How the Judges of the Appellate Body Form Their Opinion and its Reflection on the Implementation of the Reports of the WTO Dispute Settlement Body

MARIA DE LOURDES ALBERTINI QUAGLIA

“Agents are inseparable from social structures in the sense that their action is possible only in virtue of those structures, and social structures cannot have causal significance except insofar as they are instantiated by agents. Social action, then, is “co-determined” by the properties of both agents and social structures.”

(Alexander Wendt)

Resumo

Este artigo busca discutir o problema de como os juízes do Órgão de Apelação da OMC formam seus convencimentos acerca dos casos em julgamento. O artigo não tem a pretensão de esgotar o tema, mas somente levantar o debate sobre a possibilidade de se analisar o comportamento desses juízes através da aplicação de uma mistura de teoria - o construtivismo – com a visão mais tradicional do tema que considera a função do órgão como um exercício de aplicação exclusiva dos procedimentos contidos no Entendimento de Solução de Controvérsias e do Direito da OMC. Alguns casos práticos também serão usados como complemento da nossa argumentação.

Abstract

This article tries to raise a discussion about the problem of how Appellate Body judges reach their understandings about their cases. The proposal in this article is not to try to explain fully, but just to initiate a debate about the possibility of analyzing their behavior applying a mix of theory - constructivism – and the traditional view which considers the function of the body an exercise of the application of the Dispute Settlement Understanding procedures and the law of the WTO. Some case arguments to complement the main purpose of the article are also used.

1 - Introduction

A major debate concerning the Dispute Settlement Body of the WTO refers to the stage relative to the compliance with its decisions. The question of whether the member is subject because of the rules and decisions of the Dispute Settlement
Body of the WTO, while the organization is composed of sovereign states, the enforcement of the Authority not deriving from a coercive sovereign power that overrides its members, deserves further consideration which is to be undertaken in this article, without the pretension of exhausting it, perhaps tackling it from a new angle that might contribute to a better understanding of the behavior of the Member States in relation to that jurisdiction’s international trade. Thus, we start from the assumption that the decisions issued by the Appellate Body (hereinafter referred to as AB) are built up from a process of innovation, domestic and international publicizing, political selection and establishing an effective institutionalization, that creates an intersubjective understanding on which are based the interests, practices and behavior of governments and other players in the system. Accordingly, and using the statistics that demonstrate that in most cases judged by the DSB, the WTO Member States comply with its decisions, we conclude that these decisions are part of a process built up from negotiations in which all interests, desires and values were discussed and agreed at a forum for negotiation, from the interaction of agents (direct: States, and indirect: those in the domestic context in some way involved in the construction of the foreign trade of the State) and from the rules of the structure embodied in the DSU.

A series of cases shows that this hypothesis is true. We will see throughout the article that the arguments presented during the process, mainly during the phase of formation of conviction of the Judges, members of the Appellate Body occur due to a cognitive process and built up between the litigant parties, third parties and judges, that is the decisions of the Appellate Body are irrefutable evidence that the parties implemented or will implement their decisions because they are the non-coercive result of the broad debate that opens the panel and is consolidated in the oral hearings of the body. Indeed, the judges arrive at their opinion from exhaustive rounds of questions to the disputing parties that, basically, want to know from both parties why the WTO rules, taken as arguments opposed, must be applied in each case at trial. The parties, in turn, should have the expertise to respond in a convincing way so that their arguments are more valid. This is nothing more than the formation of knowledge from maieutics, or the Socratic method. Accordingly, it is the high level of legitimacy of AB decisions that demonstrates the high degree of compliance with them.

