted under GATT-1947 or GATT-1994 generate "legitimate expectations" to the members of the WTO, at least regarding the conduct to follow in their mutual relations. Anyway, the conformity of the panel or Appellate Body reports with the relevant WTO agreements is an obligation which stems from the MoU and is confirmed by the above-mentioned jurisprudential interpretations[10].

d) *The system prohibits using unilateral solutions between the Members*

Article 23 of the MoU entails that, in their mutual relations, the WTO Members cannot impose unilateral trade sanctions against another Member with a view to resolve a dispute linked to the Marrakech Agreements and that they should observe the settlement mechanism deriving from those agreements. Therefore, the WTO settlement represents a system which excludes any unilateral action[11]. In this regard, the panel in the *US-Section 301*[12] dispute had the opportunity to state the incompatibility between the WTO norms and the US Trade Act of 1974, which afforded the US special representatives the power to apriori assume the infringement by another WTO member of its obligations falling under the Organisation's remit.

e) *An interstate system*

The parties to a WTO dispute exclusively are the members of the Organisation, as confirmed by the Appellate Body in *US-Shrimp*[13], where it is emphasized that only WTO members can be allowed access to the dispute settlement procedures.

II. EU involvement in the settlement system

a) The framework for involvement

EU takes part on individual basis in the activities in the framework of the Geneva Organisation, as Art. XI of the WTO Agreement states that the original members of this institution are the contracting parties to GATT 1947 and the European Communities.

Therefore, the European Communities have had the same rights and obligations as any member state of the Organisation. This implies the direct involvement in the settlement procedures of the international

[8] US / Measures Affecting Imports of Wooven Shirts and Blouses from India, report of the Appellate Body, adopted at 23 May 1997

[9] India-patent Protection for pharmaceutical and Agricultural chemical products, complaint of the EC, panel report adopted on 22 September 1998

[10] For more details on the character of source of law of the reports, see David Palmenter and Petros Mavroitis, Dispute Settlement in the WTO –practice and procedure-, Cambridge UP, 2004, pp. 51-65

[11] Thiebaut Flory, quoted above, p. 22

[12] US – Sections 301-310 of the Trade Act of 1974, report adopted on 27 January 2001

[13] US-Import Prohibition on certain Shrimp and Shrimp Products, report adopted on 6 November 1998

trade disputes.

After the entry into force of the Lisbon Treaty, the EU has acquired legal personality, becoming a party to the WTO agreements as a successor to the Community/Communities.

A peculiarity is the fact that both the Union and the 27 are members of Organisation in Geneva, and thus the rights and the obligations brought about by the system of the WTO agreements are going to be applied on equal basis. Therefore, irrespective of the division of competencies within the EU, both the Union and the member states are accountable for the implementation of the organisation's legal norms[14]. It is to be stressed that the EU representatives present the position of the EU and the 27 members during most of the WTO meetings.

As for the representation of the EU, it is the responsibility of the Commission, according to the *Trade Barriers Regulation*. The latter represents the legal basis for the community action in Geneva. It should be stressed that,at the end of 2006, the European Commission has opened a public consultation regarding the possible alteration of the EU trade defence tools within the new global economic frame, personified by increasing interdependence and externalisation.

As the main global exporter and the second importer, EU is one of the WTO pillars. Consequently, it also represents one of the main users of the dispute settlement system of the Organisation. At the level of the first half of 2010, the statistics regarding the EU participation to the WTO disputes was the following:

- As an applicant: 81 cases;
- As defendant: 67 cases;
- As third party: 88 cases[15].

The high number of cases where EU is an applicant triggers the remark that "the Community has chosen to actively use of the dispute settlement mechanism, which has become a feature of its trade policy"[16]. The employment by the EU of the WTO settlement mechanism has a strategic character and reflects its genuine will to exploit the new Geneva legal system in its own interest[17].

The cases having EU as a party cover almost in integrity the fields of the WTO dispute settlement mechanism. Inter alia, EU started a number of disputes in areas of shared competence (e.g. investments, services, intellectual property).

