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Trade, Labor and EU Law Perspectives

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

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In Part I of this post we introduce the subject and provide a first example of problematic AB findings. In this Part II we discuss two additional examples. 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.

Exhibit B in an overview of problematic AB findings is the AB ruling in *Argentina-Footwear* that safeguard measures need satisfy the "unforeseen developments" requirement in Article XIX of the GATT additionally to the requirements in Article 2.1 of the WTO Agreement on Safeguards (according to which it must be shown that there is an import flood causing "serious injury" to the domestic industry).

As is well-known, Article 2.1 of the WTO Agreement on Safeguards skips the "unforeseen developments" requirement (according to which it must be shown that the import flood causing "serious injury" to the domestic industry is the result of "unforeseen developments"). The panel in *Argentina-Footwear* reasoned that the "unforeseen developments" requirement in Article XIX of the GATT did not apply because it had not been carried over to the Agreement on Safeguards and this Agreement reflected "the latest statement" of WTO Members concerning their rights and obligations in respect of safeguards. The AB overturned this panel finding based upon the argument that the "unforeseen developments causing an import flood" requirement and the "import flood causing 'serious injury' to the domestic injury" requirement were not in conflict with each other (because they could be applied jointly) and, therefore, should be read as cumulative requirements.

Although it is true that in terms of GATT Article XIX the two requirements were cumulative, the glaring omission of the "unforeseen developments" language from Article 2.1 of the Safeguards Agreement (truly, "the latest statement" of WTO Members concerning their rights and obligations in respect of safeguards) obviously indicated that the drafters meant to abandon such cumulation and facilitate the application of safeguards by watering down the conditions involved to a showing that there was an import flood causing "serious injury" to the domestic industry. It is interesting to inquire how this AB finding compares with contemporaneous AB findings addressing similar situations. The answer is, it is inconsistent. In particular, in *Japan-Alcoholic Beverages II*, a prior

dispute, the AB had found that the omission in GATT Article III:2, first sentence, of a reference to GATT Article III:1 had to be given meaning and this meaning was that the requirements in these two provisions did not operate cumulatively.

Not a single safeguard measure challenged at the WTO has been found to be in compliance with the "unforeseen developments" requirement which obviously has greatly discouraged their use.

Exhibit C in an overview of problematic AB findings is the AB ruling in *US-AD and Countervailing Duties (China)* that "public bodies", within the meaning of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), need be endowed with government authority.

According to the SCM Agreement, a government program falls within the definition of the term "subsidy" if it involves a "financial contribution" by a "government" proper or by a "public body" that confers a "benefit" to the recipient. The concept of "financial contribution" includes the provision of goods or services (other than general infrastructure). Logically, a "public body" that provides (read sells) goods or services has to be a commercial enterprise; otherwise, it would not be in the business of selling goods or services.

In the context of countervailing duty investigations, "public bodies" have been traditionally identified based upon two criteria: (i) whether the government holds majority-ownership of the entity concerned, and (ii) whether majority-ownership translates into effective control of such an entity. In *US-Antidumping and Countervailing Duties (China)*, China challenged this approach as applied by the United States. The AB sided with China, holding that "public bodies" need to "possess, exercise or be vested with government authority".

This begs the obvious question, however, of why on earth would (state-owned and controlled) commercial enterprises need to "possess, exercise or be vested with government authority" in going about their business of selling goods or services. You need government authority if you are a regulator (because absent such authority you cannot perform your function of regulating other entities), but (state-owned and controlled) commercial enterprises selling goods or services (for instance, an electric power company selling electricity, a steel company selling hot-rolled steel, or a commercial bank issuing loans) are not regulators. Thus, by adopting a test for "public bodies" that is fundamentally contrary to the nature of (state-owned and controlled) commercial enterprises, the AB essentially wrote this out concept out of the SCM Agreement.

The implications of this ruling cannot be overemphasized: It has become practically impossible to pass AB review when subsidy findings involve the provision of goods or services.

Subsequent AB rulings suggest that the AB has realized the enormity of its misstep as regards the interpretation of "public body" and that is looking for ways to fix such misstep surreptitiously. For instance, in recent cases involving this issue the AB has underscored that evidence that the government "exercises meaningful control over an entity and its conduct" may serve as evidence meeting its legal standard for "public body". This looks, however, as the AB attempting to avoid publicly backtracking on this flawed legal standard while reinstating a "meaningful control" test (the test originally shot down) at the stage of application of such legal standard.

The application of the AB's interpretation of "public body" has become even more confusing as of late. In *US-Carbon Steel (India)*, the AB concluded essentially that, although the panel had complied with the "meaningful control of the entity" element in the test for "public body", the

panel had not complied with the "meaningful control of the conduct of the entity" element in that test, by failing to evaluate whether the investigating authority (of the importing country) had properly assessed the existence of the latter situation.[1] However, because the test proposed by the complainant as regards "control of conduct" involved inquiring whether the government "influenced the transactions or the pricing" of the alleged "public body", such a test in practice replicated the test for "benefit", which implies that the latest iteration of the AB's legal standard on "public body" and the application thereof actually commingles "public body" with "benefit". Ohhh, what a mess.

Sadly, the list of problematic AB findings on trade remedies and subsidy disciplines issues does not end here.[2]

[1] There is, of course, the question of whether in fact there could be any cases where control of an entity does not lead automatically to control of the conduct of such entity.

[2] In our paper we provide additional examples of AB findings manifestly flawed by any standard.

* 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.

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