2 - Brief description of the functioning of the Dispute Settlement Body of the WTO

The new Dispute Settlement System introduced in the Uruguay Round through the Annex II (the so-called DSU) of the Marrakech Agreement signed in 1995 introduced a series of changes that become effective to the detriment of the previous mechanism, which was very vulnerable to the sovereignty of Member States.
2.1 The GATT 1947

In 1947, when the GATT entered into force, there was provision for the settlement of disputes in arts. XXII and XXIII. Some of the principles and practices involved in this system were codified into decisions and understandings of the contracting parties to GATT 1947. The current WTO system builds on, and adheres to, the principles for the management of disputes applied under Articles XXII and XXIII of GATT 1947 (Article 3.1 of the DSU), with important modifications brought about by the Uruguay Round. The GATT 1947 contained rudimentary rules in Article XXIII:2, which provided that the contracting parties themselves, acting jointly, had to deal with any dispute between individual contracting parties. In the beginning the disputes were decided by rulings of the Chairman of the GATT Council, but later, they were referred to working parties composed of representatives from all interested contracting parties, including the parties to the dispute. The reports of these working parties were adopted by consensus decisions, which were soon replaced by panels made up of three or five independent experts who were unrelated to the disputing parties. The panel’s reports were independent and made recommendations and rulings for solving the dispute. After that they were referred to the GATT Council. Only upon approval by the GATT Council did these reports become legally binding on the parties to the dispute. The GATT panels thus built up a body of jurisprudence, which remains important today, and followed an increasingly rules-based approach and juridical style of reasoning in their reports.

The GATT 1947 was modified many times progressively through the decisions and understandings of the contracting parties. The most important were: The decision of April 5, 1966 which modified some procedures under article XXIII; The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979; The Decision on Dispute Settlement, contained in the Ministerial Declaration of 29 November 1982; The Decision on Dispute Settlement of 30 November 1984.

The GATT Dispute Settlement System presented some weaknesses that after the Uruguay Round needed to be modified. One of these is the rule of positive consensus which meant that there had to be no objection from any Member state to the panel’s report. This means that the respondent could block the establishment of a panel. Moreover, the adoption of the panel report also required a positive consensus, and so did the authorization of countermeasures against a non-implementing respondent. Such actions could also be blocked by the respondent. From a practical standpoint, we can conclude that despite this fact the GATT dispute settlement system brought about solutions satisfying the parties in a large majority of the cases. The only problem was that many disputes were never brought before the GATT because the complainant suspected that the respondent would exercise its veto. And such vetoes actually occurred, especially in economically important or politically sensitive areas such as anti-dumping. Finally, there was a deterioration of the system in the 1980s as contracting parties increasingly blocked the establishment of panels and the adoption of panel reports.
Another difficult moment for the Dispute Settlement System of the GATT was the Tokyo Round, when a number of plurilateral agreements (which was known as GATT à la carte) were introduced, creating specific codes, such as one for Anti-Dumping Measures, containing code-specific dispute settlement procedures. Each of these specific codes were applicable only to the signatories of the codes, and only with regard to the specific subject matter. It hugely compromised the multilateral Dispute Settlement System of GATT 1947. It created a real situation of “forum-shopping” and “forum-duplication”, allowing the contracting parties to choose the agreement and the dispute settlement mechanism that promised to be the most beneficial to its interests.

2.2 The Uruguay Round and the creation of WTO

In 1986 the 8th and last Round under the GATT began. This Round finished in 1994 with the signature of the Marrakech Agreement. This agreement brought several important changes for the international, multilateral trade system, transforming the GATT into a real International Organization (with juridical personality under International Law) and increasing the spectrum of control beyond the agreement of goods to other areas such as agriculture, intellectual property and services, and above all, improving hugely the Dispute Settlement System, embodied in the Annex II of the Marrakesh Agreement (The Dispute Settlement Understanding – DSU). The new Dispute Settlement System created the right to a panel and strict time-frames for panel proceedings. As part of the results, the DSU introduced a significantly strengthened dispute settlement system, providing more detailed procedures for the various stages of a dispute, including specific time-frames. As a result, the DSU contains many deadlines, so as to ensure prompt settlement of disputes. The new dispute settlement system is also an integrated framework that applies to all covered agreements with only minor variations. Arguably, its most important innovation is that the DSU eliminated the right of individual parties to block the establishment of panels or the adoption of a report.

Now, the DSB automatically establishes panels and adopts panel and Appellate Body reports unless there is a consensus not to do so. This “negative” consensus rule contrasts sharply with the practice under the GATT 1947 and also applies, in addition to the establishment of panels and the adoption of panel and Appellate Body reports, to the authorization of countermeasures against a party which fails to implement a ruling. Other important new features of the (WTO) dispute settlement system are the appellate review of panel reports and a formal surveillance of implementation following the adoption of panel (and Appellate Body) reports.

