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ПРО ДЕЯКІ АСПЕКТИ ЮРИСПРУДЕНЦІЇ СОТ ТА МЕХАНІЗМУ ВРЕГУЛЮВАННЯ СУПЕРЕЧОК

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Safarli Kanan Yusif. On some aspects of the WTO Jurisprudence and Dispute Settlement Mechanism.

The paper first explores certain aspects of dispute resolution mechanism implemented within the World Trade Organization and then proceeds with the legal analysis of a number of legal presumptions, concepts and principles both of procedural and substantive legal nature developed and applicable within the framework of the above mentioned mechanism for resolving disputes between the WTO member-states. The Paper examines the main features that distinguish the dispute resolution mechanism used within the WTO from the GATT mechanism, which mechanism, i/e/ the one implemented within the WTO framework, is recognized to be more legal in nature in contrast to the more political nature of the GATT dispute resolution mechanism, given that under the GATT mechanism the direct negotiations had more weight in reaching the final settlement than within the WTO system, where formal juridical disciplines, as the practice of dispute settlement indicates, play far more role and has become a key element of the system.

Also, certain procedural presumptions and principles applicable in the adjudication process as well as the procedure and feature characteristic for the enforcement of decisions are examined in the paper based on and with reference to the number of panel and Appellate Body decisions. Decisions delivered by panels and the Appelate Body represent a very important tool for the interpretation of the WTO law and shapes the practice of its implementation. In this regard, although it is not considered a formal source, Appelate Body and panel decisions should be considered as an important source of both procedural and substantive WTO law. The DSB practice established under the GATT/WTO law, on the one hand, defines a set of applicable procedural rules and on the other hand, develops the WTO substantive law by way of developing the criteria and rules governing the application of provisions of the WTO agreements and other sources governing rights and obligations of the member-states.

Particular attention in this regard is paid to the peculiarities of the application of the principle of responsibility for lawful actions applied in the WTO jurisprudence, under the relevant WTO agreements and more specifically under the GATT, GATS, TRIPS and SCM Agreements. Also a number of procedural concepts the principles e.g. the “*prima facie* case”, “rational relationship” elaborated in the “Hormone” case, principle of multi-criteria assessment initially applied in «Korea - fresh, chilled and frozen meat» case and negative presumption rule applied by the panels are analysied.

Key words: WTO, responsibility for lawful actions, “non-violation” claim, specific commitments, trade negotiations, trade measures, domestic regulation, impairment and nullification of benefits.

Сафарлі Канан Юсіф, Про деякі аспекти юриспруденції СОТ та механізму врегулювання суперечок.

У статті досліджуються певні аспекти механізму вирішення спорів, запровадженого в рамках Світової організації торгівлі, а потім проводиться юридичний аналіз ряду правових презумпцій, концепцій і принципів як процесуального, так і матеріально-правового характеру, розроблених і застосовних у рамках вищезазначених механізм вирішення спорів між державами-членами СОТ. У документі розглядаються основні риси, які відрізняють механізм вирішення спорів, що використовується в рамках СОТ, від механізму ГАТТ, який механізм, тобто той, який реалізується в рамках СОТ, визнано більш правовим за своєю природою на відміну від більш політичного.

характер механізму вирішення спорів ГАТТ, враховуючи, що за механізмом ГАТТ прямі переговори мали більшу вагу для досягнення остаточного врегулювання, ніж у системі СОТ, де офіційні юридичні дисципліни, як показує практика вирішення спорів, відіграють набагато більшу роль і мають стати ключовим елементом системи.

Крім того, певні процесуальні презумпції та принципи, застосовні в процесі судового розгляду, а також процедура та ознаки, характерні для виконання рішень, розглядаються в документі на основі та з посиланням на кількість рішень колегії та апеляційного органу. Рішення, прийняті експертними групами та Апеляційним органом, є дуже важливим інструментом для тлумачення законодавства СОТ і формують практику його виконання. У зв'язку з цим, незважаючи на те, що рішення Апеляційного органу та комісії не вважаються офіційним джерелом, слід розглядати їх як важливе джерело як процесуального, так і матеріального права СОТ. Практика DSB, встановлена відповідно до законодавства ГАТТ/СОТ, з одного боку, визначає набір застосовних процедурних правил, а з іншого боку, розвиває матеріальне право СОТ шляхом розробки критеріїв і правил, що регулюють застосування положень СОТ. договори та інші джерела, що регулюють права та обов'язки держав-членів.

