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DOCTRINA

The blockage of the WTO Appellate Body: Some notes on State responsibility and dispute settlement in international trade

El bloqueo del Órgano de Apelación de la OMC: Algunos apuntes sobre la responsabilidad del Estado y la solución de diferencias en el comercio internacional

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ABSTRACT. This article discusses the role of Dispute Settlement Understanding (DSU) provisions as a source of primary obligations of international law. It stresses the importance for World Trade Organization (WTO) Members to become aware of the legal nature of these obligations and the context of international law in which the WTO Treaty is embedded. WTO Members may seek for international law solutions for the blockage of the Appellate Body (AB), not only within the WTO Treaty but in the broader context of general international law. Such an interplay with international law to practically solve the blockage of the Appellate Body is already taking place among some WTO Members. However, those practical solutions are doubtfully justified under international law.

KEYWORDS: Dispute Settlement Understanding, World Trade Organization, Appellate Body, AB blockage, State Responsibility, International Law.

RESUMEN. Este artículo discurre sobre el rol de las disposiciones del Entendimiento sobre Solución de Disputas (ESD) como fuente de obligaciones primarias de derecho internacional. Enfatiza la importancia de que los Miembros de la Organización Mundial de Comercio (OMC) tomen conciencia de la naturaleza jurídica de estas obligaciones, en el contexto del derecho internacional en el que el Tratado de la OMC está contenido. Los Miembros de la OMC podrían buscar soluciones en el derecho internacional para el bloqueo del Órgano de Apelación (OA) no solo en el Tratado de la OMC, sino que también en el contexto del derecho internacional general. Esta relación con el derecho

internacional para solucionar de manera práctica el bloqueo del Órgano de Apelación ya está tomando lugar entre algunos Miembros de la OMC. Sin embargo, tales soluciones prácticas están dudosamente justificadas bajo el derecho internacional.

PALABRAS CLAVE: Entendimiento sobre Solución de Diferencias, Organización Mundial del Comercio, bloqueo del Órgano de Apelación, Responsabilidad del Estado, Derecho Internacional.

Introduction

The blockage of the Appellate Body of the World Trade Organization has raised many concerns, not only from a trade and economic point of view, but also from a legal perspective. With regard to the latter, there are ongoing discussions among scholars pertaining to the feasibility of using the tools that the same WTO Treaty prescribes, in order to face a crisis with no precedents in WTO history.

Interestingly, the practice has seemed to overrule the theory, and some WTO Members have already resorted to legal alternatives that depart from the usage of the conservative tools that the System provides for. Nevertheless, those alternatives have proved to be legally ineffective in the research for an adequate solution to address the roots of the problem.

We strongly believe that the WTO Treaty is a Lex Specialis field of international law, not a self-contained regime isolated from the broader international legal arena. In that sense, while its members may have contracted out of specific institutions of international law to give birth to an Organization capable of dealing with their multilateral trade relations, we stress that nothing prohibits those Members to recourse to international law institutions should that Organization fail to work as it was once envisaged back in the 1990s.

In this Article, we aim at providing some notes of the institutions under general international law which may be considered to deepen the discussion of the alternatives to solve the blockage of the Appellate Body. We do this specifically on the grounds that the WTO Dispute Settlement Understanding is of dualistic nature: it works as a Lex Specialis regime of the Law of State Responsibility and is a reservoir of primary international law obligations.

The Blockage of the Appellate Body (AB)

The Appellate Body (AB) of the World Trade Organization is currently facing an important institutional crisis. One of the WTO Members, namely the United States (US), has been uninterruptedly blocking the consensus for appointing six out of the seven members required for its functioning. As a consequence, the AB ceased to function.

The risk involved in having an unworking AB is that since December 10, 2019 (the date on which the AB was comprised of one member only), a losing disputing party may not effectively appeal a panel report to the AB, without blocking the continuation of the proceedings. While previous appeals were expected to be resolved in 2020 or 2021 under the application of Rule 15 of the AB Working Procedures rules – which authorizes outgoing AB members to complete the disposition of any appeal assigned while on duty – the US has also objected the recourse to this practice of carry-over appeals.