3 - The formation of the Appellate Body’s opinion - a constructivist process

3.1 - The theoretical framework and Constructivism

Constructivism and a meta-theory that is part of the core constituent of science itself. Three main conceptions of science or scientific ideas are:
a) the rationalist: the Greeks to the seventeenth century - which says that science is deductive and demonstrative rational knowledge such as mathematics, and so able to prove the necessity and universal truth of its results and statements, without any doubt. “(...) The scientific object is an intellectual representation, a universal, necessary and true representation of things, and corresponds to reality itself, because it is rational.

b) the empiricist, that is of Greek medicine and Aristotle until the end of the nineteenth century - which says that science is an interpretation of facts based on observations and experiments that allow for induction and, when completed, provide the definition of the object, their properties and their laws of operation.

A scientific theory from observation and experiment, so that experience is not simply a function to check and confirm concepts, but to produce them. It uses rigorous experimental methods, because on this depends the formulation of the theory and the definition of objectivity investigated.

Both approaches consider that the scientific theory is an explanation and a true representation of reality, as it is in itself.

For both science is a kind of X-ray of reality.

c) constructivist: from this perspective one considers the object-building logic and the intellectual construction underlying the laboratory experiment. In this sense, it is not expected that the scientist's work will present reality in itself, but provide structures and operating models of reality which explain the observed phenomena. It does not strive for absolute truth but truth that can be corrected, modified, abandoned for another, more appropriate to the phenomena. There are three requirements for this ideal of scientificity: 1) to ensure consistency (ie there are no contradictions) between the principles underlying the theory, 2) that the models of objects (or structures of phenomena) are constructed based on observation and experimentation, 3) that the findings cannot just change the models built, but also change the very principles of the theory, correcting it.

3.1.1 - Constructivism and international trade

Trade is a phenomenon that cannot be explained from by economic or political theories, since it is a reciprocal action based on the willingness of someone to buy certain things and someone else to sell them. To explain the action of trade we must consider not only its objective elements but the subjective elements also. Trade is marked by what the law calls "habits and customs," more the habits than the customs, the regular practice of behavior that has become common. The lex mercatoria, for example, is the international law governing trade between private agents, implemented in rules not formalized in treaties between States, but obeyed by all consensually. In this sense, international trade is a result of foreign trade policies of states that are made up of domestic rules within the category of public policies, derived from the needs of commerce made by various participants such as importing
and exporting companies, employees of the industry and its class entities (such as unions), that is, it is part of a set of actions that lead to these rules, which themselves order the same actions in a feedback mechanism for both.

In turn, international trade is developed within a context of rules that are built and rebuilt from the trade practices of states and other agents endogenous to them. Thus, the process of emergence of an international institution like the WTO, given the juridical nature of international law, is part of the evolution of international trade. Indeed, international trade relations are part of the constitution of society itself. It should be said, therefore, that insofar as new technological facilities devised by men have been incorporated into trade practices, and when certain social events lead to setbacks of any kind that reflect negatively on the economic sphere, trade practice becomes more developed. Both situations can be found in recent historical times. The first is represented by the process of economic globalization that marks international relations of the end of the twentieth century, when they were deeply intensified by the rapid dissemination of information provided by technology. The second can be verified in the period between the two great world wars of the twentieth century, when the world experienced significant reduction of international trade and instability caused by the great economic crisis.

International trade is formed by processes that are part of the larger process of building international relations itself. So that the more usual way of building the structures of international trade are based on continuous negotiation forums, where interests and preferences are shared. The word “forum” is chosen, as the negotiations are not random, it being observed that the environments for discussing issues of international trade are always public environments, based on communication and transparency. The word “forum” comes from Latin meaning “public square” where there were markets where the political assembly met, where the courts were established. “(Etymological dictionary of English, Antenor Nascentes, 1932)

Two fundamentally non-constructivist authors, Kratochwil and Ruggie, but who are essentially working with the theory, are examining the arrangements and international organizations based on the confrontation of two concepts: the ontology and epistemology. Their problems are of departure: “Did Bretton Woods’ collapse ‘in 1971-1973, or change was the norm governed? Are recent trade restraints indicative of dangerous protectionism or not?” (2005;P.9)

From these questions the authors began to build an explanation for the problem of coordination of actions in the system of international trade, pointing out the failures of some theories that analyze the schemes from models in which the behavior of players are considered in simulated environments, which means that these theories do not consider the ability of players to communicate and to establish the behavior and thereby explain saying that the players are condemned to communicate through behavior.

