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DISPUTE SETTLEMENT IN THE FREE TRADE AGREEMENTS OF TURKEY

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Abstract

The order of World Trade Organization (WTO), which deals with international trade at the global level, allows the handling of trade also at the regional level under certain conditions. In this context, regional trade agreements (RTA) have been signed and this trend continues. Such treaties have been named differently whereas they have essentially same functions. On the other hand, while there is an advanced dispute settlement mechanism within the WTO, similar mechanisms are also included in RTAs. Like other WTO members, Turkey has concluded bilateral RTAs in the form of Free Trade Agreement (FTA), which include dispute resolution provisions. In the design of these settlement mechanisms, a place in the spectrum of political/diplomatic and legal character has been adopted with varying weights. Although the dispute settlement mechanisms of FTAs have more advanced provisions in recent years compared to previous ones, there are still examples where important deficiencies and gaps are noticeable.

Key Words

International Trade • World Trade Organization • Regional Trade Agreements • Free Trade Agreements of Turkey • Dispute Settlement

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TÜRKİYE'NİN SERBEST TİCARET ANTLAŞMALARINDA ANLAŞMAZLIKLARIN HALLİ

Öz

Uluslararası ticareti küresel düzeyde ele alan Dünya Ticaret Örgütü (DTÖ) düzeni, ticaretin bölgesel düzeyde de ele alınmasına belirli şartlar altında izin vermektedir. Bu kapsamda çok sayıda bölgesel ticaret antlaşması (BTA) hayata geçirilmiştir ve bu eğilim sürmektedir. Özünde işlevi aynı olan bu tür antlaşmalar farklı şekillerde adlandırılmıştır. Diğer taraftan, hâlihazırda DTÖ bünyesinde ileri düzey bir anlaşmazlıkların halli mekanizması mevcut iken BTA'larda da benzer mekanizmalara yer verilmiştir. Diğer DTÖ üyeleri gibi Türkiye de, BTA'lar akdetmiştir. Bu kapsamda gerçekleştirilen ikili Serbest Ticaret Antlaşmaları (STA)'nda anlaşmazlık çözüm hükümlerine yer verilmiştir. Bu mekanizmaların tasarımında değişen ağırlıklarda siyasal/diplomatik karakter ile hukuksal karakter arasında bir yer benimsenmiştir. Mekanizmalar son yıllarda önceki yıllara göre daha ileri hükümler içerse de, önemli eksiklikler ve boşlukların göze çarptığı örnekler hala mevcut bulunmaktadır.

Anahtar Kelimeler

Uluslararası Ticaret • Dünya Ticaret Örgütü • Bölgesel Ticaret Antlaşmaları • Türkiye'nin Serbest Ticaret Antlaşmaları • Anlaşmazlıkların Halli

INTRODUCTION

The WTO system allows the handling of trade at the regional level under certain conditions, in addition to the universal rules within its own body. GATT Article XXIV.5 regulates the conditions for establishing customs unions or free trade areas[1] by some of the Contracting Parties among themselves.

The WTO has a dispute settlement mechanism to handle disputes among member states arising from the interpretation and application of WTO treaties. On the other hand, most, if not all, regional trade

[1] Concepts such as customs union, free trade area, regional trade agreements, free trade agreements all are different expressions of economic and commercial integration. Although there are differences, they essentially fall under the general concept of "preferential trade regimes". The differences among them do not need to be dwelled upon as they are essentially of no practical value for our study. The concept of "Free Trade Agreement (FTA)" is mainly preferred for the formations of this kind that Turkey has made with third countries at the bilateral level, which constitute the scope of this study. The existing customs union with the EU is excluded from the scope.

agreements (RTAs) include a dispute resolution mechanism. Turkey, like many other WTO members, has concluded bilateral free trade agreements (FTA) with third countries, comprising various dispute settlement procedures. The scope and nature of those mechanisms, their relations with each other and with that of WTO, and the law to be applied in a dispute all appear as issues worth discussing.

In the literature review, I have not come across any study dealing with dispute resolution mechanisms in Turkey's FTAs. Thus, I aim, with this study, to contribute to the elimination of this deficiency in the literature. In this context, I will discuss the classification, scope and nature of the dispute settlement mechanisms in Turkey's FTAs, the general legal framework of possible relations with other settlement mechanisms, and the legal rules that can be applied in the resolution of disputes.

In this framework, in the first part, I will briefly mention the place of RTAs in the WTO system. In the second part, I will present a framework for the dispute resolution mechanisms of RTAs. In the third part, I will investigate the dispute resolution mechanisms under Turkey's FTAs, their potential interaction with other mechanisms and the applicable legal rules in the settlement of disputes therein. Finally, in the conclusion part, I will make some evaluations, predictions and suggestions.

I. REGIONAL TRADE AGREEMENTS UNDER WTO SYSTEM

In addition to its basic rules[2] for liberalization of international trade, the WTO system also includes various exceptions to them such as general exceptions, security exceptions and economic emergency exceptions, allowing the application of measures and practices that are normally contrary to WTO rules. One such exception is the RTAs regulated in both the GATT (Article XXIV) and the GATS (Article V).[3]

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[2] The foremost significant ones of them are the Most-Favored Nation (MFN) of GATT Article I and National Treatment (NT) of GATT Article III.

[3] The rule known as the "Enabling Clause", which was put into effect with the decision of the GATT Contracting Parties, dated 28 November 1979 and numbered L/4903, and which allows different and favorable treatment for developing countries, is another legal basis for the exemption from the MFN obligation under the preferential trade regimes. This arrangement became a part of GATT 1994 with the establishment of the WTO in 1995. (https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm Last Accessed: 11/07/2021).

Reflecting the further liberalization efforts of states in smaller groups, some experts point to the various advantages of RTAs in terms of promoting international trade: (i) Further liberalization that is not attainable at the global level may be possible at the regional level. (ii) Trade liberalization can be achieved more easily within regional trade blocs. (iii) Trade liberalization achieved at the regional level may be a stepping stone to liberalization at the multilateral level at a later time. (iv) Regional trade liberalization could generate significant economic growth in the region it covers, which could subsequently lead to more trade in the rest of the world. (v) RTAs can serve the WTO accession process of non-WTO parties, especially with regard to developing countries. (vi) Regional liberalization may be an alternative way when multilateral trade liberalization is absent or slow.[4]

Although RTAs were regulated by the GATT 1947, they mainly have increased in numbers since the early 1990s and become an important part of the international trade agenda.[5] According to WTO data, 349 regional trade agreements are in force in June 2021. The number will be much higher if we add the ones notified to WTO but not entered into force yet and the one which are not active.[6]

The main feature of an RTA is that the treaty parties can recognize more commercial advantages among themselves than with third parties. However, if the third party is a WTO member, this discriminatory treatment normally violates the MFN rule of the WTO. The WTO system is designed to strike a balance between its core disciplines and member states' desire for further liberalization, which is not possible at the global level, but possible on regional (geographical proximity) or similar other bases (a particular product, cultural proximity, etc.).

With this aim, it allowed such treaties, but introduced certain conditions so that the treaties were not restrictive and protective in favor

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4 VAN DEN BOSSCHE, Peter / ZDOUC, Werner, The Law and Policy of the World Trade Organization, Third Edition, Cambridge, Cambridge University Press, 2013, p. 649-650.

