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LEGAL SECURITY OF PARTIES IN THE ASPECT OF DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION

Abstract

One of the basic elements of world order is properly functioning legal systems of individual states. The Sars-Covid pandemic and armed conflicts around the world, including those involving Europe, have strained the certainty of legal transactions in the countries of the UN system and the need to seek new supranational solutions, especially in the field of international trade. The pillar of security is therefore becoming instruments of international law, with the World Trade Organization in mind. A special tool of this organization are the dispute settlement mechanisms to which member states must adhere. In the conducted research, the thesis was put forward that one of the guarantors of the security of legal transactions is the resolution of disputes using the basic legal tools of this organization. It was proved that disputes between states themselves become solvable if they are transferred to the WTO.

Streszczenie

Jednym z podstawowych elementów porządku ładu światowego są prawidłowo funkcjonujące systemy prawne poszczególnych państw. Pandemia Sars-Covid oraz konflikty zbrojne na świecie, w tym obejmujące Europę nadwyrężyły pewność obrotu prawnego w państwach systemu ONZ i konieczność poszukiwania nowych rozwiązań ponadnarodowych, zwłaszcza w dziedzinie handlu międzynarodowego. Filarem bezpieczeństwa prawnego stają się zatem instrumenty prawa międzynarodowego, z uwzględnieniem rozwiązań Światowej Organizacji Handlu. Szczególnym narzędziem tej organizacji są mechanizmy rozstrzygania sporów, do których muszą stosować się państwa członkowskie. W przeprowadzonych badaniach postawiono tezę, iż jednym z gwarantów bezpieczeństwa obrotu prawnego jest rozwiązywanie sporów przy wykorzystaniu podstawowych narzędzi prawnych tej organizacji. Udowodniono, iż spory między samymi państwami stają się rozwiązywalne, jeśli przenoszone są na grunt WTO.

Keywords: *dispute solution, WTO, panels, negotiations, legal security*

Słowa kluczowe: *rozwiązywanie sporów, WTO, panele, negocjacje, bezpieczeństwo prawne*

Introduction

In the past five years, countries, members of the WTO have been experiencing unprecedented upheavals, one could write, biblical shocks. The WHO's announcement in March 2020 of Sars-Covid, which has affected more than 800 million people worldwide, is not the only calamity affecting the population. On February 24, 2021, the Russian Federation launched the largest armed conflict since World War II on Ukrainian territory. It is described by the Russian Federation as a *special operation*. The pandemic was joined by all the negative phenomena associated with the armed conflict in particular, massive population migrations not seen since World War II, poverty, disease, while on a global scale, food imbalance, imbalance in the supply of energy carriers, collapse in the supply of natural resources based on solutions used for years, soaring prices and massive global inflation.

The world's fading Covid pandemic has proven the weakness of the WHO's legal solutions. The ongoing conflict in Europe has once again proven the weakness of the UN system as a global security system, while the European Union's legal system, unprepared for such events, remains in intellectual and legal impotence.

One of the greatest current threats is the breach of the commodity supply system due to the conflict in Ukraine and Israel. Food, energy or general subsistence poverty are the premises of unrest in the world. Consequently, the role of the World Trade Organization as an organization responsible for the circulation of goods and services as well as a medium that resolves disputes between states has increased dramatically. Thus, the organization's role as guarantor of the unwavering circulation of goods and services in the world has increased sharply (WTO Report, WT/DS619/1, G/L/1487). It should be emphasized that the situation related to the current crisis in the world , which is affecting the global system, is dynamic to the point of being unpredictable.

The purpose of this study is to present: a) selected aspects of WTO dispute settlement b) determine the effectiveness of selected WTO procedures c) impact on the international system d) attempt to assess the effectiveness of the WTO system e) demonstrate that WTO procedures guarantee the parties certainty of legal transactions at the international level.

The results of the analysis should demonstrate a) the need to deepen co-operation in dispute settlement b) prove that the procedures are economical from the point of view of dispute settlement time c) the parties are obliged to apply the rulings in their legal systems directly.