From the ontological perspective of régimes, they are endowed with a strong intersubjective condition in that the régimes are known by their shared understandings
of what constitutes “desire” and the acceptance of forms of social behavior. Contrary to an ontological view of the world we have the epistemological vision. The science comes from two Greek words: episteme, which means “science” and “technology”, from the logos, which means “knowledge.” It is the philosophical knowledge of the sciences.

According to the Brazilian philosopher Marilena Chauí, we can say that “contemporary science is constructivist, believing that facts and new phenomena may require the development of new methods, new technologies and new theories.” (CHAUI, 2006, p. 225).

Kratochwil and Ruggie, after making this confrontation between ontology and epistemology, demonstrate that the real world is not the result of the reactive behavior of agents in a given situation to an objective element. As an example they cite the case of France that in a situation of serious internal emergency in 1968 due to an internal revolutionary movement that became known as the “barricades of May” requested “sympathy and understanding” of its trading partners under the GATT for it to take measures against imports, although there is no legal provision or objective reason for doing so. Accordingly, it is argued that as this event was analyzed from a positivist epistemological standpoint, the literature has shown the situation as something that has led to the erosion of respect for GATT rules, since it acted cynically in favor of, and in league with France. In the authors’ critique, this positivist analysis is is mainly due to the fact that it was done based on analyses that took into account only the economic aspects involved in it, that is was an analysis marked by a positivist epistemology concentrated on the formulation of economic models, whose key element is rational calculation, and this was not the main characteristic of the situation existing in France at that time, because what was perceived there was the need to stabilize the country emotionally.

To resolve this problem, the authors proposed to examine the position adopted by the GATT which they came to call “interpretative epistemology”, which demonstrated that the institution (GATT) had three dimensions in its “organizational-design”: transparency, legitimacy and episteme, that is international organizations contribute to the formation of mechanisms of an informal order, such as the schemes, if built from its ability to guarantee intersubjective expectations and normative meanings of stability, from the moment when they present a transparent creation, which has a commitment to its legitimization and that the agendas are established from cognitive policy (the idea of public policies).

In our analysis of the proposed formation by the Appellate Body of the conviction from a process that is built up between the parties and considering that the structure and systems can be studied from the way international organizations are set up (“organizational-design”), that is from the analysis of what international organizations reflect not only their standards, but also information that changes the behavior of its members, it is possible to explain compliance with the decisions of the OSC by states, which go far beyond issues relative to rational calculation, or of a balance of power, ie the only objective questions.
Indeed, the Uruguay Round that led to the mechanism of the OSC of the WTO was a development that resulted from a process in which the states negotiated within an international context, where members’ interests converged to establish a structure that was sufficiently experienced to deal with the complexities of trade at that time. The degree of commercial interdependence has become so high that it minimized the weight of economic and political states. The construction of this facility was only possible because the states interacted with discourse, expounding their wishes, not in a very idealistic and less rhetorical sense, but an interpretative epistemological one, in the manner proposed by Kratochwil.

Currently, the operation of the Authority is still a continuation of the processes that generated it, i.e., the cases are built up argumentatively, “rule oriented”, among the agents and the structure, that interact in pursuit of common objectives, since both are part of the system. In the words of Kratochwil, “(...) the question of how rules and norms guide choices, particularly in cases in which several independent actors have to come to a joint decision, can be posed in a new way. Rules and norms mold decisions via the reasoning process (deliberation).” (KRATOCHWIL, 1995, p.43)

The decisions issued by the reports of the panels and the AB are mandatory, but not fundamentally coercive or convictions, which means they offer suggestions in search of the adequacy of the member states’ domestic trade standards to international trade rules established by the WTO or other international entities, but from forums for negotiation, allowing referees and judges of CSO access to a variety of legal possibilities (such as rules of international trade negotiation in the OECD) that best apply to the needs of the case in dispute. Therefore, there is always an element common to all the rules: the decision resulting from political processes that combine movements of bargaining with persuasion, appeals to common standards, shared values and accepted solutions, or created in a transparent manner, which gives them a high degree of legitimacy in decisions. Moreover, decisions are taken unanimously, which means that the consensus of the members is absolute under the DSU.