Overall, the main concerns raised by the US to the functioning of the WTO dispute settlement system, illustrated by the Trade Policy Agenda to the US Congress of March 2018, are as follows:

- The panels and the AB are adding to or diminishing rights and obligations under the WTO Agreements.
- The AB is disregarding the rules of the WTO by: ignoring the 90-day deadline to issue its report; showing a lack of transparency on the AB's approach; the extended service of former AB members; a tendency to unnecessary findings to resolve a dispute; "advisory opinions" rendered without having power; conclusions not based on panel factual findings or based on undisputed facts; municipal law' revision; asserting that its reports serve as precedents that the panels should follow; accepting the submission of amicus curiae by private parties.

In addition, the US has deepened its position against the WTO dispute settlement system in different international forums. At the 11th WTO Ministerial Conference Opening Plenary (December 11, 2017) the former USTR Mr. Lighthizer stated that:

> Many are concerned that the WTO is losing its essential focus on negotiation and becoming a litigation-centered organization. Too often members seem to believe they can gain concessions through lawsuits that they could never get at the negotiating table. We have to ask ourselves whether this is good for the institution and whether the current litigation structure makes sense.

WTO - DSU as Lex Specialis source of secondary obligations

WTO law is neither a system that can be read in isolation from the broader context of international law nor a self-contained regime. Far from that, practical evidence suggests that WTO Members observe its institutions not only for pursuing legitimate trade interests, but also in following a legal consciousness of compliance with the international (trade) obligations they have agreed upon. Moreover, it is due to this latter observance that the WTO System shows itself reliable for the purposes it was

once envisioned back in 1994, making it a full constituent of the cooperation scheme that international law currently stands for, in contrast with its former approach as a law of coexistence (Pauwelyn, 2003: 17-18).

But it is not only the empirical practice on trade what makes the observant confident in that the WTO is actually a System of international law. By following the approach of dissecting international law into "primary" and "secondary" obligations under the Law of State Responsibility and the terminology proposed by Ago and backed later by Crawford in the discussions of the Draft Articles (Crawford, 2002: 876), one would inevitably come up to the conclusion that WTO law components make the System also fit under such categorization.

In fact, pursuant to Article 55 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) issued by the International Law Commission, the rules of the WTO Dispute Settlement Mechanism fall under a Lex Specialis categorization of secondary obligations, with its provisions precisely aimed at dealing with the consequences of a breach of any primary obligation in the field of the trade in goods, services and in intellectual property rights related to trade. In this vein, professor Gomula notes that ARSIWA rules do apply in the context of the WTO disputes precisely because the WTO is a part of general international law, not a self-contained regime which is isolated from it (Gomula, 2010: 792).

Accordingly, the secondary obligations under the WTO Treaty are mainly contained in the Dispute Settlement Understanding (DSU), which is Annex 2 of the WTO Treaty. This Understanding is what in practical terms sets out the rules that need to be complied with in order to enable a member with the right to adopt countermeasures, or, following WTO language, suspend concessions or other obligations in case of breach to any WTO covered agreement.

Pursuant to Article IV: 3 of the WTO Treaty, the Dispute Settlement Body (DSB) — which is the holder of the adjudicative jurisdiction in the WTO — owes its responsibilities to the meetings of the General Council of the WTO acting for these purposes. In turn, Article 17 of the DSU prescribes that the DSB shall stablish the AB and appoint its members. The AB members shall serve for four-year terms and may be reappointed once. They need to be persons of recognized authority, with probed expertise in law, international trade and on the subject matter of the covered agreements. They also need to be unaffiliated with any government.

The AB reviews the appeals of the reports issued by panels within the DSU proceedings. By means of an appeal, however, the AB is limited to review only the issues of law and the legal interpretations of the reports. It may not review the facts of the concerned dispute. Nevertheless, the AB may uphold, modify or reverse a panel report brought before it.