As a matter of example, in the anti-dumping area only, the EU/EC has been a party to about 30 disputes, some of them being well-known, as there are the cases of *Anti-dumping Act of 1916, "Zeroing"* (EU was an applicant) or *EC-Bed Linen* (EU was a defendant). The panel decision in *Anti-dumping Act of 1916*[18], as subsequently confirmed by the Appeal Organ, a case relating to the disagreement to the US imposition of civil and criminal sanctions in cases of dumping, has the value of a precedent. The WTO organs considered that the states' anti-dumping measures should be assessed according to art. 18 of the Anti-Dumping Agreement, which does not allow the imposition of special measures, like those contested. Following the WTO

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[14] Peter Van der Bosche, *The Law and Policy of the WTO,* Cambridge UP, 2005, p. 106

[15] Data on the WTO website (May 2010), http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm

[16] E. Berthelot, *La Communaute Europeenne et le reglement des conflits au sein de l'OMC*, Ed. Apogee, PUF, Paris, 2001, p. 75

[17] *Ibidem*, p. 79

[18] Anti-dumping Act of 1916, WTO panel decision (confirmed by the Appeal Organ) of 26 september 2000

criticism, the US legislative branch decided to amend the blameworthy Anti-dumping Act's provisions.

Recalling that the internal rules for imposition, by the EU, of anti-dumping and safeguard measures currently are found in a process of revision, it is noticeable that, until now, the different EU approaches related to the dumping area was challenged at the WTO by states as India, Japan, Turkey, Bangladesh, Guatemala, Norway. In turn, between 1995 and 2004, with 194 imposed relevant measures, the EC was the third largest user of the WTO anti-dumping rules (after India and the US[19].

b) *The Implementation by the EU of WTO decisions in the area of dispute settlement*

The execution of the decisions for resolving WTO disputes is regulated in an intricate way, or, using S. Princen's words, it is "an interplay between law and politics", the EU case being no exception. Moreover, according to some writers, the WTO countermeasures system fails both regarding the effectiveness and impartiality grounds (the Ecuadorian example of a country lacking serious leverage to ensure observance, in the Bananas dispute)[20].

Taking the Bananas III case as an example, one notices the execution process was a hard one. Firstly, the parties were unable to agree on an execution modality. Subsequently, the EC asked for a 15 months period to comply with the decision, after invoking internal legal problems and the need to coordinate actions with the parties to the Lomé Convention. This approach, which was accepted at the WTO level, represents a signal of the difficulties an entity as EU might incur when applying a decision having different implications vis-a-vis its constituents. Following the end of the mentioned 15 months period (on January 1st, 1999), the US asked for the WTO agreement to suspend 520 millions US Dollars as concessions due according to GATT 1994. A new, more flexible, regime for bananas importation has been presented by the EC (Regulation nr. 1637/98), but even this one was to be assessed by the organs created according to article 21 paras. 4 and 5 of the MoU as insufficient to the full implementation of the initial decision[21].

The sequencing problem is the conflict between articles 21 para. 5 and 22 of the Memorandum of Understanding, issue which is described in the literature rather as a lacuna, occurred at this stage. Faced with the US demand to suspend concessions, coming immediately after the expiry of the mentioned deadline, the EU defended using as arguments the gravity of the consequences entailed by the US demarche to the whole system of settling disputes, which is construed in the assumption of avoidance of unilateral solutions, while the US accused EU for postponing observance *ad infinitum*[22].

The final settlement only became possible after the adoption, in 2001, of Regulation nr. 216, providing for a two-stage approach (a temporary tariff until 2006 at the latest and also a fixed-rate tariff), solution which seemed to be acceptable for all the stakeholders. It is to be mentioned that the EC used all procedural measures at hand to postpone the full implementation of the WTO report. The

[19] Van der Bossche, 2005, p. 515

[20] P. Mavroidis, Remedies in the WTO Legal System: Between a Rock and a Hard Place, *European Journal of International Law*, vol 11, nr. 4, 2000, p. 811

[21] EC- Bananas III, recourse to arbitration by the EC, arbitral decision of 9 April 1999

[22] A. Tancredi, EC Practice in the WTO: How Wide is the Scope of Manouevre?, *European Journal of International Law*, vol. 15, nr. 5, 2004, pp. 954-955 and the footnotes no. 90-93

efficiency of the reports' execution system became questionable, as no more than the presence of the US as a party lead to a more flexible attitude from the EU, following the threat of countermeasures. One can hardly believe that the Ecuador or other producers of small dimensions could have threatened to impose similar countermeasures without negatively affecting their own trade with the EU.