This procedural character of the body is very important in shaping the outcome of the process that in some cases, even if the panel has reached a specific result of WTO recognition of the incompatibility of the behavior of the defendant member with WTO rules, after the oral hearings and restricted legal analysis in the case made by the AB, it has to say in the report that on certain issues, how to determine if there was no violation of law or what was the right violated, or the matter could not be judged.

From the theoretical application to specific cases, we found that in most reports of the Appellate Body and processes that are already implemented, even if they have not passed by the Appellate Body, are the result of a work of formation of opinion from a process of meetings of the parties involved with the body’s panel members. In these meetings the mode of operation is essentially based on a thorough process of formulation of questions by the judicial body and answers
provided by the parties litigant, with intervention of third parties permitted, when necessary, but only as additional comments. We list some more relevant cases in which this element is shown.

EC - Chicken CUTS (WT/DS269/13, WT/DS286/15) - The arbitration procedure of Article 21.3 (c) of the DSU was implemented in 2006 with the request of the parties to Mr. James Bacchus, former member of the Body of appeal. In addition, the period of implementation of the measures in the report was suggested by the losing party - the European Communities - which was 26 months from the date of adoption of the report of the Appellate Body and Panel, under the justification that this period was reasonable taking into consideration that the decision to classify the World Customs Organization (WCO) was required under the laws of the European Communities before the European Commission could begin the process of adopting the regulations required to implement the recommendations and rules of the OSC. Furthermore, the EC challenged the need for a decision from the WCO, arguing that the implementation could be achieved also by the adoption of the Regulatory Commission in accordance with the procedures of the EC. When the final arbitrator (remembering that it has been chosen by the losing party) rejected the arguments of the EC and decided that based on examination of two relevant aspects of the case relative to the assertion that it was first necessary to obtain a decision of the WCO and then implement the decision of DSB: (i) despite the previous methods proposed in implementation of arbitration under Art. 21.3 (c) of the DSU, the method suggested here - nominally, the decision of the WCO – involved resources in processes outside the system of domestic law of the State implementing the decision, and (ii) a decision of the WCO in this case could potentially create a clear obstacle to the necessary implementation of the recommendations and rules of the DSB. In the light of these considerations the Referee determined that the EC should bear the burden of establishing that a decision regarding the WCO classification was necessary before the ECs laws as a prerequisite for the adoption of the Regulation Commission implementing the recommendations and rules of the DSB. The arbitrator concluded that the EC had not succeeded in discharging that burden and the time required for obtaining the decision of the WCO should not be considered as part of the “reasonable period of time” necessary to implement the DSB recommendations and rules. Thus 9 months for both was recommended. As a result, on June 19, 2006, during the DSB oral hearing, in a spirit of transparency and good faith the ECs submitted their first report on implementation, and undertook to present a more detailed report soon, as soon as implementing legislation had entered into force. On 30 June 1996 the ECs complied fully with the Commission’s report and the EC regulation. 949/2006 of 27/06/06 and Annex I of Council Regulation EEC no. 2658/87 on Statistical and Tariffs Nomenclature and Common Customs Tariffs which was adopted and entered into force on 27/06/06. (http://eurlex.europa.eu/LexUriServ/site/en/oj/2006/l_174/ l_17420060628en00030004.pdf).
In monitoring, for 4 months, some sessions of the Appellate Body of the trial, I experienced and understand clearly that the application of the theoretical framework of the hypothesis appears in crystalline form. Accordingly, it is not difficult to show that the parties meet, at the most, because the formation of the conviction of members of the body has not been in isolation, but always through the joint construction of dialogue between them and the litigant parties.

