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Contents

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Article

One by one, till there are none: The continuing saga of the Appellate Body

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Introduction

Since the WTO's formation in 1995, the WTO's Appellate Body has stood as a vanguard of justice to ensure a rules-based system of dispute settlement as against a power-based system that prevailed in the GATT days. A unique contribution of the dispute settlement decisions of the Uruguay Round negotiations (1986-1994), the Appellate Body's ("**AB**") significance as a mechanism to hear appeals from panel decisions is underscored by over 140 decisions it has rendered till date. Further, the AB's contribution to jurisprudence on important issues in international trade law and public international law has been recognized as highly valuable.

Designed for hearing only questions of law and legal interpretations under the Dispute Settlement Understanding ("**DSU**"), the AB is composed of seven individual members who are selected by the WTO's Dispute Settlement Body by consensus for a four-year term. Such Members are eligible for being re-appointed once for another four-year term. Since 1995, it has been the practice of the WTO Membership to re-appoint AB Members (although there has been one exception) and appoint new Members as and when existing Members retire.

However, since 2017, the US has thrown a spanner in the works by refusing to join the consensus required under the DSU for appointing new AB members, thereby resulting in a gradual depletion of the AB's numerical strength. The situation has now reached a tipping point as just three AB members are left, which is the minimum number required to constitute a bench for hearing appeals. Of these three members, two are slated to retire by the end of this year, thereby leaving just one AB Member on the bench. This would effectively render the AB unable to hear appeals.

Bonafide grievances or malafide showstopper?

The US has cited a certain number of reasons for its dissatisfaction with the AB which are discussed below:

i. The US' main criticism is the AB's judicial overreach by engaging in legal interpretations that were beyond its purview and thereby adding to Member obligations under the various WTO agreements. The US is also aggrieved by the AB's advisory opinions on issues not necessary to resolve a dispute and engaging in fact-finding despite the DSU limiting the AB's review powers to legal issues.

ii. The continued service of AB members on benches they were part of even after expiry of their term. Interestingly, before the United States raised this issue now, this was raised by India much earlier. However, this issue did not gain traction and fell into oblivion. Furthermore, the practice of AB Members serving after expiry of their term has been in place for over two decades now. The US' objections at this point of time is therefore highly suspicious.

iii. The exceeding of the 90-day deadline within which appellate decisions must be circulated to the Membership in a number of cases. This criticism seems to be unfair given the different challenges being faced by the AB such as workload, complexity, etc., which render it unable to circulate the decision in time. Further, it is odd that the US has not taken the issue with the delays at the panel stage which are much more than in comparison to the appellate stage.

Prima facie, it would not be fair to say that the United States' dissatisfaction with the AB is without merit. Indeed, the AB could benefit from a serious dose of reform. Such an approach should be collective and constructive in nature. However, none of the above issues warrant a WTO Member running the AB to the ground. Further, inspite of a number of proposals made by different WTO Members for addressing these issues, the US in itself has not come forward with any concrete proposal for reforming the AB.

In fact, a closer look at the United States' behaviour would show that the real cause for its unhappiness with the judicial function of the WTO stems from a series of AB pronouncements on the inconsistencies of the United States' domestic trade remedy measures and practices such as zeroing, adverse facts available, etc., with provisions of WTO law. In fact, this was one of the main reasons the United States did not consent to the reappointment of one of its own nationals as an AB Member.

Way ahead?

Given the imminent doom that awaits the AB, options to salvage some sort of appellate mechanism after December 2019 are urgently required. One possible solution would be to arrive at a ministerial understanding that excludes the United States from the jurisdiction of dispute settlement mechanism and giving the AB a fresh lease of life.

Another option that is available would be to invoke the provisions of Article 25 of the DSU which recognizes arbitration within the WTO as an alternative means of dispute settlement. In fact, in a communication made in May 2019, the European Union has already made a proposal for an Interim Appeal Arbitration. Notwithstanding the merits and demerits of such a proposal, it is uncertain if the United States would agree to it.

Though the absence of a large economy such as the US from the aegis of the dispute settlement mechanism is undesirable, there are limited options and time is running short. Further, the exclusion of even one Member, particularly a powerful developed country, besides causing systemic disturbance in the WTO's functioning, would send a wrong signal to the rest of the Membership and undermine the multilateral, rules-based characteristics of the WTO.

