Global Counsel

EU-China trade defence: the politics of legal ambiguity

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Summary

China's recent withdrawal of its challenge to the EU's new methodology for calculating domestic prices in trade defence cases concerning China sidesteps what was looking like a probable defeat in the WTO. In doing so it leaves a measure of ambiguity in an important part of the WTO rulebook. The EU might have preferred a clear win, but no clear judgement also serves an important political purpose. The case makes a wider point about the ways in which the WTO rulebook is ultimately a political project. And that links the EU's search for a defensible new trade defence methodology with the US's much more aggressive attempts to stall the WTO's dispute resolution system.

Back in June, all signs appeared to indicate that the WTO dispute settlement body was about to find in favour of the EU in China's challenge to the Brussels revised anti-dumping methodology. China pulled the case at the last minute; preventing the development of new jurisprudence in this area and leaving an element of formal ambiguity on the EU's approach – albeit with a clear sense of an informal win.

This is quite a big deal in some important respects. Having operated for 15 years under the protection of the unique arrangements China accepted as the price of its WTO membership, the challenge for the EU, like the US and others, is to transition their treatment of China to the main WTO trade defence regime. They want to do this without losing what they argue is a crucial capacity to treat China as a state where export costs are routinely distorted by subsidy or other state intervention and local prices thus unreliable.

This is much more than a technical issue. The ability of Brussels and Washington to operate a system of trade defence measures against China over the last decade and a half has been an important part of the wider political economy of China's integration in the global trading system. As much as Beijing may resent it, the existence of emergency tariff tools and a more or less transparent (if not unchallenged or even entirely credible) methodology for imposing them on dumped or subsidised Chinese exports, arguably made it easier for policymakers to defend a wider liberal approach. Certainly, the risk of losing those tools has been viewed with deep apprehension among EU policymakers with an eye on their domestic stakeholders. This is why winning – or at least not losing - Beijing's WTO case against the EU's new trade defence methodology was important.

There is a clear political link between the EU's case and the US's current aggressive attempts to curtail the judicial reach of the WTO dispute settlement machinery. Why? The answer is rooted in an even bigger point about the relationship between the WTO's judicial function, the operational discretion of WTO members in asserting their view of trade norms and the basic way in which members see the value of the WTO system. At its core, this is a question about what makes WTO law – and indeed most law – work politically. It is a reality of politics that sometimes ambiguity is the price of agreement. Plenty of consensus is built on a willingness not to push a point of definition or interpretation. Such political trade-offs can easily be destabilised if that ambiguity is eroded or removed. With law, this is most likely to happen via a judicial mechanism. This is what has been happening with the WTO's trade defence system.

Consensus through ambiguity

Indeed, the WTO system has thrown up a number of examples of this targeted political interest in legal ambiguity – and the costs of removing it. The fact that precise definitions of the required degree of liberalisation to qualify a free trade agreement for exemption from the MFN principle under GATT XXIV or GATS V has never been tested in large

part reflects a calculated disinterest among WTO members in knowing the answer. The same might be said of reluctance to push for clearer definitions of concepts such as national security as they are deployed in WTO law. This ambiguity is strategic. Preserving a degree of potential policy discretion at the margin enables a wider commitment to a broad framework for rules and self-limitation.

This principle of 'negotiated ambiguity' was built into the codification of trade defence norms in the WTO from the start. The initial WTO framework for trade defence practice – the 1994 Anti-Dumping Agreement - was in many respects only politically feasible because it left space for a margin of interpretation on methodology and practice. Protocols for normal price construction were only loosely set; treatment of distorted prices from state-capitalist economies was ambiguous; non-market economies were not properly defined. This ambiguity allowed agreement on normalising the principle of trade defence and its generally narrow scope. The absence of China in particular from the process obviously helped.