In principle, the **dogmatic, statistic and comparative method** was used in the work.

Outline of issues at the WTO

The Ministerial Meeting, referred to as the Uruguay Round, began in September 1986 in Punta del Este, located on Uruguayan territory formed the basis for the establishment of the WTO (Komuro, 1995, pp. 5-96). Because of the importance of the issues under consideration, it was known that this round would be of special significance. Included in the agenda were matters of amendments to agreements adopted at earlier rounds, the establishment of rules for trade in goods and agricultural products, the introduction of trade remedies including a set of import security rules. Participants in the meeting intended to introduce new regulations on trade in services and intellectual property rights into the Agreement. Negotiations were also to cover matters of further liberalization of international trade in the agricultural and textile sectors. In addition, the aim of the negotiations was to improve dispute settlement mechanisms between the parties to the General Agreement (Wolf, 1998, pp. 951-958) In the second half of 1993 and early 1994, agreement was reached on the most significant issues.

The Uruguay Round agreements adopted during the negotiations were consolidated into a single set of agreements as a comprehensive package (Marceau, 2012, pp. 493-508). The results of the eight-year Uruguay Round negotiations were included in a Final Act of more than twenty-five thousand pages. It was signed by representatives of the contracting parties on April 15, 1994 in Marrakech, Morocco. The act also included the Agreement Establishing the World Trade Organization (Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994)), which was signed by 125 signatories(Van Nuffel, 1995, pp 338-354).

Following ratification processes by 81 countries on January 1, 1995, the Agreement establishing the World Trade Organization (Jackson, Croley, 1996, pp. 193-212) came into force.

Even before the WTO was established, it was recognized that dispute settlement procedures (Understanding on Rules and Procedures Governing the Settlement of Disputes hereafter: DSU) were one of the pillars of the organization's operation. They were included in Annex 2 of a mandatory nature for state parties, it contains rules on dispute settlement (Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). It introduced unified dispute settlement mechanisms, also covering the WTO Agreement, Annex 1 and Annex 2 agreements, while providing a procedural basis for disputed issues. Annex 1 B covers the General Agreement on Trade in Services and its annexes (General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994)), Annex 1 C covers the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)), Annex 2 covers the Understanding on Principles and Procedures Governing the Settlement of Disputes, while the Annex covers the Trade Policy Review Mechanism. The procedures of the dispute settlement system therefore have a special role (Wolff, 2001, pp.116-128)

Selected mechanisms for regulating disputes

Under the GATT system, even before the establishment of the WTO, generally effective but rather complex mechanisms for resolving disputes between member states had developed (Ruttley, 1997, pp.4-9). The collection of more than two hundred settlements is the result of states' dispute settlement efforts and forms the largest body of precedent jurisprudence issued under a multilateral international agreement. The system of *precedents* operating under the GATT has sometimes been criticized. J. H. Jackson stated that the use of solutions to interpret previous

rulings through the lens of the interests not only of the disputing parties, but also of third countries, led to worthless verdicts (Jackson, 1992, pp. 429-454).

Taking into account the fact that the genesis of the WTO dispute settlement mechanism should be sought in the practice of the GATT, it is necessary to point out two different models of procedure that were used for the resolution of disputes between GATT parties (Iida, 2004, pp. 207-226) . The first model was formalized in nature. It allowed an impartial panel to make a ruling on whether or not an action was in compliance with the agreement. The second model was based on the idea that the rules of conduct should not be *formal rules*, strictly defined and rigorous, but only subsidiary norms, supporting negotiation and compromise, which are ways to achieve a resolution of the dispute.

Due to the lengthening period for settling cases in the mid-1950s, a new mechanism in the form of a panel was introduced at the initiative of GATT Director General Eric Wyndham White (Dz. U. z 1995 r., Nr 98, poz. 483). The dispute settlement procedure began with a party requesting consultations on the disputed issue (Hao, 2018, pp. 887-928) . Consultation could refer both to the settlement of already existing disagreements and could also serve to prevent the emergence of future conflict between the contracting parties. Under Article XXII(1) of the GATT, each state party had an obligation to give *sympathetic consideration* to the requesting party's request.