5 VAN DEN BOSSCHE / ZDOUC, p. 648.

6 https://www.wto.org/english/tratop_e/region_e/region_e.htm Last Accessed: 11/07/2021.

of included WTO members and to the detriment of non-included WTO members.[7] Those conditions aim to harmonize the global and regional trade policies of WTO members. Thus, the WTO system has designed such agreements to ensure a general expansion in world trade, maximizing their trade-enhancing effects for WTO members included and minimize their trade-restrictive effects against WTO members non-included.[8]

II. DISPUTE SETTLEMENT MECHANISMS IN REGIONAL TRADE AGREEMENTS

In general, dispute settlement mechanisms under international treaties fulfill two functions: (i) To eliminate the differences in interpretation between the parties about the meaning and content of the treaty provisions and thus to clarify them (ii) To determine the breach in case of violation of treaty obligations and to ensure compliance with them.

The substantial increase in the number of RTAs over the past a few decades has been accompanied by an almost equal increase in the number of dispute resolution mechanisms. Today, modern dispute resolution mechanisms included in both global (WTO) and regional/bilateral trade agreements find their basis in GATT Articles XXII and XXIII,[9] but they are more advanced than the GATT system which was based on diplomatic consultations and negotiations.

The settlement mechanisms to deal with the disputes on international trade rules have gone through three different stages since GATT 1947: (i) Diplomatic (political) tools offered by the GATT (ii) Permanent court model such as the EU Court of Justice (iii) *Ad hoc* arbitration model of NAFTA/WTO, which is a compromise between cost

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7 For details see the Article XXIV of GATT, Understanding on the Interpretation of Article XXIV of the GATT 1994, and GATS Article V.

8 MITCHELL, Andrew / LOCKHART, Nicolas, "Legal Requirements for PTAs under the WTO", Bilateral and Regional Trade Agreements, LESTER, Simon / MERCURIO, Bryan (Eds.), New York, Cambridge University Press, 2009, p. 85.

9 McDOUGALL, Robert, Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution, Geneva, International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), 2018, p. 2.

(less expensive) and the role of states (more control for states in the settlement process).[10]

On the other hand, another dimension of the development in dispute resolution mechanisms is the transformation from state control and *ad hoc* bodies to "neutral" third party control and permanent bodies. Thus, there has been a decrease in the role of diplomats and an increase in the role of experts and lawyers. However, the role of states has been preserved by means of control over the appointment of third parties (arbitrators/panelists), veto-power, comments on the final report, and limitations on the choice of sanctions.[11]

The common starting point of the studies on the classification of the dispute resolution mechanisms in the RTAs has been the degrees of politics and legality. Classifications have been made according to the locations of the mechanisms between these two extremes. In James M. Smith's quantitative study based on the data set consisting of 62 treaties between 1957 and 1995[12] the spectrum is defined as "diplomacy – legalism",[13] and on this basis, the legality of the mechanisms is determined in 5 levels as "zero-low-medium-high-very high".[14]

Amelia Porges, on the other hand, classifies the dispute resolution mechanisms in RTAs under 3 headings in a qualitative study: (i) Political or diplomatic means[15] (ii) Permanent courts[16] (iii) *Ad hoc* panels (WTO model).[17] As some RTAs contain both *ad hoc* third-party bodies and permanent appellate bodies,[18] there is an overlap between headings (ii) and (iii) of this classification.

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10 McDOUGALL, p. 4.

11 McDOUGALL, p. 5.

12 SMITH, James McCall, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts", International Organization, Vol. 54, No. 1, 2000, p. 150-155.

13 SMITH, p. 139.

14 SMITH, p. 162, 164, 166-168.

15 PORGES, Amelia, "Dispute Settlement", Preferential Trade Agreement Policies for Development, CHAUFFOUR, Jean-Pierre / MAUR, Jean-Christophe (Eds.), Washington D.C., The World Bank, 2011, p. 470.

16 PORGES, p. 471.

17 PORGES, p. 473.

18 For example MERCOSUR (Mercado Común del Sur), ASEAN (Association of Southeast Asian Nations), SADC (Southern African Development Community).

A WTO working document, based on the comprehensive classification of Porges' work, but amending the last two categories in order to eliminate the overlaps and ambiguities mentioned, classifies the dispute resolution mechanisms of 226 RTAs as (i) Political/diplomatic (ii) Quasi-judicial and (iii) Judicial models.[19] Unlike Porges, this classification is based on the degree of automatic functioning of the "application process" (the process cannot be vetoed or blocked) and the level of institutionalization, rather than the "*ad hoc* vs. permanent" criteria of the third-party adjudication.

Accordingly, the models falling under the first group (political/diplomatic) are the ones: (i) Where there is no third-party adjudicating body (ii) Where a solution is sought by negotiation within a political body (iii) Where the state-parties have an explicit right to block the third-party process even though a third-party adjudication is available.

The second group (quasi-judicial), where the resolution process grants automatic access to third-party adjudication at some point, comprises models in which an explicit authority to block that access-right is not granted, but the process can be blocked indirectly, by not fulfilling the obligations regarding the appointment of panelists.[20] Most of the models in this group provide for *ad hoc* adjudication. However, there are also instances where an additional permanent appeal body is provided.[21]

In the models of the third group (judicial models), parties have the right to automatically refer a dispute to a permanent third-party adjudicating body. Additionally, that body has some distinguishing differences from quasi-judicial models: (i) Disputes are resolved by

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19 CHASE, Claude / YANOVICH, Alan / CRAWFORD, Jo-Ann / UGAZ, Pamela, "Mapping of dispute settlement mechanisms in regional trade agreements: Innovative or variations on a theme?", WTO Staff Working Paper, No. ERSD-2013-07, Geneva, World Trade Organization (WTO), 2013.

20 This procedure has been classified under the quasi-judicial group by the authors of the study on the grounds that the dispute resolution mechanisms that contain such indirect blocking provisions do not regulate an explicit veto-power but it renders the "automatic functioning" criterion inoperable (CHASE / YANOVICH / CRAWFORD / UGAZ, p. 11.).

21 However, the practice of appeals within RTAs is not common. See CHASE / YANOVICH / CRAWFORD / UGAZ, p. 31.

applying the rules of law (ii) The judiciary has more independence and institutional presence (in this context, members of the judiciary are appointed for certain time periods instead of specific cases; the judicial body has administrative autonomy, legal personality and budget) (iii) Private persons and special rights take part in the process (iv) Sometimes there are supranational elements that allow the provisions of the treaty to be directly applicable in national courts, etc.[22] Thus, the character of legality stands out more in the third group compared to the second group.

Although states mainly prefer WTO procedures rather than RTA settlement methods,[23] with the standstill in multilateral trade negotiations, it is expected that regional agreements will be the focal point in the development of new trade rules, and therefore the importance and frequency of the use of dispute resolution mechanisms in RTAs will increase.[24]

On the other hand, in addition to a dispute settlement mechanism that has been strengthened and moved from the GATT period to the WTO, further resolution mechanisms under different treaty regimes threaten harmony and integrity in international adjudication, which is one of the biggest reasons for the fragmentation in international law. This makes the relations between these mechanisms a significant issue. There is no general rule of international law regulating that interaction. However, many RTAs attempt to address the issue through forum selection provisions.

III. DISPUTE SETTLEMENT MECHANISMS IN THE FREE TRADE AGREEMENTS OF TURKEY

A. The Free Trade Agreements of Turkey

Turkey, in parallel with the worldwide trend, has signed RTAs under the name of FTA with many countries/country groups. According to the data of the Turkish Ministry of Commerce, 22 FTAs are currently in force, and the internal approval processes are expected to be completed for another 3 ones for which negotiations have been completed. On the

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22 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 11-12.

23 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 6.

