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The AB's Seven Deadly Sins?: Frame-correction and some short Responses to Miranda & Sánchez-Miranda – Part I

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Introduction

Initially, we were unsure whether or not we should get embroiled in discussions flowing from the provocative three-part blog post by Jorge Miranda and Manuel Sánchez-Miranda ("authors") on the topic of the World Trade Organization ("WTO") Appellate Body's ("AB") current crisis.[1] The main argument of those authors was that the crisis is "*in large part…self-made…*".[2] And while we do not always disagree with the authors on some specifics of their diagnosis, we respectfully disagree with the overall framing of the issue as well as with other specifics.

We are not professional AB-defenders; in fact one of us has written on the AB's failure to give full meaning to the concept of '*good faith*' during dispute settlement.[3] But at the same time criticism should be aimed at the correct places, and we feel the authors' assessment is somewhat lacking in that regard.

Like philosophers, the primary duty of scholars and practitioners too, is to *ask the right questions*, and this duty, in our view, is even more pronounced during testing times. The WTO, as an organization and not just a forum for dispute settlement, is facing massive seismic pressures. And at this sensitive juncture it becomes even more imperative to understand what truly ails the organization. The same is echoed by the authors in their (somewhat confusing) last line: that "*continuing to assess superficially the origins of the current crisis is the best recipe for WTO dispute settlement to stall*".[4]

Aside from scholastic and practical duties, we also felt compelled to give some voice to a (largely and legally) voiceless AB; to say nothing of the need for taking the conversation away from (often superficial) news reports concerning the highly irrational Donald Trump administration.

Justifications for existence aside, this blogpost takes up what is the tendentious thrust of the authors' criticism: that the AB "*creates case law*"[5], and that it establishes a system of "*case-law*", *i.e.* precedent, when in fact its responsibility is limited to interpretation and clarification.

An underlying grouse in the allegations is that the AB is, at times, simply wrong, and that it is these "*deeply flawed*"[6] rulings that have landed the AB in the position it currently finds itself in.

We briefly respond to these various critiques, as well as one additional (and popular) one, in the

form of the perceived AB's 'seven deadly sins'. We will follow the structure of their three-part-blog and go from specifics (remedies interpretation) to some perceived bigger-picture problems ("*ultra-hardline stare decisis*"[7] *etc*.) and ask the question: are these sins, if they indeed exist, so cardinal that they justify and necessitate the killing of the AB?[8]

Allegations and Responses

I. Allegations Regarding Remedies Interpretation

a. Anti-Dumping

i. Expiry of a part of Section 15 of China's Accession Protocol: Greed?

The authors appear to criticize the AB for an issue *on which it has not even ruled – i.e.* the *EU – Price Comparison Methodologies (DS516)* dispute, which the authors themselves admit was terminated at the panel stage.[9] The alleged problem is the preceding case: *EC – Fasteners (China) (DS397).* In this current quadripartite discussion, the past views of at least two of us on this matter are (well) known.[10] The issue with the authors' recent blogpost is that it makes the critical error of elevating the certain past AB *dicta* in *Fasteners* to the status of a "*findings*"; however, it is frankly unknown to anyone how the AB would have actually *ruled*, had *EU – Price Comparison Methodologies (DS516)* come to head in an appeal. Making an off-the-cuff remark is one thing but absent any actual *finding* there is no actual proof of *greed* beyond reasonable doubt.

ii. Zeroing: Wrath?

The prohibition with zeroing under the first main rule is well known ever since the original *EC – Bed Linen* dispute, and we can safely say that the text of Article 2.4.2 Anti-Dumping Agreement ("ADA") begged for a clarification.[11] Was that clarification a sin? We submit not: the Dispute Settlement Understanding ("DSU") clearly provides that the purpose of the WTO dispute settlement system is to "*clarify … provisions of [the] agreements*"; and while the line is thin between textual clarification (allowed) and legal creation (disallowed)[12], we believe the AB erred on the right side. In fact, the entire idea came from the Panel, as a result of conflicting administrative interpretations at the local level.