A case that I followed and which is very symbolic for us, is the case of BRAZIL RETREATED Tires (WT/DS332). This case is very important because the country (the defendant) did not contest the accusation made by the EC that it had actually banned the import of retreated rubber, but its justification for proceeding with this violation of the WTO agreements were sufficiently convincing to make the AB accommodate, to the detriment of the rules of trade, considering that the question involved greater interest. In fact it was a matter of domestic public health in Brazil, ie not only in the implementation phase that the debate and dialogue affect the jurisdiction of the OSC, but as I said in the formation of the conviction. That was the argument of the AO: “At this stage, it may be useful to recapitulate our views on the issue of whether the Import Ban is necessary within the meaning of Article XX(b) of the GATT 1994. This issue illustrates the tensions that may exist between, on the one hand, international trade and, on the other hand, public health and environmental concerns arising from the handling of waste generated by a product at the end of its useful life. In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives.” (...) 

And concluded thus: “Accordingly, having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations, we uphold the Panel’s finding, in paragraph 7.215 of the Panel Report, that the Import Ban can be considered “necessary to protect human, animal or plant life or health.”
How the Judges of the Appellate Body Form Their Opinion and its Reflection on the Implementation of the Reports of the WTO Dispute Settlement Body

From the moment that the reports were adopted, Brazil, where it had to adapt to WTO rules, for example, in preventing Brazilian courts of first instance to continue to grant injunctions allowing the importation of retreated tires, which should be done within the terms defined by the Brazilian Constitution, through a declaration of unconstitutionality by the highest Brazilian Court – the Federal Supreme Court (STF) - Brazil, despite not having completed the stipulated period of 12 months as a reasonable period of time, has been justifying itself, and even entered into an agreement with the EC not to proceed to the implementation phase of art. 22 of the DSU. Therefore, the actual procedure of the DSB allows temporary solutions to prevent enforcement should it be more interesting politically and economically more feasible for the parties, which often are not interested in complying with the DSU mechanisms of enforcement only to obey the decision later, obviously, at some point, it has to be complied with.

Through analysis of cases which have already reached the stage of application of art. 21 of DSU (Surveillance of Implementation of recommendations and rulings) and have complied with the recommendations made in reports of the DSB, we can understand the arguments that justified the conduct of the winning country in accordance with our theoretical argument. If AUSTRALIA - SALMON (WT/DS18) the parties have not chosen to implement enforcement measures set out in the DSU from the time that a declaration of implementation of the measure made by Australia does not satisfy Canada. Please note that the case began on October 5, 1995, the panel reports circulated in AB on 12/06/1998 and 20/10/1998 respectively. Moreover, in the 23/02/1999 report of the arbitration of art. 21.3 (C) it was determined that the “reasonable period of time for Australia to implement the recommendations and rulings of the DSB in this case is eight months from the date of adoption of the Panel and Appellate Body Reports by the DSB, ie eight months from 6 November 1998. Meanwhile, on July 15, 1999 Canada circulated an appeal under the argument that Australia had not complied with the decisions of the panels within a reasonable period of time and therefore, considering that Canada would not enter in agreement with Australia for a mutually acceptable compensation within that determined by art. 22.2 considering that the 20 days for negotiation determined certain by that article in July 26 it would require a special meeting of the DSB on 27 July 1999, when Canada want to apply, according to art. 22.2 of the DSU, the DSB authorization to suspend the application of tariff concessions and related obligations to Australia under the GATT 94, whose trade amounted to CAN $ 45milhões, based on a list of products previously published in Canada Gazette on 29 May 1999 (attached to this feature). On August 3, 1999 Australia in its turn presented reasons for not having complied with the arbitrator’s determination of 23/02/99 and denied the request for suspension of Canada, verbis: “On 19 July 1999, in Animal Quarantine Policy Memorandum 1999/51 (AQPM 1999/51), Australia announced new “policies” for the importation of non-viable salmonid products, non-viable marine finfish products other than salmonids and live ornamental finfish.
The problem was that the policies announced by Australia (AQPM 1999/51) were in disagreement with the SPS Agreement in the opinion of Canada. Though Canada requested that the DSB considered that Australia did not take the measures to comply with the 6 November 1999 recommendations and rulings and also requested that even if Australia had taken them as they were outlined in AQPM 1999/51, they would still be inconsistent with SPS Agreement in view of the following arguments: “they are not based on a risk assessment, contrary to Article 5.1 of the SPS Agreement; they are not applied only to the extent necessary to protect animal life or health, are not based on scientific principles and are maintained without sufficient scientific evidence, contrary to Article 2.2 of the SPS Agreement; they arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between New Zealand and Canada and between Australia and Canada, and are applied in a manner that constitutes a disguised restriction on international trade, contrary to Article 2.3 of the SPS Agreement.”