24 McDOUGALL, p. 1.

other hand, 11 FTAs with Central and Eastern European countries were terminated in 2004 due to the EU membership of those countries. In addition, negotiations with 16 countries/country groups continue actively, and attempts are underway to conclude FTAs with 9 countries/country groups. There are also activities for updating some of the existing FTAs. In this context, the revised FTAs with EFTA and Bosnia-Herzegovina have recently entered into force.[25]

The most important factor in Turkey's FTA making process is to deal with the problems in terms of third countries arising from the Customs Union with the EU. While the goods of the third countries with which the EU has an FTA have the opportunity to enter advantageously the Turkish market through the EU, the same is not possible for Turkish products to enter the market of those countries. In order to eliminate this unequal and disadvantageous position, Turkey enters into FTA negotiations with the third countries with which EU has FTAs.

B. Dispute Settlement Mechanisms

There does not appear to be any objection in terms of Turkish FTAs in taking the criteria of WTO working document referred to above[26] as the classification criteria of this study. In this framework, Turkish FTAs will be classified under three headings as (i) diplomatic, (ii) quasi-judicial and (iii) judicial procedures. The main starting point in this classification will be the automatic nature of the operation and conclusion of the judicial process.

On the other hand, I should note that the diplomatic solution is not just a way specific to the mechanisms in the first group. Before resorting to a judicial procedure in resolution mechanisms of other groups, diplomatic methods (consultations) based on negotiations in political bodies are provided as the first stage of the settlement process.

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25 For the updated status of Turkish FTAs see https://ticaret.gov.tr/dis-iliskiler/serbest-ticaret-anlasmalari Last Accessed: 15/02/2022.

26 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 11-12.

On the basis of this framework, a table in which the mechanisms are classified is presented as following:[27]

Diplomatic Procedures	**Quasi-Judicial Procedures**		**Judicial Procedures**
Northern Macedonia (2000)	Israel (1997)	Mauritius (2013)	Singapore (2017)
Albania (2008)	Tunisia (2005)	South Korea (2013)	Venezuela (2020)
Serbia (2010)	Palestine (2005)	Malaysia (2015)	Bosnia and Herzegovina (2003) (2021)
Montenegro (2010)	Morocco (2006)	Moldova (2016)	EFTA (1992) (2021)
	Egypt (2007)	Faroe Islands (2017)	
	Georgia (2008)	Kosovo (2019)	
	Chile (2011)	The United Kingdom (UK) (2021)	

[27] When this work started, EFTA and Bosnia-Herzegovina FTAs were classified under the heading of diplomatic procedures. However, before the completion of the study, the revised updated version of those entered into force on October 1, 2021 and August 1, 2021, respectively. Thus, the dispute resolution mechanisms in their revised form became suitable for classification under the judicial procedures group. On the other hand, revision efforts for other some FTAs are also on the agenda. Among these, the approval process of the Montenegro FTA's revision protocols continues. Revision negotiations of Georgia and Malaysia FTAs are ongoing. It is aimed to start negotiations in a short time for the revision of the existing FTAs with Moldova and Macedonia. (See https://ticaret.gov.tr/dis-iliskiler/serbest-ticaret-anlasmalari/yururlukte-bulunan-stalar Last Accessed: 15/02/2022).

1. Diplomatic Procedures

In some of the Turkish FTAs, a third-party adjudication is not included at all. They provide that the disputes be settled through diplomatic negotiations within the political bodies established under the FTA. Political partnership bodies, mainly called Joint Committee or Association Council and where decisions are taken by consensus, fulfill the function of resolving disputes through negotiations in addition to the execution of the FTA.

On the other hand, since an independent third-party solution is not provided, diplomatic procedures do not have a legal mechanism that guarantees compliance with the recommendations of the partnership bodies or imposes sanctions in case of non-compliance.

The classification criteria adopted by this study consider the mechanisms as diplomatic procedures, which authorize the parties to explicitly block the automatic functioning of the third-party adjudicating process, but no such clear veto-power has been detected in any of the Turkish FTAs. In the FTA with 4 countries under diplomatic procedures heading, no third-party adjudication is included.

In general, the relevant provisions of the FTAs authorize the complaining party to take the action it deems appropriate, provided that it complies with good faith rules (e.g. giving priority to the measures that will cause the least damage to the operation of the treaty) in the event that an agreement cannot be reached in the consultations within the partnership body. In this respect, it does not offer a real consensus and solution.

For example, in Turkish-Macedonian FTA,[28] when one party considers that the other party has not fulfilled an obligation, differences of opinion will be discussed in consultations within the Joint Committee, but in the meantime it can take appropriate safeguards measures. In choosing the safeguards, options that will cause the least harm to the functioning of the treaty should be preferred.

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28 Turkish Official Journal (d. 25/07/2000 and no. 24120). See Articles 21 and 32.

We see procedures with similar content but differently written in the FTAs with Albania,[29] Montenegro[30] and Serbia.[31]

In these agreements, in the event that the obligations arising from the agreement are not fulfilled, the notification and consultation procedures are provided as the first address, and if a solution cannot be reached, the injured party is allowed to take the measures it deems necessary to remedy the situation. With these very general provisions, it is possible for one of the parties to decide that the other party has acted contrary to the FTA, and to apply unilateral countermeasures without any agreement or decision of the partnership body. It is clear that this cannot be considered as a solution.

2. Quasi-judicial Procedures

In another group of resolution mechanisms in Turkish FTAs, *ad hoc* third-party adjudication[32] is provided, but there are provisions that allow the political bodies to indirectly block the third-party process. The majority of Turkish FTAs fall into this group.

In these FTAs, diplomatic procedures are preserved as a prior stage before going onto the third-party proceedings. In this context, it is suggested that the parties first seek a solution to the conflict through consultations in political/diplomatic bodies. In cases where no solutions can be reached therein, a third-party adjudication process is avaliable. Although certain institutional provisions (such as time limits, panelist or arbitrator determination procedures, binding effect of panel or arbitration reports, etc.) are included in most FTAs, the fact that the third-party body is *ad hoc* and its intervention depends on the attitudes of the state-parties makes the judicial process far from automatic.

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29 Turkish Official Journal (d. 12/03/2008 and no. 26814 – Repeated). See Articles 21 and 32.

30 Turkish Official Journal (d. 14/01/2010 and no. 27462 – Repeated).

31 Turkish Official Journal (d. 09/03/2010 and no. 27516).

32 In the official texts of FTAs, different concepts such as "panel, arbitration, arbitration panel" have been used for *ad hoc* third-party adjudicating bodies fulfilling the same function. Besides, looking at the details of the procedural rules, they have the same content more or less.

Just to briefly recall the automaticity in the WTO dispute settlement mechanism, if the parties fail to reach a mutually agreed solution at the consultation stage, one of the parties can automatically initiate the panel process, thanks to the decision-making procedure called "reverse consensus" or "negative consensus".[33] With this automaticity, it is not possible for the defendant to block the process. There is no such regulation in any of the Turkish FTAs, however, in 4 FTAs under the heading of "judicial procedures", there are rules that ensure automatic operation, not allowing to block the third-party process.

On the other hand, especially since 2011, FTA dispute resolution mechanisms which include more detailed provisions similar to the WTO panel process have been established. The quasi-judicial ones of these FTAs contain many provisions that increase institutionalism and legality, but they do not have mechanisms that guarantee the automatic functioning of third-party proceedings. There is no explicit veto-power to block the establishment of the panel/arbitration process in any of Turkish FTAs. However, the states' failure to fulfill their treaty obligations that would ensure the progressing of the process may indirectly block the third-party trial.