In practice, an AB report is always adopted (the so-called "automaticity process"), as a consequence of the negative consensus that the system provides for. In this re-

gard, Matsushita emphases that "the automaticity guarantees that an appellate report is always adopted and, in this way, the Appellate Body has the ultimate power to decide cases before it. There is no higher organ in the WTO to which the losing party can appeal and, in this sense, the Appellate Body acts just like a supreme court in a nation-state." (Matsushita, 2019: 45). Hence, the importance of having a working AB within this Lex Specialis System of secondary obligations relies on the fact that, in practice, the AB works as guarantor of the legal control in the reasoning of the panel reports.

WTO - DSU as primary obligations: the dilemma of contesting violations to it

It shall be noted that the DSU is not only a source of Lex Specialis secondary obligations to deal with the consequences of breaches to WTO "substantive trade obligations" (i.e., those of trade in goods, services and intellectual property rights related to trade). It is also a source of primary obligations that the WTO Members need to comply with, together with their "substantive trade obligations". Moreover, one should not forget that the DSU (Annex 2 of the WTO Treaty) is also one of the so-called "covered agreements", captured in the Appendix 1 of the same DSU.

In theory, a dispute arising from the consistency of a measure vis-à-vis the DSU provisions may be also subject to the same dispute settlement procedures it so governs. We say "in theory" because even if a WTO Member potentially activates the Mechanism to seek the redress caused by a the violation of any of the DSU provisions, that WTO Member may face the dilemma of facing an inoperative procedure. This would be the case of a WTO Member which tries to bring a claim against another Member that has adopted a measure for blocking the functioning of the AB. At a certain point in time, that complaining Member may not successfully appeal before the inoperative AB a report of a panel that refers, precisely, to the same blockage of the AB.

In light of the above-described dilemma, we foresee two possible courses of actions that WTO Members may take into account. On the one hand, a WTO Member may look for alternatives under the same WTO treaty, in and beyond the DSU. On the other, as it will be discussed from now onwards, a WTO Member may recourse to appropriate rules under general international law in which WTO Law is embedded.

The right to bring a claim against a DSU violation

DSU obligations as "erga omnes partes" obligations

The great majority of obligations in the WTO are bilateral or reciprocal, thus any claims under the WTO Treaty are likely to be brought only by a Member who has been somewhat affected (at least potentially) by a measure adopted by another Member in a particular reciprocal engagement. As such, a bilateral approach towards WTO

obligations contrasts with erga omnes partes obligations to be found in other areas of international law, such as in the field of Human Rights or International Environmental Law, where claims may be brought by any party to a given multilateral treaty, notwithstanding the particular engagement of that party with the given breaching State. However, one of the few detectable cases of erga omnes partes obligations within the WTO may refer, precisely, to those pertaining to its institutional framework (Pauwelyn, 2003: 64-70). This institutional framework also includes, without doubt, those obligations related to the operation and functioning of the AB and the appointment of its members.

While in the early 2000s the study of erga omnes partes obligations in the WTO (i.e., the breaches to its institutional framework) was nothing but a theorical exercise, today the world demands further analysis on how international law —both general international law and its Lex Specialis WTO law— come into play in order to help in addressing breaches to that kind of obligations. In contrast to the great majority of (reciprocal) WTO obligations, if WTO's institutional framework obligations are to be considered as erga omnes partes obligations, any WTO Member may be entitled to bring a claim against a WTO Member that has attributably breached DSU Article 17. In other words, a sort of actio popularis within the WTO System.

The legal interest for bringing a claim

Article 3.8 of the DSU provides as follows:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

The above-mentioned Article sets out a prima facie presumption of nullification or impairment for infringements of obligations assumed under a covered agreement, where the burden of proof to rebut the presumption rests on the defendant of the given claim. As it was mentioned earlier, the DSU is also a covered agreement. Therefore, one should naturally expect that any claim invoking a breach of a DSU provision would be also subject to this presumption.