At the same time, Australia presented a recourse against Canada under the following arguments: “Australia wishes to advise that, as the measure identified in Canada’s request is an import ban that ceased to be in existence on 19 July 1999 and, given that Canada has not identified any other relevant measure from which nullification or impairment might arise, Canada has no legal basis for proceeding with its request. The DSB meeting on 27 July (now 28 July) will be the first opportunity for Australia to contest Canada’s right to seek authorization on the basis of WT/DS18/12. As Australia wishes to proceed with an abundance of legal caution in regard to safeguarding its WTO right to arbitration accorded by Article 22.6 of the Dispute Settlement Understanding (DSU), Australia, hereby objects to the level of suspension proposed by Canada in document WT/DS18/12, and requests that, in the event the DSB accepts that Canada can proceed with its request for authorization, the matter of whether the level proposed, in accordance with the provisions of Article 22.7 of the DSU, is equivalent to the level of nullification or impairment of benefits suffered by Canada, be submitted to arbitration.”

All the arguments developed between the parties since then have led the DSB to conclude that the parties should cooperate mutually. The defendant country in the case of Australia to implement the measures suggested by the panel report, as set out in the request of Canada for the implementation of art. 21.5 of the DSU. So the panel concluded: “On the basis of our findings above, we conclude that Australia has acted inconsistently with Article 5.6. We recall that in so doing we do not impose any specific alternative upon Australia. We have been convinced, however, that there are other, significantly less trade restrictive, measures which are reasonably available, be it the options discussed above taken separately or a combination thereof, that would meet Australia’s ALOP. We leave it up to Australia, preferably in close cooperation with Canada and other trading partners, to select and identify the details of such other measure(s).” (our highlights)
How the Judges of the Appellate Body Form Their Opinion and its Reflection on the Implementation of the Reports of the WTO Dispute Settlement Body

Another important case is the U.S. - Anti-Dumping Act of 1916. During the oral hearing of the Appellate Body it was said it was so complex to implement the measures determined by the final reports, as follows: “At the oral hearing, I enquired whether, although it is not within the mandate of an arbitrator to determine or suggest the precise means of implementation, it is necessary for the arbitrator to know the scope and complexity of the Member’s legislative process, in order to assess the “reasonable period of time” required to put in place the proposed implementing measure... The United States, explained, however, that regardless of the complexity of the legislation required to implement the rulings and recommendations of the DSB, this would be taken care of through the normal legislative process, and the United States does not argue for the implementing legislation in this case. In view of the explicit acknowledgement of the United States that it is not relying on the complexity of the implementing legislation as a particular circumstance to justify or lengthen the period of time needed for implementation in this case, it is not necessary for me to examine this issue.”

The determinations of the DSB has not been implemented internally, but the U.S. in repeated statements to the board, have demonstrated the internal search to achieve that goal as demonstrated below in a statement of 11 November 2004: “The United States submits this report in accordance with Article 21.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. On 26 September 2000, the Dispute Settlement Body (“DSB”) adopted its recommendations and rulings in United States – Anti-Dumping Act of 1916 (WT/DS136 and WT/DS162). At the following DSB meeting on 23 October 2000, the United States informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. On 19 May 2003, legislation repealing the 1916 Act and terminating all pending cases was introduced in the US Senate (S. 1080). Other bills repealing the 1916 Act were introduced in the US House of Representatives on 4 March 2003 (H.R. 1073), and in the Senate on 23 May 2003 (S. 1155). On 29 January 2004, H.R. 1073 was reported favourably out of the Committee on the Judiciary of the US House of Representatives. On 30 June 2004, Ambassador Zoellick wrote a letter to the leadership of the US House of Representatives urging support for legislation to repeal the 1916 Act. He emphasized the importance of passing repeal legislation “at the earliest opportunity”. On 8 October 2004, the US House of Representatives approved the Miscellaneous Trade and Technical Corrections Act of 2004 (H.R. 1047). H.R. 1047 includes a provision to repeal the 1916 Act. It is now before the Senate. The US Administration is continuing to work with Congress to enact legislation. The United States will continue to confer with the European Communities and Japan in order to reach a mutually satisfactory resolution of this matter.”