For example, in the Turkish-Israeli FTA, the first FTA of Turkey to provide for third-party proceedings,[34] unless a settlement is reached through a time-bound consultation period (60 days) within the Joint Committee, a panel begins with either party notifying the other that it has appointed an arbitrator within 45 days. Two arbitrators appointed by the parties will, within 60 days, determine a third arbitrator by joint decision, who is not of nationality of either parties and who will act as the chairman. As can be seen, a quite institutional-looking procedure tied to deadlines has been determined. However, the operation of this procedure

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33 Consensus, as traditionally practiced, requires an unanimous vote of all participants present at the meeting in order for a decision to be taken. In this method, a participant's vote in a different direction prevents the decisions to be made. The WTO Treaty introduced a different consensus definition: “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” (Article IX.1, footnote 1)

34 Turkish Official Journal (d. 18/071997 and no. 23053). See Article 30.

is dependent on the will of the parties. Even if one party initiates the arbitrator appointment process, the other party may not appoint an arbitrator, which means an implicit veto-power.

The possibility of blocking the process is also available in the FTAs with Tunisia (2005),[35] Palestine (2005),[36] Morocco (2006),[37] Egypt (2007)[38] and Georgia (2008),[39] which contain similar provisions. Thus, these six countries form a sub-group. On the other hand, in FTAs with Chile (2011),[40] Korea (2013),[41] Malaysia (2015)[42] and UK (2021),[43] more detailed rules and institution-oriented regulations similar to WTO procedures are included. The common point of these two groups is that the panelists' appointment and start of work can be vetoed indirectly by one of the parties although highly detailed procedures and rules of practice are adopted in the latter group of 4.

In some FTAs, unilateral initiative was not included in the initiation and execution of the panel process. For example, in Turkey-Mauritius FTA (Article 32.14),[44] the Joint Committee may agree to set up an arbitration panel if the dispute cannot be resolved through consultations within a reasonable time. The number of arbitrators, the principles for the selection of them, the working procedures of the panel and the schedule of the report to be submitted will also be decided by the Joint Committee. The same arrangement is found in the FTAs with Moldova (Article 31.8),[45] Faroe (Article III.3.8)[46] and Kosovo (Article IV.3.8).[47] Thus, these 4 FTAs constitute another sub-group in this aspect. Decisions in the Joint

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35 Turkish Official Journal (d. 10/05/2005 and no. 25811). See Article 48.

36 Turkish Official Journal (d. 18/04/2005 and no. 25790). See Madde 22, 46.

37 Turkish Official Journal (d. 28/12/2004 and no. 25684). See Article 33.

38 Turkish Official Journal (d. 30/01/2007 and no. 26419). See Article 34.

39 Turkish Official Journal (d. 24/09/2008 and no. 27007 – Repeated). See Article 32.

40 Turkish Official Journal (d. 31/12/2010 and no. 27802 – 4th Repeated).

41 Turkish Official Journal (d. 21/03/2013 and no. 28594).

42 Turkish Official Journal (d. 01/062015 and no. 29373 – Repeated).

43 Under the Article 13.3.3 of the FTA, preferential treatment in trade became operational on 1 January 2021, but internal approval procedures have not yet been completed.

44 Turkish Official Journal (d. 24/01/2013 and no. 28538).

45 Turkish Official Journal (d. 28/01/2016 and no. 29786).

46 Turkish Official Journal (d. 02/08/2017 and no. 30142 – Repeated).

47 Turkish Official Journal (d. 14/07/2015 and no. 29416).

Committee are taken by consensus. This necessitates a compromise in the operation of the process from the very beginning. Therefore, it seems more possible to reach a real solution compared to the one-sided operation of the panel process. Once an agreement has been reached in the Joint Committee on moving to the panel stage, it can be expected that the panel results will be accepted more easily by the parties.

The sub-group of FTAs with Chile, Korea, Malaysia, UK, with detailed rules largely borrowed from or inspired by the DSU, are distinguished from the other quasi-judicial mechanisms. In these FTAs, there are detailed rules that are very similar to each other in terms of issues such as time limits; confidentiality; panel formation; qualifications and selection of panelists; professional ethical rules to be followed by panelists; procedural rules for the conduct of the panel process; burden of proof; interpretation rules; etc. Thus, on the one hand, the gaps that could interrupt the process are minimized, on the other hand, a more rule-oriented process is defined. In particular, although priority is given to unanimous decision making for the panel, when concensus could not be achieved, the ability to take decisions by majority vote significantly eases the functioning of the panel process, including the acceptance of the panel report.

This sub-group of 4 has also addressed some gaps of the WTO dispute settlement mechanism. The most important of those is the "sequencing" problem in the implementation phase. This issue concerns the order of priority between the “DSU Article 21.5 panel” and the arbitration for “suspending concessions” under DSU Article 22, as a result of overlapping in some time limits.[48] Turkey's FTAs in this sub-group of

[48] The Article 21.5 panel is the compliance panel dealing with the disputes as to whether the respondent eliminates the non-conformity determined in the panel reports. The complainant, while requesting a panel under Article 21.5 on the one hand, may apply, on the other hand, to the WTO Dispute Settlement Body (DSB) under Article 22.6 with a request to apply a counter-measure (suspension of concessions) since the non-compliance continues after the expiry of a reasonable time. An Article 21.5 panel must be concluded within 90 days of the expiration of the reasonable time, while Article 22.6 arbitration within 60 days. The 30-day gap allows the plaintiff to enact retaliation under Article 22 before the Article 21.5 panel concludes. A provision addressing this situation is not included in the DSU, and an agreement has not been reached among the member states so far. The issue is currently dealt with on a case-

4 include clear and unambiguous provisions that allow retaliation practices only after the Article 21.5 panel is concluded and the search for compromise on compensation is exhausted. Thus, sequencing problem has been eliminated.

On the other hand, in the Malaysian FTA (Article 12.5), unlike the others, good offices, conciliation and mediation, which can be applied at every stage of the process, are also provided as alternative settlement methods. These can be initiated and terminated at any stage of the resolution process. They may also continue during the period when the matter is before the arbitration panel.

3. Judicial Procedures

I have identified 4 Turkish FTAs, which have automatic decision mechanisms effective in deciding and concluding the third-party trial process, thus saving the process from political influence, either explicitly or indirectly.

The settlement mechanism of Singaporean FTA has great similarities with that of the sub-group of 4 under quasi-judicial models (Chile, Korea, Malaysia and UK FTAs). Indeed, it would have been necessary to treat this FTA among those quasi-judicial procedures, if there were not few provisions providing automation. The factor ensuring the automaticity is the inclusion of WTO Director-General in the appointment of panelists. It is possible for the parties to activate the Director-General at two points. First, if one of the parties fails to appoint its own panelist within 30 days from the receipt of the panel request (Article 17.5), upon the other party notifying the Director-General of the situation, the Director-General shall first notify the failing party, and appoint a member if no appointment is made within 14 days. Second, if the third member is not appointed or, if appointed but not approved by the parties within the time limits specified in Article 17, the Director-General will again perform the task of appointing the third member upon the request of one of the parties. With these provisions, the way for the defendant, avoiding the

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by-case basis through bilateral agreements between the contending parties. For the sequencing issue see GALLAGHER, Peter, Guide to Dispute Settlement, The Hague, Kluwer Law International, 2002, p. 48-51.

obligation to appoint its own panelist, to block the third-party trial process has been closed, which ensures certain automation. The remaining provisions on the dispute resolution mechanism are almost identical to those of the Chile, Korea, Malaysia and UK FTAs. As such, the sequencing problem has been resolved in the Singaporean FTA, as well.

