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INTRODUCTION

Things Have Changed: Dispute Settlement Inside and Outside of the WTO in 2022

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The numbers do tell a story: 2022 was the year with the fewest disputes ever submitted to the WTO. The possibility to appeal into the void must have a played a role, dis-incentivizing potential complainants from formally submitting disputes. Appeal into the void? This requires some explanation.

WTO knows of a two-instance adjudication regime (panels, Appellate Body). The Appellate Body is not functional anymore, due to the Trump Administration decision to stop renewing the mandate of its members. As decisions in WTO are taken by consensus, the US 'no' to the renewal of mandates sufficed to bring the Appellate Body to its knees. But the law has not changed, and appeals are still possible, even if there is no body to entertain them. The current insurance policy against the risk of an appeal into the void proves to be blatantly insufficient, as only a few WTO members have agreed to a 'surrogate appeal procedure', the MPIA (Multi-Party Interim Agreement). It has adjudicated only one dispute so far in well over four years since the Appellate Body became no more.

Outside of the WTO, there is some new dispute settlement-related activity taking place in the realm of FTAs (free-trade areas). This was so intriguing, we decided to look into experiences there as well.

Paulsen-Pinchis, Mavroidis, and Saggi discussed two reports (*United States – Certain Measures on Steel and Aluminium Products*, DS556; *United States – Origin Marking Requirement*, DS597) which focused on the interpretation of Article XXI of GATT, the GATT security exception. This provision was practically in hibernation until very recently. Fourteen panel reports have been issued so far, and their key feature is the standard of review they adopted. They focus on 'when' action was taken and not on 'what' action was adopted. The authors of this paper see two problems with this construction. First, the 'when' focus might be due to privileged information that authors may be unwilling to divulge. Second, national security is an amorphous concept and unless it is disaggregated, it is simply impossible to pronounce on the appropriateness of measures adopted to pursue the overarching objective. In turn, the absence of disaggregation could lead to false positives and negatives, as the same action could be pursuing essential security or providing protection to domestic players.

Pahis explores how adjudicators and member states have navigated WTO dispute settlements in this post-AB world. He explains the incentives created by the lack of a functioning appeals mechanism and provides the background on the alternative appeals procedure agreed to among a subset of WTO members: the MPIA. He then closely examines five WTO disputes, namely, *Thailand–Cigarettes (Philippines)* (DS371), *Costa Rica–Avocados (Mexico)* (DS524), *Turkey–Pharmaceutical Products (EU)* (DS583), *Colombia–Frozen Fries* (DS591), and *EU–Safeguard Measures on Steel (Turkey)* (DS595). Through these five disputes, the author examines the circumstances in which members have agreed to binding appeals arbitration even without

committing to the MPIA, the circumstances in which members have appealed to arbitration or foregone such appeals, and whether the facilitated negotiations present a workable alternative to an effective appeals mechanism. The author also closely analyzes the reasoning of two arbitration awards issued to date, namely *Turkey–Pharmaceutical Products (EU)*, and *Colombia–Frozen Fries*. He first asks whether arbitrators have observed past case law, and then draws lessons from this analysis. He asks whether the crisis could have been averted, had a line of thinking akin to that adopted in *Colombia–Frozen Fries* been incorporated in prior rulings.

Rajan Sabitha discusses a report by the Panel of Experts constituted under Article 13.15 of the EU–Korea Free Trade Agreement. The EU complained alleging inadequate protection of certain labour rights in Korea, and Korea's less than satisfactory efforts to ratify the fundamental ILO Conventions. The dispute presented an opportunity for the panel to examine the scope of the labour commitments under the FTA, specifically whether a demonstration of trade-nexus of the labour measure is required for the panel to exercise its jurisdiction. The panel adopted an 'expansive' interpretation, and found that the FTA parties' commitments to adhere to labour standards and to ratify ILO conventions are not limited to trade-related aspects of labour, and therefore there is no requirement to demonstrate that such measures should be trade-related. The author finds the panel's interpretive reasoning not compelling, as it does not sit well with the text of the FTA. He also warns that the panel's attitude could have serious systemic implications going forward. In addition to raising fundamental questions regarding the purpose and motivations behind including labour standards (or more generally sustainability standards) in FTAs, the panel effectively transformed the FTA into a vehicle to enforce ILO commitments and induce countries into ratifying fundamental ILO conventions. Developing countries especially might re-think their adherence to similar schemes as a result.

Bown and Claussen discuss the Rapid Response Mechanism – the USMCA (US–Mexico–Canada Agreement) innovation that provides for monitoring and expedited enforcement of certain labour rights at particular facilities. This is a fast-track, state-to-state arbitration process that is designed to ensure the effective implementation of Mexico's landmark labour reforms. The USMCA provides for the possibility to establish a Labour Panel to assess compliance with the USMCA of assumed obligations regarding the freedom of association and collective bargaining. The facilities that disregard similar obligations could be punished. Although it is too early to pronounce on the effectiveness of this institution, it is remarkable in that the target of sanctions are not one of the signatories of the USMCA but private enterprises. It remains to be seen how their incentives will be affected as a result.

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