Moreover, Article 3.8 of the DSU is usually read in conjunction with GATT Article XXIII:1, when the dispute refers to trade in goods, which reads as follows:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

> (a) the failure of another contracting party to carry out its obligations under this Agreement, or
>
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
>
> (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

It shall be stressed that there is no equivalent to GATT Article XXIII:1 in the GATS to be applied with respect to disputes in the field of trade in services. Moreover, the Appellate Body has reversed panel's rulings which have attempted to connect both provisions. This happened, for instance, in Mexico-Telecoms, where the AB ruled recalling EC-Bananas III that:

> Unlike some other covered agreements (e.g., GATT Article XXIII:1 in connection with Article 3.8 of the DSU), the GATS does not require that, in the case of a violation complaint (GATS Article XXIII:1), 'nullification or impairment' of treaty benefits has to be claimed by the complaining WTO Member and examined by a Panel. Whereas Article XXIII:1 of the GATT specifically conditions access to WTO dispute settlement procedures on an allegation that a 'benefit' or the 'attainment of an objective' under that agreement are being 'nullified or impaired', the corresponding provision in the GATS (Article XXIII:1) permits access to dispute settlement procedures if a Member 'fails to carry out its obligations or specific commitments' under the GATS. In this respect, we note that the Appellate Body in EC – Bananas III stated that the panel in that case 'erred in extending the scope of the presumption in Article 3.8 of the DSU to claims made under the GATS'. Having found that Mexico has violated certain provisions of the GATS, we are therefore bound by Article 19 of the DSU to proceed directly to the recommendation set out in that provision (Panel Report, Mexico-Telecoms, para. 8.4.)

Professor Pauwelyn notes that a complainant Member is not required to prove that actual trade is being affected, as effects in trade opportunities may also suffice for the same purpose (Pauwelyn, 2003: 86). Moreover, by following the ruling of the Appellate Body in Mexico-Telecoms referred to above, one should consider that the same reasoning would apply with respect to disputes concerning to DSU violations, especially because there is no GATT Article XXIII:1 equivalent in the DSU for disputes arising from its own provisions.

Therefore, a complaining Member may not necessarily be burdened to argue in terms of nullification or impairment of the benefits accruing to it, whenever it invokes a violation of the DSU, for instance, with respect to Article 17. Additionally, if

DSU obligations are to be considered as integral or erga omnes partes obligations, the requirement of alleging nullification or impairment would be even less stringent than that for bilateral obligations, to the extent that potentially any WTO Member may be interested in bringing a claim against a violation that systemically erodes the whole System. In fact, blocking the Dispute Settlement would imply a violation of the rules of the WTO legal System as a whole.

Unblocking alternatives under the WTO Treaty

As noted above, one may seek to raise a claim against a breach of the DSU (the blockage of the AB) by following the procedures provided for in the same DSU. However, considering the dilemma of facing an unworking AB (and so a never-ending story), a complainant may also be interested in looking for alternatives within the WTO Treaty, but beyond the boundaries of such DSB procedures.

The Multi Party Interim Appeal Arrangement

In early 2020 some WTO Members signed what was called the "Multi Party Interim Appeal Arrangement" which, on the grounds of DSU Article 25, states as follows:

> In order to render the appeal arbitration procedure operational in particular disputes, the participating Members indicate their intention to enter into the arbitration agreement (the "appeal arbitration agreement") contained in Annex 1 to this communication and to notify that agreement pursuant to Article 25.2 of the DSU within 60 days after the date of the establishment of the panel. For pending disputes where, on the date of this communication, the panel has already been established but an interim report has not yet been issued, the participating Members will enter into the appeal arbitration agreement and notify that agreement pursuant to Article 25.2 of the DSU within 30 days after the date of this communication (MPIA Article 10).