Admittedly, to subsequently extend the prohibition of zeroing under the main rule to a prohibition under the *exception* was a bit of a stretch, but was it really *wrath*, intended to teach any of the *zeroing*-perpetrators a lesson? We submit: no. It was perhaps not more than an inadvertent mistake committed by well-meaning lawyers not fully aware of the intricate mechanics of an anti-dumping calculation: *juris non calculat*. Yet, the mathematics of anti-dumping are such that this deprived the exception of much practical meaning compared to the main rule, if any, *i.e.* the exception was *de facto* reduced to a nullity.[13]

But taken in light of all the good that the AB has done to clarify the compromise-text that is the ADA, we consider that one mistake does not equate to a cardinal sin. Let's just randomly recall some landmark cases concerning the text of some key provisions from the Agreement and let us agree that many important clarifications on vague key provisions have been provided by the AB, for example: Article 2: *EU – Biodiesel (DS473/480)*; Article 3: *US – Hot Rolled Steel (DS184)* and *China – GOES (DS414)*; Articles 4 and 6: *EC – Fasteners (DS397)*; Articles 5 and 9: *Mexico – Rice (DS295);* Article 11: *US – Corrosion Resistant Steel Sunset Review (DS244)* and *US – OCTG Sunset Reviews (DS268)* and Article 15: *EC – Bed Linen (DS141)*.[14] The point here is about

perspective: do you see the glass as half-full or half-empty?

b. Safeguards: Envy?

The next major critique that the authors' present with respect to trade remedies interpretation is that the AB has incorrectly incorporated the '*unforeseen developments*' test (originally found in Article XIX:1 of the General Agreement on Tariffs and Trade ("GATT")) into Article 2.1 of the Safeguards Agreement ("SGA"). The authors' then contend that this has "*greatly discouraged their [safeguards'] use*".[15]

The problem is that the critique lacks nuance. First, there are actually some plausible reasons why such a '*carry-forward*' makes sense. GATT-continuity is a commonly accepted aspect of the institutional transfer that occurred in 1995. This is what the '*single undertaking*' was all about: Members could not pick-and-choose which agreements would apply to them, and at the same time, interpretatively, it meant that all agreements formed context for the interpretation of all other agreements, so as long as there was no conflict. And this is what the AB found in *Argentina – Footwear (DS121):* that the 'unforeseen developments' test was not in conflict with the rest of the requirements of SGA Art. 2.1. In fact, the SGA is clear on its relationship with the GATT: the SGA seeks to "*clarify and reinforce disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products),*"[16] (emphasis added), and it establishes rules for safeguard measures, which "*shall be understood to mean those measures provided for in Article XIX of GATT 1994*".[17] (emphasis added)

What we should *actually* be talking about is: what on earth *are* such '*unforeseen developments*'?[18] The AB has so far provided no guidance regarding what it thinks such developments could be. So again, the problem is one of framing: the issue is not that a GATT requirement was carried over, the issue is that nobody knows what that requirement entails, and that the AB has not shone its interpretative light where it should have.

The other problem with the critique is factual: there is no evidence that Members are being discouraged by AB interpretation (except the US if one argues that the actions under Section 232 are not actually safeguards in disguise). In fact, the WTO safeguards committee meeting this month noted a record number of safeguard notifications (45), a substantial jump from when the committee met in April earlier this year.[19]

c. Countervailing Duties ("CVD"): Gluttony?

An interesting dissonance is visible in the authors' view regarding CVD interpretation. And this again goes to perspective. They admit that some AB findings on CVDs are "*laudatory*", but simultaneously claim that others are "*deeply flawed*".[20] Fair enough. But then the authors' go on to say that it is only the latter that deserve attention: "*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.*"[21] This seems to imply that *all* the AB has done is to curtail Member's policy space. This is not true. By properly appreciating concepts like '*causation'*, the AB has also *protected* this policy space. Our point is that it is important, even when critiquing, to have a balanced outlook.

This is *not* to say that the AB's findings with respect to public body are non-controversial.[22] In

fact, those rulings might well be some of the most controversial to date and we are well aware of the debate that is raging on this very issue of "public body".[23] Yet, even if one sin is conceded, should it be considered cardinal so that the entire dispute settlement system therefore must be beheaded? This is what the authors seem to imply.