Conclusion

The WTO's Dispute Settlement Mechanism has rightly been hailed as the WTO's 'crown jewel'. The AB has played a key role as part of this crown jewel. However, the clock is ticking. Like a terminally-ill patient living his last days, the Appellate Body, or what's left of it, is staring at what seems like certain doom. Given that two of the three remaining AB Members are slated to retire by the end of this year, unless the DSB fills the vacant Appellate Body slots, the appellate mechanism of the dispute settlement function will cease to function.

Eventually, even with a functioning panel system, the absence of an AB would significantly weaken the WTO's dispute settlement mechanism as a system without the right to appeal would be ineffective and lack credibility. This issue becomes all the more important given that Members appeal panel decisions more as a

norm rather than an exception, and if the appellate mechanism ceases to exist then appealed decisions would be rendered ineffective.

In case WTO Members are unable to arrive at a solution to resolve the issue, Members would be forced to wait out the current US Administration till it is replaced by an administration that sees light in a well-functioning appellate mechanism. But till then, the United States would be well advised to see the benefit of the importance of a rules-based system of settling disputes complemented with a healthy appellate body.

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Trade Remedy News

Trade Remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Digital Offset Printing Plates	China PR, Japan, Korea RP, Taiwan, Vietnam	F.No.6/7/2019-DGTR	16-05-2019	Anti-dumping investigation initiated
Jute sacking cloth	Bangladesh	24/2019-Cus. (ADD)	18-6-2019	Anti-dumping duty imposable on jute sacking bags extended to jute sacking cloth after anti-circumvention investigation
Paracetamol	China PR	22/2019-Cus. (ADD)	10-06-2019	Anti-dumping duty extended till 24-06-2019 during the pendency of the High Court and Supreme Court litigation
Poly Vinyl Chloride (Resin) Suspension Grade	China PR, Thailand, USA	23/2019-Cus. (ADD)	11-06-2019	Anti-dumping duty extended till 12-08-2019 during the pendency of sunset review
Saccharin	China	F. No. 6/18/2018-DGAD	19-6-2019	Imposition of definitive Countervailing duty recommended

Product	Country	Notification No.	Date of Notification	Remarks
Textured Tempered Coated and Uncoated Glass	Malaysia	F.No.6/45/2017 -DGAD Corrigendum	31-05-2019	Corrigendum issued to correct name of producer at Serial No. 1 and 6 of Final Findings issued vide notification No. 6 / 45 / 2017-DGAD dated 17.1.2019

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Corrosion-Resistant Steel Products	United States of America	84 FR 26819 [A-533-863]	10-06-2019	Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017-2018
Hot-Rolled Carbon Steel Flat Products	United States of America	84 FR 27242 [C-533-821]	12-6-2019	CVD – Affirmative sunset review
Hot-Rolled Carbon Steel Flat Products	United States of America	84 FR 26817 [A-533-820]	10-6-2019	ADD – Affirmative sunset review
Lined Paper Products	United States of America	84 FR 23765 [C-533-844]	23-05-2019	Final Results of Countervailing Duty Administrative Review; 2016
Lined Paper Products	United States of America	84 FR 23017 [A-533-843]	21-05-2019	Final Results of Antidumping Duty Administrative Review; 2016-2017

WTO News

US dumping duties on Canadian lumber - Canada appeals panel report

On June 4, Canada has filed the notice of appeal concerning the WTO panel report in the case brought by Canada in "*United States — Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*" (DS534). The panel had circulated its report to WTO members on 9 April 2019. As per the document circulated in WTO on 5th of June,

Canada requests review of the Panel's finding that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement requires an investigating authority to use the weighted-average-to-transaction methodology for 'pattern' transactions and a symmetrical comparison methodology for non-pattern transactions. The Panel, interpreting Article 2.4.2, had also found that a 'pattern' could include export prices that are significantly higher than other export prices. The Panel had also held that United States' application of zeroing as part of the US Differential Pricing Methodology was consistent with Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement.