However, there was the possibility of blocking the adoption of a report made by the panel. Such an option was available to a party dissatisfied with the outcome, which could do so when voting on the report (Shoyer,1998, pp.75-78). This mechanism was modeled on the GATT model of decision-making by consensus. Although the Agreement stipulated that decisions be made by majority vote, using the principle of *one country, one vote,* as practice indicates, the contracting parties avoided voting by seeking unanimity.Most of these issues were addressed in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) (Stoll, P., Steinmann, A.,1999,407-438). This is the first time the issue of disputes has received so much attention. The DSU agreement consists of 27 articles and is supplemented by annexes covering special and additional procedures.

However, different opinions have been voiced about giving the settlement a *binding party* feature. L. Henkin stated that such a decision binding a party entails far-reaching consequences in its internal legal order. Only an analysis

of internal legislation can indicate what the scope of the decision's impact is. In his argument, L. Henkin refers to general principles of international law (Henkin, 1994, pp. 30-42). On the other hand, J. H. Jackson pointed to the domino effect of the influence of these settlements on the interpretation of other normative acts of domestic law regulating similar areas of trade (Jackson, 1992, pp. 311-312).

The DSU agreement governing dispute settlement in the WTO does not provide for a single model of procedure, but based on an analysis of its provisions, taking into account also the positions presented during the Uruguay Round negotiations (GATT Report, 1994), it can be concluded that the current system is based on the concept of concreteness and legalism (Mitchell, 2006, pp. 339-371).

This follows from the provisions of Article 3(2) of the DSU Agreement according to which *the dispute settlement system is a central component that gives security and predictability in the multilateral trading system. (…) it serves to safeguard the rights and obligations of members with respect to the agreements listed and to clarify the provisions of these agreements in accordance with customary rules of interpretation of public international law.* These provisions indicate the need to guarantee the certainty of international trade based on the regulations contained in the agreements using for this purpose also the general principles of international law (Guiguo, 2005, pp. 123-132). This position has been confirmed in panel and Appellate Body rulings. This is particularly true of the Appellate Body's ruling in the U.S. Gasoline case (WTO Report, 1997). The body stated, among other things, that *both the proceedings, as well as the GATT 1947 and the World Trade Organization, belong to the system of international law.* However, it should be noted that at the issuance of this ruling, different opinions were also expressed, for example, it was pointed out that the WTO proceedings constitute a specific regime set apart based on the principles of international law (Srivastava,2023, pp. 1-9). The Appellate Body, on the other hand, held that WTO dispute proceedings fall within the realm of international law, adding also that the Organization in its operation *applies the principles of treaty interpretation set forth in the Vienna Convention on the Law of Treaties.*

Another important issue is determining the extent to which the Dispute Settlement Body can be bound in its decision-making by the interpretation of contractual provisions made by the governments of the countries involved

in the dispute. It is doubtful whether there can be any dependence at all on the interpretation made by WTO member states. In practice, there have been attempts by states to influence decisions made by WTO bodies. During the Uruguay Round, representatives of the United States of America proposed that WTO bodies should be bound by interpretations made by state governments on certain issues (Sharma, 2007, pp. 757-770). This was particularly true in cases relating to anti-dumping measures. The U.S. negotiators suggested that the mechanism resulting from the Chavron doctrine adopted in the federal system should be applied in these cases. However, this was not included in the provisions of the Uruguay Round.

It is also worth noting the provisions in this regard of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 201). Article 17(5) states that *in evaluating the facts of the case, the adjudication panel will determine whether the authorities' determination of the facts was appropriate and whether the evaluation of those facts was impartial and objective. If the determination of the facts was appropriate and the evaluations were impartial and objective, then even if the adjudicating panel reached a different conclusion, this evaluation should not be challenged* (Appendix 1 A Dz. U. z 1998 r., Nr 34. poz. 195). In light of these provisions, it is possible to formulate a conclusion about the recognition of the facts accepted by the parties, if this does not create doubt on the matter. The provisions of this article, however, are *lex specialis* with respect to the general rules adopted in the DSU Agreement, and can only apply to the matters set forth in this annex (Davey, 2009, pp 119-128).

