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Trade, Labor and EU Law Perspectives

The Way the AB Has Approached WTO Case Law Is Not Helping (Part I)

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The WTO dispute settlement system runs a serious risk of regressing by year end into the conditions that prevailed in the GATT era. The difference between the GATT and the WTO formulations of dispute settlement is gigantic. Under the GATT, compliance by the defendant with dispute settlement findings was, in practice, voluntary; under the WTO, lack of compliance with dispute settlement findings may lead to the application of countermeasures on the defendant by the complainant. It has come to this because of the unwillingness on the part of the United States to agree to the appointment of replacements for the members of the Appellate Body ("AB") who have completed their terms. If this situation continues, going forward from December 2019 a Member that finds a panel report objectionable would be able to send that report into legal limbo by the simple recourse of appealing it since the AB, lacking a quorum as of then, will not be able to discharge the appeal involved.

A popular view holds that the United States has adopted such hardball tactics purely out of resentment for having lost a number of WTO challenges to some of its trade remedy practices; most notably the practice of "zeroing". In this post we explain that this view is way too simplistic, because in large part the crisis that WTO dispute settlement is undergoing is self-made, particularly on account of the "super hardline" approach the AB has adopted in respect of how it creates case law, which makes impossible for the AB to openly backtrack where a decision is manifestly flawed. That the avenue for addressing bad dispute settlement decisions through a political fix is effectively foreclosed within the WTO system compounds the problem of a "super hardline" approach to case law.

We should emphasize that neither one of us is a professional critic of the AB. By way of illustration, one of us has written laudatory reviews of the AB findings on causation in the context of both trade remedy and "serious prejudice" WTO disputes. [1] We thus believe that, overall, the AB has done a commendable job as regards the interpretation and application of WTO provisions. But this does not mean that the AB has not at times come up with findings that are deeply flawed by any standard. Unfortunately, some of these deeply flawed findings have had very serious policy implications, because they have had the effect of significantly curtailing the ability of Members to exercise their rights particularly in the area of trade remedies and subsidy disciplines.[2]

Exhibit A in an overview of AB findings manifestly flawed by any standard is the AB *dicta* in *EC-*

Fasteners (China) to the effect that, in respect of China, the "surrogate country" methodology in antidumping investigations has a finite shelf life irrespective of whether China remains a non-market economy ("NME"). In this dispute, the issue properly before the AB was whether "NME" status for purposes of determining "normal value" also had implications for calculating export prices and the setting of antidumping duty rates. The AB confirmed that, under Paragraph 15 of China's Protocol of Accession, there were no such implications.

The AB went on to state that the expiry of a portion of Paragraph 15 in December 2016 revoked, as regards China, the legal basis of the "surrogate country" methodology connected to NME status. The thing is, however, whether the "surrogate country" methodology, as applied to China, came to an end in December 2016 or not was not an issue before the panel and, therefore, was even not part of the terms of reference of the appeal of the panel report. Why in such circumstances the AB chose nevertheless to gratuitously make a strong statement on this huge issue continues to bewilder trade law experts. If this is not an instance of the AB making a pronouncement that threatens to diminish the rights provided in the covered agreements (including first and foremost the right of due process in WTO dispute settlement), then we do not know what is.

In fact, in *EU-Price Comparison Methodologies*, where China challenged the continued application by the European Union of a methodology not based on Chinese prices and costs to determine the "normal value" of Chinese exporters, China essentially contented itself with arguing that any rebuttal of its claim was useless, because the AB ruling in *EC-Fasteners* implied that from December 2016 onwards Members were obliged to use Chinese prices and costs for such purposes.

Fortunately, the AB never had to try its hand at resolving this conundrum because China asked for the panel proceedings to be suspended just prior to the circulation of the panel report.[3]

In Part II we discuss two other archetypal examples of problematic AB findings. In Part III we explain how the AB adopted an approach to creating case law that is "super hardline" as compared to how case law is created by appellate courts in national jurisdictions, including in common law countries, and provide some policy recommendations.

[1] See Jorge Miranda's papers "Causal Link and Non-Attribution as Interpreted in WTO Trade Remedy Disputes", *Journal of World Trade*, Vol. 44 (2010). No. 4, and "The Economics of Actionable Subsidy Disputes", in Joost Pauwelyn, et al., *The Use of Economics in Trade and Investment Disputes*, Cambridge University Press, 2017.

[2] Whether this might actually be a good thing from the perspective of consumer welfare in partial equilibrium is wholly irrelevant. The fact is that the WTO grants Members rights in respect of trade remedy protection and subsidy disciplines and that, according to Article 3:2 of the WTO's Dispute Settlement Understanding ("DSU"), "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

[3] See WTO document WT/DS516/13, circulated on 17 June 2019. According to a news report by Bloomberg, China requested the suspension of the panel proceedings because the interim panel report was strongly adverse. See https://www.bloomberg.com/news/articles/2019-04-18/china-is-said-to-lose-market-economy-trade-case-in-eu-u-s-win

* The opinions presented in this post do not represent in any way official views of King & Spalding or its clients. We thank Bárbara Medrado of King & Spalding for having directed us to

the Stanford materials on comparative case law. This post is a summary of research we have conducted preparing a paper intended for publication in the not so distant future. And, by the way, although this post espouses views that might be mischaracterized as pro-U.S., we are both proudly Mexican.

This entry was posted on Tuesday, November 5th, 2019 at 4:00 pm and is filed under China, Trade Law, USA, WTO
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