Особливу увагу в цьому плані приділено особливостям застосування принципу відповідальності за правомірні дії, який застосовується в юриспруденції СОТ, відповідно до відповідних угод СОТ і, зокрема, відповідно до Угод ГАТТ, ГАТС, ТРІПС та SCM. Крім того, ряд процедурних концепцій, принципи, напр. аналізуються «випадок prima facie», «раціональний зв'язок», розроблений у справі «Гормон», принцип багатокритеріальної оцінки, спочатку застосований у справі «Корея – свіже, охолоджене та заморожене м'ясо», а також правило негативної презумпції, застосоване групами.

Ключові слова: СОТ, відповідальність за правомірні дії, вимога про «непорушення», специфічні зобов'язання, торговельні переговори, торговельні заходи, внутрішнє регулювання, знецінення та анулювання переваг..

Introduction. The dispute resolution system (DSS) ensures the effectiveness of the WTO law by ensuring, when and where necessary, the enforcement of the rules applied within the framework of the WTO, thus creating confidence in the member-states that their rights and ingterests will be protected [22, p. 5]. **This paper aims** to explore certain aspects of the dispute settlement mechanism applicable under the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding" or "DSU") that distinguishes it from the GATT system and which confers more teeth to the mechanism as a legal procedure. The Paper also examines certain aspects of the WTO jurisprudence highlighting the role and significance thereof in ensuring and enforcement of the WTO substantive law.

In preparation of this paper in order to achieve a comprehensive analysis of the research topic an extensive research has been made of the relevant sources of the WTO law, decisions of the WTO bodies, and specifically of the panel and Appelate Body decisions, providing information and data relating to the dispute resolution experience within the WTO and other sources representing interpretation of the relevant regulations applicable within the WTO system, including scholarly literature. The research has been conducted by way of utilisation of the general scientific theoretical research methodology featuring study of legal literature, formal (such as WTO agreements) and material (such as panel and Appelate Body decisions) sources on the basis of functional and structural analysis and synthesis, as well as legal analogy and comparison, legal modelling as the special methods specific to the legal research.

The paper first explores certain aspects of dispute resolution mechanism implemented within the World Trade Organization and then proceeds with the legal analysis of a number of legal presumptions, concepts and principles both of procedural and substantive legal nature developed and applicable within the framework of the above mentioned mechanism for resolving disputes between the WTO member-states and concludes with the affirmation of the role and significance of the features explored herein for the efficient adjudication of disputes within the WTO system.

Main material. *Peculiarities of the WTO Dispute Settlement mechanism.* The introduction of a new dispute settlement mechanism under the WTO was necessitated by the existence in the GATT dispute settlement system of a number of important deficiencies and ineffeciency of the GATT enforcement mechanism. The relative weakness of the GATT enforcement mechanism caapable of mandatory

application of the agreed trade rules from a legal point of view prompted the creation of more effecient enforcement mechanism within the WTO framework distinct from the one existed under the GATT.

The DSU includes provisions that confers both legal and political features to each stage of the the WTO dispute resolution mechanism [9, p. 3-4]. However, it is unversally percieved that the process is generally of a legal nature [2, p. 64]. Possibility of negotiations between the parties to a case is viewed to be the indication of the political character of the dispute settlement process, even though it constitutes a legal obligation (DSU: 4 and 5) [23]. The purpose of the mechanism and negotiations in particular, which is aimed at achieving a positive result acceptable to both parties (MHHA: 3.7) [23] also denotes the political nature of the process [15, p. 6-7]. However, the determination of specific legal obligations and mandatory procedural rules indicates that the process has a legal character [26, p. 9-11].

Firstly, possibiity for the delay of the delivering final decisions by the panels were eleminated by way of introduction of time limits for the conduct of each procedural stage under the WTO law unlike the GATT rules [9, p. 3–5]. Under the GATT rules, an interested state could block the adjudication of a dispute, that is, there was an opportunity to block the adjudication process, and as a result, disputes under the GATT could drag on for a long time before being concluded [8, p. 103-104].

Also, the GATT dispute settlement experience revealed one another deficiency intrinsic to the GATT DSS, which deficience was, however, rooted in economic rather than legal aspects of GATT member-states' relationship: taking of countermeasures by small economies, even if sanctioned by the Council, did not represent in itself a significant concern for the member states with large trade turnover. Dispute Settlement Understanding (DSU) applicable under the WTO although did not ultimately eleminate such weakness, added however teeth to the enforcement mechanism by way of allowing retaliation across sectors and WTO agreements thus making the enforcement more effective [21, p. 8955–8957].