Turkish-Venezuelan FTA, which, unlike the Singaporean FTA, contains few and general provisions regarding the settlement of disputes. As in all other FTA dispute settlement mechanisms, and also that of WTO, it is stipulated that the preferred way is consensus-based resolution, and in this context, disputes will be settled primarily through consultations to be carried out in cooperation by the parties within the Joint Committee. There are certain time limits for each step in the process. If the matter cannot be resolved within 30 days from the date of receipt of the request for consultations, the Joint Committee will initiate an arbitration procedure in line with the arbitration rules of the UN Commission on International Commercial Law (UNCITRAL). While the expression of "can initiate" is used in some other FTAs (Mauritius, Moldova, Faroe and Kosovo), which are among the quasi-judicial mechanisms and include panel processes that can be operated by the decision of the Joint Committee, the Joint Committee of Venezuelan FTA is bound with the phrase "shall initiate".[49] This provides an automatic procedure that the parties could not block, which has cleared the operation of the mechanism from political influence.

The FTA with EFTA, first FTA of Turkey, in its original form that came into force in 1992, provided such a pure diplomatic way to resolve disputes that no expression of "dispute" or "dispute resolution" was even included. For the purpose of the proper implementation of FTA, at the request of any party, exchange information and consultations would be made within the Joint Committee (Article 25.2).[50] Accordingly, a dispute could only be dealt with through consultations and friendly settlements. However, with the revised FTA,[51] the dispute settlement mechanism underwent a radical change. In the mechanism consisting of consultations

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49 Turkish Official Journal (d. 01/06/2020 and no. 31142 – Repeated). See Annex V.

50 Turkish Official Journal (d. 18/04/1992 and no. 21203 – Repeated).

51 Turkish Official Journal (d. 25/05/2021 and no. 31491 – Repeated.

and arbitration panel stages, the possibility of blocking the panel process has been eliminated with clear rules on operational time limits, the appointment procedures of panelists, and the way the panel takes decisions. For example, when one of the parties tries to block the process by not appointing panelist, the other party can apply to the Secretary General of the Permanent Court of Arbitration (PCA) and request the completion of the missing member of the panel (Article 9.4.3). Again, the ability to make decisions by majority vote in the arbitration panel if a unanimous decision would not be possible (Article 9.5.7) eliminates the risk of blocking the process by one of the parties. On the other hand, the panel process will be conducted by applying the Arbitration Rules of the PCA dated 2012 (Article 9.5). A possible sequencing problem has also been eliminated (Article 9.8.3). Additionally, good offices, concillation and mediation procedures, previously referred to in the Malaysian FTA, are provided as alternative means at any stage of the dispute, including the panel stage (Article 9.2).

The dispute resolution mechanism in the initial version of the Bosnia-Herzegovina FTA,[52] was a diplomatic procedure that did not contain too many details. It provided consultations within the Joint Committee while allowing appropriate safeguards to be taken in the meantime. On the other hand, in the revised FTA,[53] inter alia, improvements regarding the settlement of disputes have also been introduced. The possibility to block the process has been eliminated. In the event of a blockage in the panel member appointment, the Secretary General of the PCA fulfills it at the request of either parties (Articles 7.3 and 7.4). With clear rules and timeframes for the implementation of the panel decisions, a possible sequencing problem has been eliminated, as well.

C. Relations With Other Dispute Settlement Mechanisms

1. Forum Selection

When it comes to different forums available for a dispute, it is possible to summarize three ways adopted in RTAs: (i) Giving exclusive

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52 Turkish Official Journal (d. 05/05/2003 and no. 25099). See Articles 25 and 26.

53 Turkish Official Journal (d. 25/06/2021 and no. 31522).

priority to one of the two forums (ii) Allowing the selection of a forum at the beginning but the chosen forum being exclusive to that dispute after it has been selected (iii) Allowing the use of both forums.[54]

In a WTO study on the subject, the provisions of the RTAs on this issue are classified into 5 groups: (i) Provisions that make the RTA's resolution mechanism mandatory (ii) Provisions that make the WTO resolution mechanism mandatory (iii) Provisions that encourage the use of the RTA's resolution mechanism (iv) Provisions that allow parties to choose one of two forums but prohibit using the other one once a forum selected (so called *fork-in-the-road*) (v) Provisions that allow the sequential use of the resolution mechanisms of the RTA or the WTO.[55]

In some of the Turkish FTAs, a possible conflict of jurisdiction with other forums has been eliminated through arrangements regarding the selection of forums. The provisions on the choice of forum are relatively new and were not included in the FTAs before the Chilean FTA in 2011.

Article 39 of the Chilean FTA regulates the choice of forum between the FTA and the WTO mechanisms. Accordingly, if a dispute arises on a subject covered by both WTO Treaty and the FTA, the complaining party is given the right to select one of them, chosen procedure excluding the other. In Article 39 provisions, there is no statement on sequential operation. In other words, it is not clearly stated that once a procedure is chosen, it is prohibited to apply to the other procedure while the selected one is in progress and/or after it is completed.

A sequential selection of forums is allowed in Korean FTA. According to Article 6.3, if one of the dispute resolution mechanisms of the FTA or the WTO is applied, a resolution process cannot be started in the other forum unless the process in the selected forum regarding the *same measure* is concluded. On the other hand, in the same paragraph, it is regulated that a party cannot initiate a dispute settlement process in the other forum for the *same obligation* under the FTA and the WTO Agreement, except that the selected forum cannot take a decision due to

54 McDOUGALL, p. 6.

55 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 21.

the procedural or jurisdictional reasons. This will be the case if the FTA and WTO have *identical obligations*.

Malaysian FTA did not limit the forum selection provisions to the WTO, but made a general forum selection arrangement. According to the second paragraph of Article 12.3, the complaining party is obliged to notify the other party, in written, of its intention to do so before choosing a particular forum. The procedures of the selected forum will be used excluding the other. FTA remains again silent on whether exclusion of the other forum will be simultaneous, sequential or forever.

Another FTA with a forum selection clause is the Moldovan FTA. In fact, it does not give the right to choose a forum; it determines the order of forum-selection. Article 31.10 states: "Parties may apply to the WTO Dispute Settlement Process in cases where any dispute cannot be resolved within the Joint Committee". This article contains uncertainty about one issue. The Moldovan FTA includes a resolution process based on the possibility of establishing an arbitration panel by the Joint Committee, if the dispute cannot be resolved through consultations within a reasonable time-period. The expression "in cases where any dispute cannot be resolved within the Joint Committee" in Article 31.10 brings to mind the question whether it is to be understood only during the consultations within the Joint Committee or including the arbitration panel stage. On the other hand, the phrase "may" in the sentence "If the dispute cannot be resolved through consultations within a reasonable time, the Joint Committee may agree to the establishment of an arbitration panel" of Article 31.8 means "if the parties take a decision to establish an arbitration panel in the Joint Committee". In this case, the situations where the parties cannot agree on the establishment of an arbitration panel should be understood within the scope of "situations where the dispute cannot be resolved within the Joint Committee". Accordingly, the WTO dispute settlement mechanism can be operated in cases where (i) a solution cannot be reached through consultations (ii) a consensus cannot be reached on

the establishment of an arbitration panel (iii) a solution cannot be reached during the arbitration panel process.[56]

The Singaporean FTA includes a general and overarching choice of forum provision, which is not limited to only WTO mechanism. According to Article 17.3.2, before the complaining party declares that it will take a dispute to a particular forum, it must notify the other party, in written, of its intention to do so. The provisions of Article 17.3.3 require a forum to be selected to the exclusion of other possible forums. Whether or not the exclusion is sequential is left unclear like Malaysian FTA.

The provisions of Venezuelan FTA (Annex V, parag. 11) specifically address the forum selection between the FTA and the WTO. Accordingly, if a dispute resolution procedure is initiated in one of them, a new one cannot be established on the other platform for the *same measure*. Unless the chosen forum fails due to procedural or mandate and authority reasons, the dispute resolution process cannot be run again in the other platform for *identical obligations* of the FTA and WTO.