According to the Participants' Statement as of 24 January 2020, the MPIA works as an alternative to deal with appeals of WTO disputes until the Appellate Body becomes fully operational. To date, MPIA applications consist of the cases of Canada Sale of Wines (DS537), Costa Rica Avocados (DS524), Canada Aircraft (DS522, notes to the DSB of 29 May 2020), and Colombia Antidumping Duties on Frozen Fries (DSU591, note to the DSB of 13 July 2020).

It should be noted that DSU Article 25 arbitrations are agreed on a voluntary basis only and there is no binding obligation among WTO Members to enter into arbitration agreements (including those for appeals) in the event of a non-functioning Appellate Body. In this way, the intention of MPIA Participants was essentially to address the crisis of the Appellate Body in the urgent need to seek a procedural appeal alternative by which to solve their pending or future "substantive" trade disputes.

It was not their intention to solve the issue of the blockage of the Appellate Body through this Arrangement. Moreover, any movement towards exercising responsibility against the AB blocking Member through MPIA would have turned infeasible if such a member was neither a Participant to the MPIA, nor a party to an actual appeal arbitration constituted in light of it. This is simply explained with the rule of pacta tertiis and the situation of the US vis-à-vis the MPIA.

Majority voting decisions

Some scholars have suggested that the blockage of the Appellate Body may be solved by resorting to certain voting provisions of the Marrakesh Agreement.

The proposed solution under this scheme is as follows. Any decisions taken under the DSU (and in the WTO Treaty in general) are subject to the consensus. That means, according to the footnote to DSU Article 2.4, that a matter may be decided "if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision". There are some exceptions to this rule, which follow the colloquially known "negative consensus" (applicable for the establishment of panels; the adoption of panel or AB's reports; and the authorization to retaliate). In addition to those exceptions, Article IX:1 of the WTO Treaty sets out that "where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting".

On that legal basis, Kuijper suggests that emergency measures need to be taken in case of emergency, and, in that regard, it would be possible for the General Council to appoint AB Members directly by applying the rule of majority votes, should the default rule on consensus fail (Kuijper, 2017: 12). To this same extent, Petersman also states that Article IX:1 of the WTO Treaty emphasizes that the Ministerial Conference and the General Council are legally required (with a "shall") to overcome an illegal blocking of the DSB in order to meet collective WTO legal duties (Petersman, 2019: 30). Those collective WTO duties, or erga omnes partes obligations as referred to above, may be subject to voting procedures in emergency situations, such as in the case of the blockage of the AB.

Authoritative interpretations

Other scholars have further argued that it would be possible to overturn the blockage of the Appellate Body by means of taking interpretations under the auspices of the WTO Ministerial Conference. As an example, Vidigal (2021) considers that:

> The Ministerial Conference could, for example, issue a multilateral interpretation: (i) establishing its own authority to, acting under AEWTO Article IV:1, appoint persons to the Appellate Body; (ii) clarifying that the consensus requirement in DSU

> Article 2.4 applies generally to decisions of the DSB, not constituting a specific requirement of decisions to appoint Appellate Body members under Article 17.2; and (iii) clarifying that, as a consequence, a decision by the Ministerial Conference to employ its authority to appoint persons to the Appellate Body would be subject to the regular rules for decision-making of AEWTO Article IX (23 and 24).

Waivers on appeal reviews

Another possible solution refers to the possibility of setting a waiver to the appellate review. According to Payosova, Hufbauer and Schott,

> Instead of an ad hoc agreement to refrain from appeals, WTO Members could adopt a temporary waiver on appellate review". However, these scholars warn that "[T]he WTO experience in adopting waivers is very limited for the same procedural reasons as the adoption of authoritative interpretations. Article IX:3 of the Marrakesh Agreement requires a three-fourths majority, but in practice waivers are adopted by consensus (Payosova, Hufbauer and Schott, 2019: 9).

In addition, Art. IX:3 of the WTO Treaty stipulates that:

> In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths [..] of the Members unless otherwise provided for in this paragraph.