Reduction of the above mentioned inefficiency resulted in the introduction of a more effective dispute resolution mechanism within the WTO framework which is legally more strong [20, p. 485-486]. The distinguishing feature of this mechanism is that the possibilities for the interested state to stop or suspend the process of consideration of disputes have become almost non-existent. In distinction from the GATT mechanism which required consensus of the Council members for the approval of the panel findings and issuing prmission for the retaliatory measures by a victim of violation, the DSU introduced mechanism based on the consensus for rejection of the findings and recommended retaiatory mesarues by a victim state, i.e., a decision is deemed to have been adopted as recommended by a panel is not rejected by the Council by consensus [2, p. 55–63].

One of the significant aspects/features of the dispute settlement procedure established under the DSU is the automation of the establishment and composition of the panels, making decisions on *compromise* which along with other novelties, eliminated the dependence of the process on the participants to a dispute [24].

The DSU stipulates precise deadlines for each stage and does not allow extensions thereof. An expedited process is envisaged for urgent matters [3, p. 65; 22].

The Dispute Settlement Body (the "DSB") which is the General Council itself under the defferent guise, supervises the execution of the panel or the Appelate Body decisions. If the decision is not implemented by the member, the other party can request a sanction for countermeasures. Counter-measures are first applied to the area that is the subject of the dispute, in case of ineffectiveness or practical inconvenience of such measures, a retalaiatory measure can be applied in respect of other goods or services within the same agreement, and in case of ineffectiveness or practical inconvenience of such countermeasures as well, the countermeasures may be applied under other agreements adminsitered by the WTO as cross countermeasures. Such measures may be applied to the services or goods area if such application is seen to be more effective or in respect of the intellectual property rights under the TRIPs agreement [24].

Despite of the right of application of the countermeasures by a WTO victim state-member in respct of another member-state inflicted damage to the victim, the practice of the WTO indicates the instances where a victim state refused to exercise such right granted by the DSB under the DSU. Refusal to use the right to apply the sanctioned retaliatory measures may be caused by the dependence of the claimant country on the defendant on other issues or the insignificance of countermeasures for the defendant, as well as the possibility that the countermeasures will be inconvenient for the claimant (price increase in the markets, violation of public order, etc.) [17, p. 2-3].

Some features of the WTO Jurisprudence. The dispute settlement practice under the GATT/WTO resulted in emergence of the WTO jurisprudence which features crtain distinctive charachteristics.

The DSB practice established under the GATT/WTO law, on the one hand, defines a set of applicable procedural rules and on the other hand, develops the WTO law by way of developing the criteria and rules governing the application of substantive WTO law [19, p. 8].

As an example of a notable rules characterizing the WTO jurisprudence a requirement of submission by a complainant of a sufficiently strong evidence of a violation of a the WTO law by the respondent in order to initiate a case may be shown. The decision of the Appellate Body on the Hormone case [25, p. 5–7] indicates that in case of inconsistency of the domestic regulations of a member-state with the requirements of the WTO law, such inconsistency needs to be substantiated by the complainant as a *prima facie* case in order the complaint to be recognised as acceptable [7, § 97-109]. Acording to this rule, a prima facie case is one which, unless effectively rebutted by the defendant, warrants a decision in favor of the complainant as a matter of law [7, §104]. Another principle established in in the Hormone case is the doctrine of rational relationship. This principle provides for making a decision on a case based on the information or data which are closest to the issue under consideration from among the numerous different information and/or data relating to the case. However, that doctrine does not define precise legal criteria for the selection of the applicable one(s) from aamong the various conflicting information and data [7].

Another doctrine applied in DSB practice is the principle of multi-criteria assessment («Korea - Measures affecting the import of fresh, chilled and frozen meat» case) [6]. As another example, the inadmissibility of the application of exceptions from the WTO obligations based on the precautionary principle and possibility of application of exceptions on scientifically approved grounds only may be shown («Hormone» case) [12, p. 697–701; 18, pp. 32-33].