Although the revised EFTA FTA brings advanced regulations on many issues, it includes provisions open to interpretation on sequentiality in forum selection. According to Article 9.1.2, a dispute on the *same subject* under both the FTA and WTO rules can be taken to one of the forums at the discretion of the complaining party, selected forum excluding the use of the other. However, the FTA again is silent on whether the exclusion will be simultaneous, sequential or forever. The same is true for the revised Bosnia- Herzegovina FTA. Article 3.3 of Annex VI states: "When the complaining party selects a specific forum, the selected forum shall be used to the exclusion of other possible forums."

2. The Recognition of Other Mechanisms

Most of the FTAs contain general provisions confirming the rights and obligations under other agreements binding the parties, especially

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[56] Since there is no provision in the Moldovan FTA regarding the bindingness of the arbitration panel reports or its acceptance by the Joint Committee, it is considered that the situation numbered (iii) should also be taken into account. Otherwise, in common practice, an arbitration panel decision is either directly binding or it is accepted and made binding by the decision-making body.

the WTO. For example, the rights and obligations of the parties under WTO agreements are confirmed in the Chilean FTA (Article 3) and the Malaysian FTA (Article 1.3). In the Moldovan FTA (Article 3), the parties confirm their rights and obligations to each other under WTO treaties, successor agreements and other agreements with which they are contracted. It can be deduced from these provisions that the right to resort to dispute resolution procedures under other agreements is also reserved and mutually recognized by the parties.

On the other hand, in some FTAs, special provisions are also included, which reserves the right to apply to the dispute settlement procedures of other international agreements. For example, Article 6.3 of the Korean FTA provides that recourse to its dispute resolution provisions shall not prejudice the right to appeal to the WTO dispute settlement mechanism. Article 31.10 of the Moldovan FTA stipulates that in cases where a dispute cannot be resolved within the Joint Committee, the parties can resort to the WTO dispute settlement process. Therefore, not disabling the WTO's mechanism, it does not impose the arbitration panel as the only way when consultations fail. The provisions in the Article III.3.10 of the Faroe FTA, confirm the rights and obligations under GATT 1994 Articles XXII and XXIII together with the DSU, regarding the settlement of disputes. Thus, the right of the parties to operate the WTO settlement mechanism is protected without leaving any room for doubt and interpretation, which eliminating a potential conflict of jurisdiction. A similar provision exists in the Venezuelan FTA (Annex V.11), as well.

3. Contracting Out of FTA Dispute Settlement Mechanism

In some FTAs, certain issues are excluded from the resolution procedures. For example, in Korean FTA, disputes that may arise from paragraph 4 of the liberalization chapter (Article 1.5) are left out from the scope of the settlement procedures of the FTA. Another one in the Korean FTA is Chapter 5, trade and sustainable development. Article 5.12 stipulates that the problems arising from this chapter shall not be referred to the dispute settlement mechanism regulated in Chapter 6 of the FTA.

Likewise, in Malaysian FTA, for disputes arising from the chapters of health and phytosanitary (Article 6.8), technical barriers (Article 7.12),

safeguards (Article 8.8), anti-dumping (Article 8.15) and cooperation (Article 9.20), its settlement mechanism will not be applied. Again, in the Singaporean FTA, various issues are excluded from the dispute resolution mechanism, which are matters regarding dumping and anti-dumping measures (Article 3.4), the temporary movement of natural persons (Article 11.6), and competition (Article 14.6). In the UK FTA, disputes over sanitary and phytosanitary measures (Article 6.3), competition policy (Article 7.4), and trade measures (anti-dumping and compensatory measures - Article 5.3) are excluded from its settlement mechanism.

However, none of them contain a regulation on which forum will be used in the excluded areas. Taking into accout the fact that the states, in practice, mainly prefer WTO procedures rather than FTA,[57] I consider that these provisions aim to take the disputes related to mentioned issues to the WTO resolution mechanism. The technical nature of the excluded issues draws attention. It could be appropriate to address them by WTO resolution mechanism, which is more experienced and advanced.

D. Applicable Law in the Settlement of Disputes

In a broad sense, applicable law refers to the legal resources that settlement body can apply to in a dispute. Not all of these resources are of the same legal value and status. While some of them are a direct source of rights and obligations, others are helpful in determining the rights and obligations and clarifying their scope. In this study, I refer as "substantive law" to those that can be a source of rights and obligations.

Article 38(1) of the Statute of the International Court of Justice (ICJ) lists the sources of law that the Court will apply in cases brought before it. It is generally accepted that Article 38(1) gives an informal list of sources of international law.[58] Article 38(1) refers to international conventions, international customary rules and general principles of law as applicable rules of law, as well as judicial decisions (case-law) and the

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57 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 6.

58 MITCHELL, Andrew / VOON, Tania, "PTAs and Public International Law", Bilateral and Regional Trade Agreements, LESTER, Simon / MERCURIO, Bryan (Eds.), New York, Cambridge University Press, 2009, p. 115.

opinions of well-known authors of various countries (doctrine) as auxiliary tools in determining the rules of law.

FTAs are international law treaties in nature and are subject to the general rules of treaty law and other relevant international law. In this framework, it is possible to deal with the applicable law under two sub-titles with regard to the disputes that may arise within the scope of FTAs.

1. Substantive Rules

In a treaty regime, the main source of rights and obligations that can be applied to the disputes are the treaty text on which the treaty regime is based and the secondary rules created within the regime. In this context, all Turkish FTAs include the expression of "disputes between the parties regarding the interpretation or application of *the agreement*" or similar ones with the same meaning. Accordingly, the law to be applied to the merits (substantive law) in disputes is primarily the text of the relevant FTA as the source of rights and obligations.

In addition, if another treaty or similar legal instruments are referred to as a source of rights and obligations in the FTA, they will also be in the status of substantive law. To give an example, in Bosnia-Herzegovina FTA, Article 7 and Article 10, respectively, refer to the obligations imposed by the relevant agreements of the WTO for technical barriers to trade (TBT Agrement) and sanitary and phytosanitary measures (SPS Agrement). In the same FTA, according to the third paragraph of Article 16, the measures related to balance of payments shall be compatible with Article VIII of the IMF Agreement. Many other FTAs have similar provisions on various issues as well. In this way, the agreements that are integrated into the FTA text with explicit reference are in the status of the substantive law in the resolution of FTA disputes.

Although there are no specific and explicit provisions under the name of "applicable law" in Turkish FTAs, there are other provisions that indireclty address it. The most significant ones among them are the rules regarding panels' job description. For example, in Article 42 of the Chilean FTA, the terms of reference of the arbitration panel are as follows: "To examine, in the light of *the relevant provisions of this Agreement*, the matter referred to in the request for the establishment of an arbitration

panel pursuant to Article 41, to make findings together with the reasons on whether the measure is in conformity with *the Agreement* or not and to issue a written report for the resolution of the dispute. If the Parties agree, the arbitration panel may make recommendations for resolution of the dispute." [italic added]

In the same article, it is also allowed for the parties to decide on different terms of reference. In that case, the question arises whether the parties can determine substantive rules other than the FTA through the terms of reference.[59] I have the opinion that this is possible in bilateral agreements, while such a disposition has the potential to cause problems in multilateral agreements in terms of the rights and obligations of third parties in. This is an issue related to Article 41 of Vienna Convention on the Law of Treaties (VCLT). Article 41 regulates the situtation in which a limited number of parties to a multilateral treaty amends it among themselves (*inter se* modifications). According to Article 41, (i) the amendment should be provided or should not be prohibited in the amended treaty (ii) the amendment should not affect the rights and obligations of third parties of the treaty (iii) the amendment should not create incompatibility with the effective achievement of the aims and objectives of the treaty as a whole.