Panels as a guarantor of the speed of DSU proceedings

On the basis of statistics cited by R. Hudec (Hudec, 1998), it can be established that in the history of the GATT, 278 cases came before the Panels, which were processed on the basis of the general principles contained in the Agreement. In 110 cases the proceedings ended with the issuance of a ruling, while in the remaining cases the dispute between the parties ended before the report was issued. In 88 cases in which the panel found violations of the Agreements, its rulings were adopted by the contracting parties by majority vote (Marceau, 1997, pp. 25-28). According to R. Hudec, the efficiency of dispute settlement by panels between 1947 and 1994 was more than 90%.Today, the model of proceeding with adjudication panels, after the Uruguay Round arrangements, differs significantly from that used previously (Herwig, 2008, pp. 823-846).

Adjudication panels, unlike the Appellate Body and the Dispute Settlement Body, do not have the status of permanent bodies. They are appointed on an ad hoc basis by the Dispute Settlement Body in accordance with the procedures and principles set forth in the DSU Agreement (Davey, 2016, pp.404-406). Pursuant to Article 2 of the DSU Agreement, *the DSB … shall have the authority to establish adjudication panels, accept the reports of the adjudication panel.* The DSB's authority to establish a panel is also set forth in Article 6(1), according to which it should appoint a panel *at the request of the complainant no later than the DSB session following the one at which the request was first placed as an item on the DSB's agenda.* The adopted regulation is a *lex specialis* to the provisions of Article 2, for the appointment of adjudicatory panels in the event of a request was adopted as a rule. However, the Dispute Settlement Body may not grant such a request and may not form a panel. There is no doubt that these are exceptional situations. In addition, such a decision of the DSB may be made on the basis of a consensus reached at its DSB sessions, which seems unlikely due to the participation of representatives of the disputing parties in making such a decision. Within a certain period of time after the report is presented to the members, *the report should be adopted by the DSB* (Article 16 of the DSU Agreement). In this case, a similar solution has been adopted to the request for an adjudication panel. The rule is to

accept the report, while the exception, limited by the need to reach consensus, is to reject it. The condition for the report to become effective is its acceptance by the Dispute Settlement Body. This indicates the quasi-judicial nature of the panels. The basic premise within the proceedings of the panels is the pursuit of a positive settlement of the dispute and the principle of good faith. Therefore, if the *defending party* intends to bring new charges, it should initiate the procedure from the beginning. The meaning of Article 3.10 of the DSU Agreement, according to which *the request for conciliation and recourse to dispute settlement procedures should not be intended,* remains unclear. The main goal of the parties to the dispute is to achieve a positive settlement of the case. The question arises as to how this should be done if their actions in this direction should not be *intended* (Gomula, 2002, pp. 97-102)?The nature of panels indicates that they are the primary form of dispute resolution, and very often the panels are responsible for the smooth conduct of the dispute proceedings. As a rule, a panel should issue a report within six to nine months.

Special procedures as a forgotten element of dispute resolution

Parties to a dispute, very often driven by political considerations, forget that legal certainty is linked to the ability to end a dispute through negotiation. The WTO, starting from the premise of practical application of the law, has introduced several important procedures, which include conciliation, good offices and arbitration. Conciliation is provided for under Article 5 of the DSU Agreement. In particular, Article 5 of the DSU Agreement, which is the legal basis for special proceedings, uses the term *good services, conciliation, mediation.* Their essence is to negotiate and come to an agreement to adopt a mutually acceptable solution. An important feature of conciliations conducted in accordance with Article 5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes is that they are voluntary. Paragraph 1 of this article states that *good offices, conciliation, mediation are procedures undertaken voluntarily with the consent of the parties to the dispute.* Thus, the condition for initiating conciliation is the occurrence of the consent of the parties to the dispute The conciliation procedure can be initiated at any ti*me.*

The provisions of the DSU also do not specify the moment of its termination. It seems that the initiation of the procedure occurs when the participants reach a consensus that the case will be subject to such a procedure.