Also a rule established in the WTO jurisprudence connected with the absence in the DSU of a provision directly requiring disclosure of information and evidence by the parties to the dispute worth noting. Although Article 13 of the DSU empowers thr panels to obtain the relevant information from any source they deem appropriate, this, however, does not constitute a direct requirement of disclosure of information by the parties to each other. It is undeniable that the disclosure of information and evidence to which parties refer in order to substantiate their claims or defense, as the case may be, at the initial stages of deliberations is of the paramount importance for making a fair decision on the case. In the WTO dispute settlement mechanism a legally effective disclosure system was created through the application of a negative presumption rule. According to this presumption, if a party refuses to disclose the requested information, it is determined that the information requested and refused to be disclosed contains evidence against such party which refused to disclose it [25, p. 2–6].

Another significant feature of the WTO jurisprudence, as in the general International Law, is that cases are required to be decided on the basis of agreements applicable within the WTO framework only, which formally excludes the use of judicial precedent as a source of law. Nevertheless, decisions and opinions of panels and of the Appellate Body on disputes are considered as authoritative sources for the interpretation of the WTO law. Undoubtedly, decisions delivered by panels and the Appelate Body represent a very important tool for the interpretation of the WTO law and shapes the practice of its implementation. In this regard, although it is not considered a formal source, Appelate Body and panel decisions should be considered as a important source of substantive WTO law [1, p. 432–437].

The concept of responsibility for lawful actions as applicable within the framework of the WTO legal system should represents one another distinctive feature of the WTO jurisprudence. This concept was formed in the GATT era and continued to be applied within the WTO framework. According to this rule, if any action(s) taken by a WTO member-state (e.g. application of a regulatory or a border measure) without violating its obligations under the GATT or GATS results in the impairment or nullification of benefits of another WTO member-state resulted or to be resulted from the concession(s) agreed by such first member-state taking the action (applying a measure), such another member-state shall have the right to bring a claim and seek removal of such measure(s) or provision of compensation. Compensation is provided in the form of provision of new or additional concessions by a state applying measures resulted in impairment or nullification of benefits of another member-state (GATT: XXIII:1(b) [13], GATS: XXIII:3 [14], Agreement on Subsidies and Counterveiling Measures: 5(b) [4], DSU: 26.1(a) [24]).

It comes out that a measure implemented by a WTO member-sate which does not constitute a breach of obligation *per se,* may be disputed/questioned on the basis of such measure resulting in the reduction or nullification of the benefit obtained or expected to be obtained by another WTO member from the

negotiated concessions under the WTO agreements. In other words, in a situation where benefits of a member-state obtained from the concessions granted by another member-state as result of tariff reduction negotiations or expected to arise out of such concessions are either reduced (impaired) or nullified by a measure implemented by such another member-state the first member-state whose actual or expected benefits have been or threatened to be impaired or nullified may claim removal of the measure implememnted by the first member-state despite the fact that such measure does not constitute a breach of obligation out of itself [13, Art. XIII; 14, Art. XXIII; 34, Art. 64; 23, p. 1–4]. This, in our opinion, amounts to the applications of the concept of responsibility for lawful actions even this is not specifically provided for or mentioned in any WTO agreements [23, p. 18–22].

As mentioned above, the following conditions shall be in existence in order responsibility is established for the lawful acts, i.e. in the absence of any wrongdoing, within the WTO legal system: (i) the market conditions and the market share (benefit) to be resulted and maintained on the basis of concessions fixed in the negotiated national schedules of a WTO member-state must have changed as a result of the applied measure (which is in compliance with the obligations of the WTO member-state under the relevant WTO agreements), and (ii) the application of the measure and its outcome must have been reasonably not possible to predict when the concessions were agreed upon [10, p. 3, 12].

The meaning of the first condition is that the measure must be actually applied and be in exeistence in reality, that is, the planning of the measure is not sufficient to satisfy that condition.

Under the second condition, a complaint can only be filed if the measure(s) in question resut(s) in a deterioration of market conditions to the extent that the benefit(s) obtained or expected by the complaining party is substantially reduced to the extent of almost non-existence or negated entirely. In the practice of the WTO dispute settlement, this situation has been interpreted not as the negation of «any benefit» (market share) as written in the text of Article XXIII:1 (b) of the GATT 1947 [13], but rather the negation of the increase in market share expected as a result of negotiation of binding commitments. [10, p. 12]. Bazar şəraitinin pozulmasının özü adi qaydada başa düşülür, buraya müxtəlif təzahür formalar aid edə bilər: məs., malların/xidmətlərin bazardan sıxışdırılıb çıxarılması, inhisarlaşma, rəqbət şəraitinin pisləşməsi və s. Məsuliyyətin əmələ gəlməsi üçün həyata keçirilən tədbirlə onun nəticəsi (faydanın itirilməsi) arasında səbəbli əlaqə olmalıdır. Deterioration of market conditions itself is understood in the ordinary meaning. It can occur in various forms, like, for example, squeezing goods/services out of the market, monopolization, disruption of competitive conditions, etc. For liability to arise, there must be a causal link between the action taken/measure implemented and its outcome (loss of benefit(s)).