Qatar measures on goods from UAE - Panel established

On 28 May, the Dispute Settlement Body (DSB) established a panel to rule on measures imposed by Qatar relating to the importing, stocking, distribution, marketing or sale of goods from the United Arab Emirates. According to UAE, Qatar's retaliatory actions against UAE products and suppliers were in clear contravention of the prohibition on unilateral measures under Article 23 of the WTO's Dispute Settlement Understanding and violate core WTO obligations. India has reserved its third-party rights to participate in the proceedings.

The DSB also considered a request from the European Union for a panel to rule on anti-dumping and countervailing duties imposed by the United States on imported ripe olives from Spain. This was the first request by the EU in the dispute and the USA did not agree to the establishment of the panel.

Safeguard duties on specified goods imported into Indonesia. Morocco and Panama

- On 13 June 2019, Indonesia notified the WTO's Committee on Safeguards that it initiated a safeguard investigation on 12 June 2019 with respect to the imports of "evaporators".
- On 27 May 2019, Morocco notified the WTO's Committee on Safeguards that it initiated a safeguard investigation on 29 May 2019 with respect to the imports of hot-rolled sheets of steel.
- On 14 May 2019, Panama notified the WTO's Committee on Safeguards that it had decided to initiate on 3 May 2019 a safeguard investigation on certain fresh, chilled or frozen meat of swine.

India Customs & Trade Policy Update

India implements tariff retaliatory measures against USA: India has increased import duties on certain goods imported from USA with effect from 16-6-2019. The retaliatory Tariff measures, which are aimed to counter USA's measures on import of steel and aluminium from India, were first proposed in June 2018 but were repeatedly postponed 8 times. Customs Duties have been increased on lentils, chickpeas, almonds, walnuts, apples, phosphoric acid, boric acid, diagnostic reagents, certain flat rolled products of iron, steel and stainless steel, electric steel and certain articles of iron and steel imported from USA. Notification No. 17/2019-Cus., dated 15-6-2019 amends Notification No. 50/2017-Cus. for this purpose.

Manufacture and other Operations in Warehouse Regulations 2019 notified: Ministry of Finance has notified new Manufacture and other Operations in Warehouse Regulations, 2019 on 19-6-2019 in supersession to the said Regulations of 1966. Accordingly, a person who has been granted a licence for a warehouse and a person who applies for a such licence along with permission for manufacturing or other operations therein, are eligible to apply for operating under said Regulations. As per the new Regulations, the person filing an application for such permission for working under the provisions of the Regulation has to furnish his accounts of receipt and removal of goods, to the bond officer (Officer of Customs in-charge of a warehouse) on monthly basis. Among other changes, the new Regulation also explicitly provides for penalty as per Customs Act, in case of any contravention of the Regulation.

Export benefits – RCMC required only from one Export Promotion Council: DGFT has clarified that an entity requires only one RCMC from its relevant EPC as per Appendix-2T to the FTP-Handbook of Procedures Vol.1 and that the entity can keep on adding any number of businesses afterwards and RCMCs from other EPCs will be optional only. According to Trade Notice No. 17/2019-20, dated 22-5-2019, if an entity having RCMC for goods from a particular EPC/FIEO exports services subsequently, there is no need to obtain second RCMC from SEPC as membership with SEPC in such a case is merely optional.

FTP – No requirement of destruction certificate from excise/custom authorities: DGFT has waived off the requirement of destruction certificate from excise/custom authorities for unutilized duty free imported material in cases of regularisation of bona fide defaults. Now, Authorisation holder will have to submit a self-declaration along with Chartered Accountant's certificate. Para 4.49(g)(i) of Handbook of Procedures Vol.1 relating to regularization of bona fide default in cases where authorisation is issued for import of drugs from unregistered sources with pre-import condition, has been amended by DGFT Public Notice No. 11/2015-2020, dated 14-6-2019 for this purpose.

Smuggling of foreign currency – Guidelines for launch of prosecution revised: CBIC has revised the guidelines for launch of prosecution in the cases of smuggling of foreign currency. Observing that foreign nationals once released on bail are not available to face trial, it has now been directed that prosecution in cases involving foreign nationals may be launched at the earliest, even before issuance of show cause notice. Circular No. 12/2019-Cus., dated 24-5-2019 in this regard amends para 6 of Circular No. 27/2015, dated 23-10-2015. Further, 'foreign currency' has also been added in said para to allow for launch of prosecution immediately.