But one can also ask the question: who is to blame when a certain term (such as public body) is not defined in a Covered Agreement? So instead, rather than killing the judge when the judgment does not suit, a more proper way to deal with the alleged problem is the path that the EU followed, *i.e.* issue a paper, get the discussion started and try to get the *Membership* to agree on a *'better'* definition of public body.[24] This brings us to the next controversial issue, the allegation of law creation.

Part II of this post will be published later today.

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Views expressed by the authors are in personal capacity.

[1] Jorge Miranda and Manuel Sánchez-Miranda, *The Way the AB Has Approached WTO Case Law Is Not Helping (Parts I, II and III)*, Regulating for Globalization Blog, available at: http://regulatingforglobalization.com/2019/11/05/the-way-the-ab-has-approached-wto-case-law-is-not-helping-part-i/ [hereinafter "*Miranda & Sánchez-Miranda*"]

[2] Miranda & Sánchez-Miranda, Part I.

[3] Akhil Raina, *The Day the Music Died': The Curious Case of Peru – Agricultural Products*, 11(2) Global Trade and Customs Journal (2016).

[4] Miranda & Sánchez-Miranda, Part III.

[5] Miranda & Sánchez-Miranda, Part I. Similar exaggerated platitudes have recently been voiced in multiple other fora, see for example *The International New York Times* of 30 November 2019, "*The World Trade Organization is Dying. What Should Replace It*?", by Lori Wallach. More erudite magazines such as *The Economist* see the situation in a slightly more nuanced light, see for example, "*The Twilight of the WTO: The umpire expires*", The Economist of 30 November 2019.

[6] Miranda & Sánchez-Miranda, Part I.

[7] *See* Miranda & Sánchez-Miranda, Parts II and III.

[8] Note that we do not allege that the authors would favour such killing; our point, as mentioned in our first para, is simply that the authors have framed the issue in a way that makes it more conducive for someone like Trump to carry out the beheading.

[9] *See* Miranda & Sánchez-Miranda, Part I.

[10] *See*: Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9(3) Global Trade and Customs Journal (2014); Folkert Graafsma & Elena Kumashova, *In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent*

Modification?, 9(4) Global Trade and Customs Journal (2014); Jorge Miranda, *More on Why Granting China Market Economy Status after December 2016 Is Contingent Upon Whether China Has in Fact Transitioned into a Market Economy*, 11(5) Global Trade and Customs Journal (2016).

[11] As is known, Art. 2.4.2 exists of two main rules and an exception. The ball started rolling in *Bed Linen (DS141)*, with the clarification of the Panel and the AB concerning the first main rule.

[12] DSU Art. 3.2.

[13] The more recent and unanimous Panel in *DS534* shed clear light on the alternative interpretation as to whether or not it should be permitted to zero under the exception.

[14] This list is somewhat random and by no means exhaustive. Also, we did not mention other important and well-known cases such as *Mexico – HFCS (DS132)*, *US – Steel Plate from Korea (DS179)*, and *EC – Salmon (DS337)*, for the simple reason that they were not appealed.

[15] Miranda & Sánchez-Miranda, Part II.

[16] SGA Perambulatory Clause No. 2.

[17] SGA Art. 1.

[18] *See* Alan O. Sykes, The Safeguards Mess: A Critique of WTO Jurisprudence, 2(3) World Trade Review (2003).

[19] *See*: https://insidetrade.com/daily-news/wto-sets-safeguards-record-members-lament-their-increased-use?utm_source=dlvr.it&utm_medium=twitter

[20] Miranda & Sánchez-Miranda, Part I.

[21] Miranda & Sánchez-Miranda, Part I.

[22] Indeed, in DS397 most third parties (Argentina, Canada, EU and Mexico) agreed with the US and the Panel.

[23] See, for example, https://ielp.worldtradelaw.net/2019/05/chinas-industrial-subsidies-is-the-wtos-ab-jurisprudence-about-definition-of-a-public-body-an-instan.html?cid=6a00d8341c90a753ef0240a4aedaef200b#comment-6a00d8341c90a753ef0240a4aedaef200b

[24] Document WK 8329/2018 INIT, issued by the Council, dated 5 July 2018, implying that the law should be changed since, allegedly, AB jurisprudence has allowed a considerable number of State Owned Enterprises to escape the application of the SCM.

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