While no date for the completion and duration of the conciliation procedure is specified, it seems that it should be completed within a ‚reasonable time'. The provision of good offices by the WTO Director-General is provided for in Article 5.6 of the DSU Agreement. According to these provisions, the Director-General may offer good offices in order to ‚assist Members in the settlement of their dispute'. The initiative to take such action is therefore not dependent on the will of the parties to the dispute, but neither does it preclude it. The Director General's authority to propose good offices appears to derive from his or her position in the Organization, and is linked to the confidence he or she enjoys among its members. Another means of dispute resolution is arbitration (Kennedy, 2012, pp. 555-590). This method, which is used quite frequently within international organisations, has also found its way into the structure of the World Trade Organization. It is provided for in Article 25 of the DSU Agreement. Paragraph 1 states that ‚WTO arbitration, as a dispute settlement alternative, may facilitate the resolution of various disputes concerning matters clearly identified by both parties'. Arbitration is therefore a separate and equal means of dispute settlement.

Ukraine-Poland dispute under the WTO

On 18 September 2023, Ukraine requested the WTO Secretary-General to initiate a dispute settlement procedure in accordance with Article 4 of the DSU. As indicated by the plaintiff-Ukraine on 15 April 2023, the Minister of Economic Development and Technology of Poland adopted Regulation No. 717. The regulation imposed restrictions on the import of agricultural products from Ukraine. The import referred to the import of agricultural products into Poland as well as the prohibition of transit through the territory of Poland. On 2 May 2023, the European Commission decided to ban imports from Ukraine to Poland, Hungary, Slovakia, Romania and the Czech Republic. The import ban covered: grain, sugar, dried fodder, seeds, hops, flax and hemp, fruit and vegetables, hemp, fruit and vegetable products, wine, beef,

veal and milk. On 16 September, Poland upheld the ban on Ukrainian grain imports by Regulation No. 1898. In particular, these measures appear to be incompatible with: 1. Article XI:1 of the GATT 1994, in that they prohibit or restrict the import of agricultural goods from Ukraine into the territory of the Republic of Poland; 2. Article V:2 of the GATT 1994, insofar as the Republic of Poland's measure de jure or de facto restricts the freedom of transit of Ukrainian agricultural goods through the territory of Poland to other EU Member States; 3. Article X:1 of the GATT 1994, in that the Republic of Poland did not promptly publish the provisions at issue in a manner enabling the Government of Ukraine and bussiness to familiarize themselves with it.

For the time being, the matter is being dealt with within the exchange of documents between the parties and the organization. It seems that the best way would be to reach a consensus and agreement through the mechanisms described above.

Conclusions

The post-pandemic world and in the midst of growing conflicts is moving towards the need to resolve disputes in core areas. These core areas are, besides defense, trade in goods and services. The role of the WTO is increasing all the more as armed conflicts interrupt the supply chains of many products. At the time of writing, there were 624 dispute cases pending at the WTO, of which 178 cases were resolved through negotiations, 41 cases went to panels. One third of the cases have therefore been resolved at the level of the underlying mechanisms. The average time to reach consensus was around 18 months. The role of the WTO is increasing because of the speed of proceedings, the professionalism of the lawyers involved, the quick turnaround time and efficiency. For the time being, it is important to realize that the WTO is the only organization that can settle disputes between the EU itself and other non-EU countries. Furthermore, it should be stressed that the EU has party status in the WTO and, as such, can act as a party on its own. The dispute settlement procedures are characterized by transparency, impartiality, international recognition. Efficiency is associated with the resolution of trade conflicts, and the bodies' decisions are implemented by the state parties.

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