Considering that the DSU is comprised under those Multilateral Trade Agreements, its obligations may also be waived. However, in spite of the temporal benefits that such a waiver could entail, that would simultaneously deprive the Members of their "trade-procedural" right to review panel reports by means of appeals, thus inevitably affecting that sort of "guarantee of the legal control" that we pointed out above.

Unblocking alternatives under general international law

The law of countermeasures

The European Parliament and the European Council have recently passed the Regulation 2021/167 of 10 February 2021 whereby the EU enabled itself to unilaterally suspend concessions or other obligations in the context of the WTO and free trade agreements "if effective recourse to binding dispute settlement is not possible because the third country does not cooperate in making such recourse possible" (recital 6).

The purpose of passing Regulation 2021/167 was to extend the scope of the earlier Regulation 654/2014, namely by addressing the situation in which the EU has faced a "dispute settlement through adjudication [that] is blocked or otherwise not available

for reasons of non-cooperation of the third country which has adopted the measure" (recital 2, emphasis added). To that end, the Regulation 2021/167 depicts the blockage of the Appellate Body and the interim arrangements for appeal arbitration pursuant to Article 25 of the DSU that the EU and other WTO Members have undertaken to face the AB crisis, stating that "if a WTO Member refuses to enter into such an arrangement, and files an appeal to a non-functioning WTO Appellate Body, the resolution of the dispute is effectively blocked" (recital 3).

It flows from the above that the EU considers that there is a breach of an international obligation (i.e., an obligation to cooperate) whenever a WTO Member refuses to sign an appeal arbitration arrangement and files an appeal to a non-functioning AB in a given WTO dispute. The breach of this obligation to cooperate allows itself to adopt countermeasures, in the form of suspension of concessions or other obligations, towards the infringing WTO Member. We doubt, however, on the legal grounds to assert that position, for several reasons.

First, interim arrangements pursuant to DSU Article 25 represent only one of the different legal means that the international community is currently seeking to deal with the blockage of the Appellate Body. An example of those interim arrangements is the MPIA we described above, entered into by its Participants on a completely voluntary basis. Second, the pretended unilateral suspension is not even justified on the grounds of the law of State Responsibility. Precisely, according to the "Commission Declaration on Compliance with International Law" (2021/C49/03), the EU seems to justify under international law only the unilateral countermeasures with respect to those suspensions of concessions or other obligations adopted in the context of blocked disputes under international trade agreements (i.e., free trade agreements), but not with regard to those carried out in the context of multilateral level, namely the WTO.

Recourse to alternative forums: the case of the ICJ

The International Court of Justice is the principal judicial organ of the United Nations (Article 92 of the UN Charter). Its role is to settle disputes according to the international law when submitted to it by states, and also to give advisory opinions on legal questions referred to it by authorized international organs. The Court acquires jurisdiction:

- by entering the parties into a special agreement submitting the dispute to the Court,
- by a jurisdictional clause in a treaty or agreement, or
- through the reciprocal effect of declarations made by them under the Article 36 of its Statute, accepting each one the jurisdiction of the Court in the event of a dispute with another State issuing a similar declaration.

In this matter, we need to consider that the WTO DSB jurisdiction is compulsory, as its expressly provided for the Dispute Settlement Understanding. To that extent, parties to a WTO dispute (if not all WTO Members, since this dispute settlement would represent an erga omnes parte matter, as discussed above) should necessarily enter into an agreement consenting to submit their trade disputes to the Court. While this possibility may currently sound theorical, the truth is that States are sovereign to enter into those agreements, notwithstanding the political balance to be made of eroding the multilateral trading system and the DSB in particular.

Suspension under the Vienna Convention on the Law of Treaties

The WTO legal system does not provide the right to expel or suspend a Member for serious breaches. However, if VCLT (1969) is considered as the applicable body of general rules in the field of the law of treaties in the absence of a Lex Specialis rule to the contrary, we should bear in mind what Article 60 of this Convention provides for with respect to suspension:

> Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach.
>
> 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
>
> 2. A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
>
> (i) in the relations between themselves and the defaulting State; or
>
> (ii) as between all the parties.