The unforeseeability of the measure is related to the impossibility to reasonably foresee by the complainant based on common sense of the possibility of the implementation of the measure produced a harmful outcome at the time of negotiating concessions of which benefits are claimed to be impaired or nullified by the measure in question [16, p. 6–8]. The establishment of responsibility is contingent upon proof of the above mentioned conditions and the burden of proof rests with the complaining state.

GATS, TRIPS and SCM Agreements provide for a slightly different grounds for «non-violation» claims. Although TRIPS provides for the possibility of bringing non-violation claims [5], the initial moratorium has been extended several times and is still in effect, which makes impossible application of the DSU procedures to the non-violation claims under the TRIPS as at the time of this paper. GATS Article XXIII:3, in analogy with the GATT, provides for the possibility of «non-violation» complaints only in respect of services included in the GATS specific commitments schedules. Both GATS and SCM Agreement provide for the transformation of the grounds for «non-violation» claims into the grounds for bringing the «violation» claims within the framwork of the WTO dispute settlement mechanism under certain conditions. Under Article VI:5(a) of the GATS, the enactment of licensing and/or qualification requirements that were not reasonably foreseeable at the time of granting commitments and which result or may result in the loss of benefits of another member in areas where specific commitments have been made, are not permitted [14]. This prohibition provides basis for a "violation" claim for the reason of breach of obligation not to impose licensing or qualification requirements or technical standards in the services sectors included within the scedule of the member's specific commitments and therefor making "non-violation" claims either redundant or unfeasible or impracticable [10, p. 12]. A similar obligation is created by Article 5(b) of the CSM Agreement [4], given that the said provision prohibits the granting of a subsidy that results in the loss of a benefit (in the sense described above) that members expect to obtain under GATT 1994, therefore the loss resulting from a subsidy provides grounds for the violation

claim under the DSU as the loss in such case is linked with the breach of obligation that produce loss of benefits by a counter-party member-state [10, p. 13].

The issue of resolving conflicts between applicable provisions of the various sources of the WTO law may also be regarded to be one of the specific aspects of legal regulation of international trade. The possibility of conflicts between the agreements comprising the WTO legal framework may not be ultimately excluded, although such possibility is not high. Specifically, there may be conflicts between the GATT-1994 and agreeements appended thereto. It is noted in the literature that conflicts between such agreements and GATT-1994 are resolved in the context of the relationship between general and special rules with reference to the general provision included in the Marrakesh Agreement, where the GATT-1994 norms are considered to comprise «lex generalis» and others constituting «lex specialis» [27, p. 154].

It is also important, in order to be able to make use of the said provisions and concepts established in the WTO jurisprudence, to have any and all limitations, exceptions and other conditions of application of GATS rules specified in a clear and unequivocal manner in the specific commitments schedules of the WTO member-states. Appellate Body decision in the «Mexico - Telecommunications» case is clear and specific in establishing such an importance. However, it should also taken into account that legality of any trade distorting measure enacted within the domestic legal system is subject to the assessment against the «necessity» criterion also established by the same decision [11, p. 9-10].

In **conclusion**, it should be noted that what makes the WTO distinct from other international institutions is the possibility of questioning the domestic trade policy measures falling short of the requirements of the WTO law and/or creating obstacles to the trade flaws within the WTO legal framework. Given that the decisions delivered within the framework of the dispute settlement mechanism and the WTO jurisprudence developed under the DSU are recognised to have superior legal force than the domestic trade regulations and therefore to be mandatory for the member-states and are backed by sanctions that may be ordered by the DSB, the WTO dispute settlement mechanism is regarded to be one of the most remarkable acievements of the Urugway Round negotiations capable of protecting interests of smaller states which are weaker in terms of their trading strengh vis-a-vis discriminatory trade practices of their larger and stronger counterparties [5, p. 232-233; 8, p. 182]. The legal function of effective adjudication under the DSU is, as highlighted above, conditioned to the suvstantial extent, by the above examined features of the dispute settlement procedure and WTO jurispridence.

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