There are other provisions in Chilean FTA pointing to FTA text as substantive law. According to Article 41.3, the complaining party's request for the establishment of the arbitration panel shall consist, inter alia, the legal basis of the complaint including the *alleged violated provisions and other relevant provisions of the FTA*. Similar arrangements exist in FTAs with Korea (Articles 6.5 and 6.6), Malaysia (12.7 and 12.9), Singapore (17.2, 17.4-17.6) and UK (12.5 and 12.7). Article 12.9 of the Malaysian FTA counts among the functions of the panel to reach the findings that will help to make the necessary assessment for the *applicability of the FTA* and *compliance with the FTA*. Articles 17.2 and 17.5 of the Singaporean FTA refer to the obligations under the FTA and its applicable provisions. In the relevant parts of the revised EFTA (Article 9.4.8) and Bosnia-Herzegovina

[59] FTA should be understood as including the external rules which are incorporated into it.

(Articles 5 and 6) FTAs, there are provisions indicating the FTAs' text as the applicable substantive law.

On the other hand, trade relations with third countries are referred in almost all of the FTAs, and the parties recognize each other's rights to establish customs unions or free trade zones and maintain existing ones, unless the provisions of the FTA are adversely affected. For example, in Chilean FTA the parties mutually confirm their rights and obligations arising from the WTO agreements and any other international agreements to which they are a party. Similar provisions are also found in other FTAs (like Article 3 of the Moldovan FTA). Such provisions do not create new rights and obligations that could be subject to complaint under the FTA. However, since both parties mutually recognize such rights and obligations outside the FTA, I consider that it is possible for them to be brought forward and applied to the merits *as a defense* against a complaint.

In Korean FTA, the parties have made mutual commitments on multilateral labor standards and agreements and multilateral environmental treaties. If Chapter 5, which covers these issues, had not been excluded from the dispute resolution mechanism of the FTA, the international agreements in question would have been integrated into the FTA, and in this way, they would have been a source of mutual rights and obligations for the parties. This would have made it possible to apply these rules not only for defense but also for complaint (claim) purposes.

The UK FTA, on the other hand, includes general recognition provisions similar to the previous examples, as well as clear integration provisions in some respects unlike other FTAs. Paragraph 1 of Article 4, which deals with technical barriers to trade, states: "Articles 2 through 9 of, and Annexes 1 and 3 to the TBT Agreement are incorporated into and made part of this Agreement, *mutatis mutandis*." This makes the relevant provisions of TBT Agreement substantive law for disputes arising from the FTA.

When procedural non-FTA rules on third-party adjudication are imported through FTA provisions, they become a source of rights and obligations for the parties in terms of trial proceedings. This situation is

detected in two FTAs. First is the Venezuelan FTA importing the UNCITRAL rules and second is the revised EFTA FTA importing the PCA Arbitration Rules.

2. Other Rules

The legal rules which can be applied in a dispute are not limited to the ones that are the source of rights and obligations. The rules of customary international law, general principles of international law, case-law of other international judicial bodies and doctrinal resources can also be resorted to assist in the interpretation and clarification of rights and obligations. It is generally accepted both in doctrine and international judicial circles that such general rules of international law can be applied in treaty regimes unless they are expressly contracted out.[60] Accordingly, it is always possible to apply these rules in FTA regimes even if they are not explicitly integrated into. However, none of these are qualified to be a source of rights and obligations, therefore, they cannot be resorted to in a way that they change the rights and obligations determined in FTAs. Rights and obligations should only be sought in instruments that reflect the will of the FTA parties.

In some FTAs, such rules are explicitly referred to. For example Chilean FTA (Article 46.3) states: "Arbitration panels shall interpret the provsions of this Agreement in accordance with custormary rules of interpretation of public international law, due accout being taken of the fact that the Parties must perform this Agreement in good faith and avoid circumvention of their obligations." Thus, the FTA provides an area of application both for customary interpretation rules and the principle of "good faith",[61] which is a general principle of law accepted in international law. Similar references to the customary rules of international law on interpretation are also found in Article 6.10.5 of the

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60 MACNAIR, Arnold Duncan, The Law of Treaties, Oxford, Clarendon Press, 1961, p. 466; INDONESIA – AUTOS (Indonesia — Certain Measures Affecting the Automobile Industry), WTO Panel Report, WT/DS54/R, WT/DS55/R, WTDS59/R, WTDS64/R, 1998, parag. [14.28].

61 There are other examples of FTAs that include the principle of good faith. For example, the Australia – USA FTA, Article 21.5(1) obliges the parties to consult each other in good faith in the event of a dispute.

Korean FTA and Article 12.9.2 of the Malaysian FTA. Singaporean FTA Article 17.6 includes a more spesific reference regarding customary rules: "The arbitration panel shall interpret the provisions referred to in Article 17.2 (Scope) in accordance with customary rules of interpretation of public international law, including those codified in the 1969 Vienna Convention on the Law of Treaties." Explicit reference to VCLT is also found in the revised FTA with Bosnia-Herzegovina (Article 16 of Annex VI).

These provisions in the FTAs reflect Article 3.2 of DSU, which brings the obligation to clarify the provisions of WTO treaties according to the customary rules of interpretation in public international law. While a part of the international case-law states that the customary rules of interpretation are the rules in Articles 31 and 32 of VCLT,[62] another part thinks that those cannot be limited to the rules codified by VCLT because there are also non-codified rules that can be deemed within this scope.[63] Accordingly, interpretation rules that are not codified by VCLT but have somehow become customary as a result of practice among states, can be considered as a "supplementary interpretation tool" within the scope of VCLT Article 32 and related general principles of law and thus be applied in the interpretation of FTA provisions.

A few separate words should be said on the rules of the WTO which are legal basis for FTAs. Besides, many RTAs, including Turkish FTAs, refer to WTO provisions on various issues (For example, NAFTA Article 30.1) or repeat them almost as they are (For example, Thailand-Australia FTA Article 809, which are similar to GATS Article XVI). This interaction between WTO law and RTAs makes WTO law and WTO judicial decisions relevant for RTA disputes. As a matter of fact, there are

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62 LAGRAND CASE (Germany v. United States of America), Judgement of International Court of Justice of 27 June 2001, 2001, parag. [99]. (https://www.icj-cij.org/files/case-related/104/104-20010627-JUD-01-00-EN.pdf Last Accessed: 22/09/2021); US – GAMBLING (United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services), WTO Appellate Body Report, WT/DS285/AB/R, 2005, parag. [158-212].

63 KOREA – PROCUREMENT (Korea — Measures Affecting Government Procurement), WTO Panel Report, WT/DS163/R, 2000, parag. [7.96].

examples of RTA case-law taking into account WTO judicial decisions.[64] In this context, there are opinions suggesting that the provisions and case-law of WTO related to RTAs may evolve into customary international law and may be a relevant source of law in the interpretation of RTAs.[65] On the other hand, although it is rare, the WTO judiciary refers to the RTA case-law to interpret a WTO provision.[66]

CONCLUSION

In this study, I discuss dispute resolution mechanisms under bilateral FTAs of Turkey. I classify the dispute resolution mechanisms of 22 currently in force FTAs under three headings on the basis of political/diplomatic means versus third party adjudication. I take, as criteria, the degree to what extent disputes are settled independently from political decision mechanisms. I examine, at one end of the spectrum, the mechanisms in which the political bodies are decisive under the title of "diplomatic procedures", while, at the other end, under the title of "judicial procedures" in which the third party trial process can operate automatically without being dependent on political decisions. In between, under the heading of "quasi-judicial procedures", I deal with the ones in which there is also a third-party judicial body but the parties have the opportunity to indirectly block the functioning of the process by avoiding the fulfillment of certain treaty obligations.