Additionally, we should recall that the VCLT codified the rules of customary international law in the field of the law of treaties. In addition, the DSU Art. 3.2 states as follows regarding interpretation of treaties:

> The Members recognize that it (WTO dispute settlement) serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

Under WTO caselaw, the DSB has ruled that "customary rules of interpretation" may include other than those referred to in Articles 31 and 32 of the VCLT. In this sense, for example, the AB has settled on the basis of the "principle of effectiveness" in the interpretation of treaties. The recourse to this principle was used in US — Gasoline case, where the WTO AB concluded that "one of the corollaries of the "general rule of interpretation" in the Vienna Convention is that interpretation must give

meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (WTO/DS2 1996:I /AB/R p. 23).

Like in the case of US – Gasoline, a material breach of a DSU provision may also be interpretated under the WTO Treaty as a failure to apply the provisions effectively. In fact, if the AB does not work the way it needs to, the System as a whole fails to function effectively. Then, if the WTO Members have not contracted out of the general international law of treaties, and no special provision on material breach and suspension is provided for in the WTO Treaty, one may conclude that a failure to effectiveness would mirror the material breach that VCLT Article 60 refers to, allowing for a suspension of the infringing party.

In fact, it could be stated that, to some extent, effective interpretation "encounters" the material breach that allows for suspension when there is an infringement of the object and purpose of the treaty itself. The object and purpose are referred to in Article 31 (1) with regard to interpretation. But the same references to object and purpose are also provided for under paragraph 3 (b) of Article 60 concerning the violation of a provision that is "essential to the accomplishment of the object or purpose of the treaty". Thus, if the functioning of the AB is essential to the accomplishment of the object or purpose of the WTO Treaty, it could be stressed that, in theory, a blockage of the AB may be interpreted as a material breach of the WTO Treaty.

Now, applying the field of the law of treaties with respect to the situation of the US, Stephen Mulligan, the Legislative Attorney of USA Congressional Research Service, recalled that "[a]lthough the United States has not ratified the Vienna Convention, courts and the executive branch generally regard it as reflecting customary international law on many matters". For instance, in De Los Santos Mora v. New York, (2d Cir. 2008) the Court ruled that "[a]lthough the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it 'as an authoritative guide to the customary international law of treaties,' insofar as it reflects actual state practices" [1].

In spite of the foregoing, it would be virtually impossible to suspend a major player of the WTO system, not only because of the impressive trading consequences that such a suspension could entail, but also because this would likely require unanimity across all Members of the Organization, as mandated by the VCLT itself. Still, legally speaking, there is no reason for a Member to stay as a party to a treaty, if it actively blocks the effects of that treaty.

1. "International Law and Agreements: Their Effect upon U.S. Law", updated September 19, 2018 in Congressional Research Service 7-5700 www.crs.gov RL32528.

Conclusions

As it has been discussed in this article, the WTO Treaty is immersed in the broader context of international law. In this vein, it works as a sort of Lex Specialis regime of some general international law institutions, such as the Law of State Responsibility. It is for this reason of Lex Specialis that WTO Members should seek for solutions to breaches within the same System of law. To this extent, the WTO Treaty foresees special mechanisms by which the Members may raise claims in case of breaches of multilateral trade obligations.

Nevertheless, those special mechanisms do not only encompass secondary obligations to deal with substantive trade obligations. They are, by the same token, also primary obligations, in the form of "trade-procedural" obligations, which may also be enforced as in the case of the substantive trade obligations. In this sense, WTO Members have the "trade-procedural" obligation to respect the functioning of the Appellate Body.

The problem is that, in the event of a breach of the "trade-procedural" obligation on the functioning of the AB, a procedural dilemma of an endless problem could emerge if WTO Members do not resort to other tools that may exist beyond the DSU. Those tools may be found in the Marrakesh Agreement or in international law rules from which Members did not contract out.

To that extend, could the end of the blockage of the AB also mean the end of Members' conception of the WTO as a system of law apparently isolated from general international law?

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