Import policy for Bio-fuels relaxed: Policy condition for import of biofuel, classifiable under EXIM codes 2207 20 00, 2710 20 00 and 3826 00 00, has been removed with effect from 24-5-2019. This Policy condition allowed imports only for non-fuel purposes subject to actual user condition. It may however be noted that Import Policy of bio-fuels remains 'restricted' and its import will require import licence from DGFT. Schedule-I (Import Policy) of ITC (HS) has been amended in this regard by Notification No. 6/2015-20, dated 24-5-2019.

Ratio Decidendi

Valuation – Doubt to justify enquiry to be based on certain reasons: Supreme Court of India has held that a doubt to justify detailed enquiry under proviso to Section 14 of the Customs Act, 1962 read with Rule 12 of the Customs Valuation Rules should not be based on initial apprehension, be imaginary or a mere perception not founded on reasonable and certain material. The Apex Court in this regard held that doubt should be based and predicated on the material in the form of 'certain reasons' and not mere *ipse dixit*. Adjudication order in original, not giving cogent and good reason for rejection of transaction value, was hence held flawed and contrary to law. [*Century Metal Recycling Pvt. Ltd.* v. *Union of India* – Judgement dated 17-5-2019 in Civil Appeal No. 5011 of 2019, Supreme Court]

No Anti-dumping duty on saccharin salts – Notification to be strictly interpreted: CESTAT Mumbai has held that anti-dumping duty under Notification No. 41/2007-Cus. is imposable only on saccharin and not on its salts. Department's plea that word saccharin is generic and wider meaning needs to be given to include even sodium saccharin, was rejected. Tribunal observed that saccharin and its salts are not same and that the notification did not intend to levy anti-dumping duty on saccharin salts. It was held that interpretation of notification should be strictly in accordance with the wording of the notification. [*Sanjay Chemicals* v. *Commissioner* - Final Order No. A/85967/2019, dated 3-5-2019, CESTAT Mumbai]

Classification of hearing aid connectors – CJEU interprets Chapter Note 2(a) of Chapter 90: Court of Justice of the European Union has held that Note 2(a) to Chapter 90 of EU's CN, read in conjunction with the General Rules Nos. 1 and 6 for interpretation, must mean that expression '*Parts and accessories which are goods included in any of the headings of this chapter or of Chapter 84, 85 or 91*' refers only to the four-digit headings of those chapters, and not to six & eight digit codes. Court however referred the case back to the referring Court on the issue of classification of hearing aid connectors, whether under Heading 8544 or under Heading 9021. [*Skatteministeriet* v. *Estron A/S* – Judgement dated 16-5-2019 in Case C-138/18, Court of Justice of the European Union]

Classification of vehicles – Intended use when to be considered: US Court of Appeals for Federal Circuit has reversed the US Court of International Trade judgment which had held a certain vehicle to be classifiable under sub-heading 8703.23.00. Classification under sub-heading 8704.31.00 was upheld. Court in this regard held that the CIT erred by refusing to consider intended use as part of its analysis. Considering structural and auxiliary design features, and inherent use considerations, it was held that subject merchandise is not principally designed for transport of persons. The rear seats were removed in post-import processing. [*Ford Motor Company* v. *United States* – Decision dated 7-6-2019 in 2018-1018, US Court of Appeals for Federal Circuit]

News Nuggets

Flash sale price acceptable for Customs valuation purposes: WCO

Technical Committee on Customs Valuation at WCO has at its 48th Session recently adopted an instrument (Advisory Opinion 23.1) on valuation of goods purchased in a flash sale. Reiterating transaction value as primary basis under the Agreement on Implementation of Article VII of GATT 1994, Committee concluded that highly discounted price is acceptable for Customs valuation purposes, provided the conditions of application laid down in Article 1 of the Valuation Agreement are met. It also held that transaction value in a flash sale could be used to determine transaction value of identical or similar goods for which there is no transaction value. The Committee in this regard however noted that it is unlikely that the commercial practices and market conditions prevailing under flash sales would exist in situations other than flash sales.

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