The execution proved even more difficult in the Hormones case, when the Dispute Settlement Body asked the EC to bring the relevant measures in conformity with the Community's commitments under the SPS (Sanitary and Phitosanitary Measures) Agreement. In this case again, the EU was afforded a 15 months postponement of the execution deadline, which expired in May 1999.

Even though the withdrawal of such prohibitions is the preferred measure according to a subsequent WTO report[23], the internal support in the EU for prohibiting the importation of hormone-treated meat continued to increase, thus dragging the European Commission in a conundrum. The execution of the WTO report was supposed to be initiated within a thorny context, in the late 90's, when the concerns for food safety were rising, in particular as a consequence of the BSE crisis. Moreover, European farmers' unions (COPA/COGECA) perceived as an inequity allowing the importation of hormone beef while keeping the prohibitions related to the internal production. There also were counter-opinions within the EU, in particular within importers, situation which subsequently would trigger the Biret case before the ECJ.

Confronted with the European Commission's lack of action, Canada and the US demanded and obtained, in 1999, an authorisation for over 100 millions US dollars equivalent countermeasures, affecting, in particular, the Danish pork meat and the exquisite goods (e.g. French cheese) producers [24].

Even though components of the European consumers industry were affected, it was only in 2003 when Directive nr. 2003/74/EC was adopted, amending the preceding Council Directive nr. 96/22/EC, on the prohibition of hormonal substances. According to European officials, this new Directive observed WTO standards, as it was founded on new scientific evidence related to the effects hormones entail to the human health. But even the new piece of legislation might fall outside the WTO's norms, the US expressing, on the occasion of a meeting of the Dispute Settlement Body, its "doubts" on the compatibility with such norms[25].

The internal play of interests forced the EU, in the two before-mentioned cases, to prefer costly countermeasures to rapid implementation of WTO reports. An expert considers that the EU's margin of manoeuvre with a view to avoiding full implementation of WTO reports is even more extended. In particular, the European officials prefer to continue the consultations with representatives of affected states even after the beginning of judicial proceedings to settle WTO disputes, in order to make possible the negotiation of less costly options as compared to an unfavourable report [26].

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[23] WT/DS26/15 şi WT/DS48/13, paragr. 39

[24] Details regarding the implementation of the Hormones report to be found in S. Princen, EC Compliance with WTO Law. The Interplay of Law and Politics, *European Journal of International Law*, vol. 15, nr. 3, 2004, pp. 568-570

[25] V. A. Alemanno, *Private Parties and the WTO Dispute Settlement System*, Cornell Law School LLM Series, 2004, p.13

[26] Tancredi, p. 946 and p. 948

According to the same author, there are four layers of solutions reachable by the parties to an international trade dispute: a) agreements *infra ordinem*, expressly allowed by the MoU, if they stem as the result of negotiations during the preliminary phase or even during the panel phase; b) agreements *infra ordinem*, also authorized by the MoU in the article 22 (paras. 2 and 8), after the end of the first phase; c) agreements *extra ordinem*, falling outside the strict provisions of the MoU, but which aim *praeter legem* to filling the gaps in the treaty text; d) agreements *extra ordinem*, which are contrary to the WTO norms[27].

III. Concluding remarks

The WTO dispute settlement mechanism is an innovatory system, which could be described as an integrated, interstate, exclusive of unilateral solutions and founded on the Organisation's agreements one.

Even if it is not a state, the EU takes part in WTO activities on its own behalf, together with or for the 27 EU member states, which are also members of the Geneva Organisation. In the 1994 Marrakech agreements, EU is portrayed as an original member of the Organisation.

The aforementioned imply that the EU may be a party to the disputes pertaining to or resolved within the Organisation. Moreover, it represents one of the main actors of the dispute settlement system in the WTO. As example of the EU activism is the anti-dumping area, where EU adopted an important number of countervailing measures and has been involved in a series of disputes.

Another level is represented by the execution of decisions taken as an effect of dispute settlement. While "it has almost become a commonplace that the EC's reputation as a subject of the WTO legal system is far from irreproachable", the EU implementation record, "though not exemplary, does not add up to a *generally* non-complying approach"[28]. More difficult it seems to be the implementation in intricate cases, as Hormones, where the law-policy WTO execution compound implies even the consideration of undesired options, like accepting countermeasures and so consciously distorting the WTO mechanism.

[27] *Ibidem*, p. 948
[28] *Ibidem*, pp. 934 and 936

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