The design of dispute resolution mechanisms adopted in RTAs reflects the different political, legal, economic and cultural factors. This may include, inter alia, the nature of the relationship between the parties, the depth and breadth of treaty obligations, and regional preferences.[67] It is possible to observe this situation in Turkish FTAs, as well. It is seen that similar solution processes are adopted in FTAs with countries that are geographically close to each other. In particular, in the FTAs with Balkan

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64 CROSS-BORDER TRUCKING SERVICES, NAFTA Chapter 20 Panel Report, USA-MEX-98-2008-01, 2001, parag. [260], [262].

65 MITCHELL / VOON, p. 118.

66 EC – CHICKEN CUTS (European Communities — Customs Classification of Frozen Boneless Chicken Cuts), WTO Appellate Body Report, WT/DS269/AB/R, 2005, parag. [310-345].

67 McDOUGALL, p. 1.

Countries (Macedonia, Albania, Serbia, Montenegro and non-revised Bosnia-Herzegovina), no judicial way is provided for the settlement of disputes; on the contrary, political/diplomatic ways are preferred. In FTAs with Middle Eastern and North African countries (Israel, Palestine, Syria, Jordan, Tunisia and Morocco), quasi-judicial procedures were provided. There are opinions which evaluate this as "regional bias".[68]

It is not difficult to guess that the political/diplomatic ways in some FTAs may have been preferred by partner countries. This could be purely a political choice or the result of their familiarity and integration levels with international practices.[69] Aditionally, it can be argued that this preference stems from the states' concern to hold the initiative in policy areas. In this context, Smith argues that while more legalistic mechanisms support greater compliance with RTA obligations, less legalistic ones give states more space for domestic policy.[70]

In all FTAs, third-party adjudication is entrusted to *ad hoc* bodies. Various names such as panel, arbitration panel, etc. for those bodies in FTAs are preferred with essentially the same meaning. These bodies mainly consist of 3 members. Only in the FTAs with Mauritius, Moldova and Kosovo, the number of panel members is left to the decision of the Joint Committee. The procedures for determining the panel members, their job descriptions and qualifications are provided in FTAs at varying levels. On the other hand, in addition to *ad hoc* panels, other alternative third-party solutions, which can be operated in parallel, such as good offices, concillation and mediation are also provided in some FTAs. Besides, in some FTAs, it is always possible to reach "mutually agreed solutions" at any stage of the dispute settlement process. However, there is no specific method on how to do this, and the process is left entirely to the parties.

In recent years, starting with the Chilean FTA in 2011, a group of FTAs have included detailed and efficiency-enhancing rules (on

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68 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 16.

69 For example, Albania became a WTO member in 2000, Macedonia in 2003 and Montenegro in 2012, while Bosnia-Herzegovina and Serbia have yet observer status in WTO.

70 SMITH, p. 147.

procedures, time limits, implementation measures, etc.) in a similar way to the WTO's settlement mechanism. Especially, there are FTA provisions eliminating issues such as the "sequencing" problem, which have not yet been definitively dealt with even within WTO. Despite all these, no permanent institutional judicial body, which has its own autonomous administration and budget and members appointed among professional experts for certain periods, has been identified in any FTA. In this context, no appellate body is encountered in any Turkish FTA.

All Turkish FTAs' settlement mechanisms cover only state-to-state disputes; therefore there is no opportunity for private individuals, including companies, to directly participate in the process. It is possible for individuals to reflect their interests only through their own governmental bodies. However, there are some multilateral free trade areas or advanced integrations such as NAFTA and the EU, where private individuals may initiate a complaint process in resolution mechanisms for certain situations.

Although significant improvements have been made recently in the solution mechanisms of Turkish FTAs in terms of rule-oriented and judicial nature, there still exist some gaps and deficiencies that could adversely affect the proper functioning:

(1) In some FTAs, there are loopholes, a kind of implicit veto-power, which allow to block the panel process due to the methods of appointing the panel members. If the complained party adopts an uncompromising attitude in appointing the arbitrator on behalf of herself or the third arbitrator to serve on the panel, she may actually prevent the process from moving from the political/diplomatic (consultations) stage to the judicial (panel) stage.

(2) In some FTAs (Mauritius, Moldova, Faroe, Kosovo) there is no provision on the bindingness of the panel report. With a general approach, I consider that it is possible to get rid of the problems this gap may create, by applying the general customary rules regarding arbitration practices and thus reaching the conclusion that arbitration decisions are binding.

(3) Concrete and effective implementation rules are not provided in a significant part of FTAs. In the FTAs with diplomatic procedures and some of the FTAs with quasi-judicial procedures, it is striking that the implementation and sanctioning issues are addressed insufficiently or not at all. This renders the resolution procedures practically meaningless. In contrast, detailed implementation provisions are included in other group of FTAs such as Chile, Korea, Malaysia, Singapore, UK, revised EFTA and revised Bosnia-Herzegovina FTAs. Nevertheless, considering FTAs are bilateral agreements, there are no collective coercion mechanisms to ensure the losing party to fulfill the findings of the binding panel report.

(4) The competition of jurisdiction issue has not been adequately addressed. This situation has the potential to create a conflict of jurisdiction especially between FTAs and WTO mechanisms. The fact that FTA mechanisms are not preferred in practice has prevented a conflict of jurisdiction from occurring until today.

(5) As from Chilean FTA, provisions regarding the selection of forum have begun to enter the FTAs, which has caused another problem in some FTAs. FTAs often contain a statement that if one forum is selected, the other will be excluded. At this point, a situation arises that is open to interpretation as to whether the other forum is disabled simultaneously, sequentially or permanently. While some FTAs eliminate this potential problem by providing explicit rules, some others remain silent about it.

(6) It is reported that RTAs' settlement mechanisms are not used very frequently and effectively for various reasons despite the increase in their number and sophistication.[71] Paradoxically, with the increase in the number of RTAs, states prefer the WTO mechanism more than the RTA mechanisms in solving their disputes.[72] This is true for Turkish FTAs, as well. According to the information open to public, none of the dispute resolution mechanisms of 22 existing FTAs have been used so far. Preferring WTO mechanisms instead of FTAs renders their resolution procedures dysfunctional and prevents their development and

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71 McDOUGALL, p. 1.

72 CHASE / YANOVICH / CRAWFORD / UGAZ, p. 6.

maturation. This situation weakens the applicability of FTA provisions, as well. This subject, which cannot be detailed here, is worth another study.

(7) Finally, there are no transparency tools and database that allow tracking the resolution of disputes. For this reason, it is not possible for most RTAs to follow up the disputes and resolution processes handled by their procedures. It is the case for Turkish FTAs, as well. Therefore, we do not have the opportunity to evaluate the effectiveness of FTA settlement mechanisms. Within this limitation, no dispute has been identified so far, which has been dealt with in accordance with the legal procedures of the resolution mechanism of an FTA. However, it is presumed that consultation mechanisms are effectively used in the relevant FTA's political bodies.

ABBREVIATIONS

DSU	WTO Dispute Settlement Understanding
DSB	WTO Dispute Settlement Body
EFTA	European Free Trade Association
EU	European Union
FTA	Free Trade Agreement
GATT	WTO General Agreement on Tariffs and Trade
ICJ	International Court of Justice
MFN	Most-Favored Nation
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
RTA	Regional Trade Agreement
UK	The United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
VCLT	1969 Vienna Convention on Law of Treaties
WTO	World Trade Organization

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