Accordingly, following our hypothetical arguments in another point of the AB process, the latter acknowledged the arguments of the U.S. and added: “Turning to the complexity of the United States legislative process, I note that the United States has explained, in sufficient detail, the multiple and time-consuming steps involved in the enactment of legislation within the specific context of the legislative system of
the United States. It is generally accepted that certain of these steps are not subject to compulsory minimum time limits. In other words, the United States’ legislative process, while complex, is characterized by a considerable degree of flexibility. That this flexibility is exercised to achieve the prompt passage of legislation when this is considered necessary and appropriate is revealed by the fact that bills have been passed by the United States Congress within short periods of time, using its “normal” legislative process. The United States has stated that it “will make every effort to promptly implement the DSB’s recommendations and rulings” in this case. Since this is a case where the United States has to enact a piece of legislation to bring it into compliance with its international treaty obligations under the covered flexibility available within its normal legislative procedures to enact the required legislation as speedily as possible.”

4 - Confronting the theory applied to the arguments in favor of absolute application of the rules of the DSU and enforcement of International Law

In our opinion it would also be also very interesting to confront, even if very briefly, our arguments about the idea that obedience to the decisions of the Appellate Body occurs because of the way the formation of the opinion of the members of this body occurs on a deliberative basis, involving the direct stakeholders, with those of authors such as Jackson who argue that what leads to obedience to the decisions is the law itself established in the DSU (as he defends in the work “International Law Status of WTO Dispute settlement reports: obligation to comply or option to ‘buy out?’”).

The confrontation is necessary because after the analysis of cases where the decision has not been implemented we can say that there is no unanimity in conformity, that is, even if there are rules that are mandatory to implement the decisions, they are sometimes not sufficient in some cases, to promote compliance by the member that breaks WTO rules, according to decision of the Appellate Body. In such cases, then we can ask, is the DSU rule fragile or flexible, or allows gaps for noncompliance? This is where we have confrontation. It is not the rules of the DSU that are not up to forcing compliance with the decision by the party, but the way the decision was formed, was built up, that was not sufficient to lead the State to realize the need for compliance.

This will be another key point of our discussion. Of course we continue to recognize that the law prescribed in the DSU is one of the elements necessary to comply with the decisions and rulings of the DSB, which is why we restricted our research to an analysis of the decisions of the AB, as it is there that the law is detailed and verified whether it should actually be applied or not. However we want to understand more. We want to understand the behavior of states facing such decisions.
How the Judges of the Appellate Body Form Their Opinion and its Reflection on the Implementation of the Reports of the WTO Dispute Settlement Body

BIBLIOGRAPHY


BERNARDINI P., L’arbitrato commerciale internazionale, Giuffrè, Milano, 2000


COMBA A., Il neoliberalismo internazionale, Giuffrè, Milano, 1995


european communities–customs classification of frozen boneless chicken cuts Status Report by the European Communities. in: < http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&g1=%28%40meta%5FSymbol+WT%5FCDS269%FC%24%2%language=1>

FRIGNANI A., L’arbitrato commerciale internazionale, collana Trattato di diritto pubblico dell’economia diretto da F. Galgano, CEDAM, 2004


HUGGIE, John Gerard. Multilateralism: the anatomy of an institution. in:


How the Judges of the Appellate Body Form Their Opinion and its Reflection on the Implementation of the Reports of the WTO Dispute Settlement Body


VENTURINI Gabriella., L’Organizzazione Mondiale del Commercio, Giuffrè, Milano, 2000, 2004