Table 1 – Eroding discretion – some relevant cases

Decision	Implication
US – DRAMS (DS99, 2001)	Appellate Body narrows the scope of 'permissible interpretations" under Article 17.6 (i) and (ii) of the WTO Anti-Dumping Agreement (ADA) onto one – its own. This eliminates the negotiated ambiguity in the agreement allowing national authorities to assess the establishment and interpretation of facts in antidumping investigations (the principle of deference in judicial review of investigating authority actions) based on 'permissible interpretations' of public international law upon application of the relevant rules of the Vienna Convention (i.e. Art. 31 and 32).
US – Steel Safeguards (DS248, 2003)	Appellate Body rules that the Safeguard Agreement and GATT Art. XIX (Emergency Action on Imports of Particular Products) should be read in accordance. More specifically, the ruling establishes that the use of safeguard measures is only permitted as a response to 'extraordinary' and 'unforeseen' increases in imports, rather than as a response to an 'absolute' or 'relative' increase in imports of a particular product. The ruling markedly restricts the ability of members to use safeguard measures by making them contingent on meeting an 'unforeseen developments' test, which combined with other requirements of the Safeguard Agreement, considerably narrows its scope of use.
US – Zeroing (EC) (DS294, 2006)	In a series of rulings – also including DS322 (2007), DS350 (2009) and DS402 (2011) – the Appellate Body found the use of the practice of zeroing by the US in the calculation of dumping margins to be inconsistent with ADA Art. 2.1, 2.4 and 2.4.2 of the antidumping agreement in almost all situations. This effectively eliminated the policy discretion negotiated into ADA whereby WTO members gave up the use of zeroing in comparisons in some instances, but retained it in aggregated calculations in review proceedings.
US – Anti-Dumping and Countervailing Duties (China) - DS379, 2011	The Appellate Body's interpretation that a 'public body' consists of an "entity that possesses, exercises, or is invested with governmental authority" markedly restricts the ability to show that financial contributions from state-controlled entities are incompatible with the terms of the WTO Agreement on Subsidies and Countervailing Measures. This interpretation was again upheld by the Appellate Body in a July 2019 report. The report, however, also included a dissenting opinion stressing the practical challenges raised by the precedent set by DS379 in its definition of 'public body' in the use of countervailing measures. The separate opinion further stresses the need to define it on "a case by case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operates."

Table 2 - WTO Appellate Body composition timeline

Breach AB statutory minimum of three members to function

Dec 1st, 2016	Dec 11th, 2017	Sept 30th, 2018	Dec 11th, 2019
Ricardo Ramírez-Hernández	Ricardo Ramírez-Hernández	Ricardo Ramírez-Hernández	Ricardo Ramírez-Hernández
Peter Van den Bossche	Peter Van den Bossche	Peter Van den Bossche	Peter Van den Bossche
Ujal Singh Bhatia	Ujal Singh Bhatia	Ujal Singh Bhatia	Ujal Singh Bhatia
Hong Zhao	Hong Zhao	Hong Zhao	Hong Zhao
Thomas R Graham	Thomas R Graham	Thomas R Graham	Thomas R Graham
Shree Baboo Chekitan Servansing	Shree Baboo Chekitan Servansing	Shree Baboo Chekitan Servansing	Shree Baboo Chekitan Servansing
Hyun Chong Kim	Hyun Chong Kim	Hyun Chong Kim	Hyun Chong Kim

Non-replaced retiring / resigning AB members

However, the benefits of subsequently preserving that ambiguity have not been evenly spread across the WTO membership – and neither has the political motivation to protect it. The largest importers have had an incentive to do so as they face the inward flows that can demand political management. But growing exporters with more limited parallel import flows (a description of some of the key emerging economies over the last two decades) have not had the same incentive. The result has been a series of challenges and judicial decisions that have generally squeezed policy discretion and ambiguity out of the system rather than preserve it.

That said, from the point of view of the large importers and users of trade defence, there has been one key carve-out from this process – China's WTO accession agreement. This agreement protected a series of unique methodologies from Chinese challenge for 15 years. Above all, it provided a basis for the designation of China as a non-market economy and the use of 'analogue' or 'surrogate' market methodologies for determining 'normal' Chinese prices. When that broad carve-out expired in 2016, the tension in the debate over how much discretion – or what kind of discretion - was desirable in the trade defence system took on an acute new edge for the US and the EU.

However, even before then, the US in particular had experienced a series of reversals in its preferred approach to trade defence (Table 1). The WTO Appellate Body has ruled against the US practice of partial zeroing (treating positive dumping margins as having zero counterbalancing effective on negative dumping margins in determining overall dumping margins) and sharply reduced the scope for using safeguard measures. It made it harder to show that a financial support for an exporter comes from a public body and may therefore be an actionable subsidy. The Appellate Body has also deliberately asserted its own primacy in interpreting the WTO Anti-Dumping Agreement.

This run of setbacks is of course the context for the gradual withdrawal of US support for the Appellate Body over the last 14 years. This has progressed from protest and calls for reform, to the decision in 2011 not to re-nominate its own appointment Jennifer Hillman to the Appellate Body. After 2016, it produced a strategy of actively blocking Appellate Body nominations, effectively crippling the mechanism (see Table 2). Trump watchers should of course note that much of this was happening before the current US administration.

Indeed, it is easy to simply see this as a one-sided display of US unilateralism and obstruction. But a number of US complaints about the ways in which WTO jurisprudence and judicial conduct have evolved are undeniably important for the politics of the WTO. Its argument that the Appellate Body has focused on defining its own prerogatives at the expense of building wider consensus around the

system has some justification and has been echoed by others. Its assertion that the AD rulebook is imperfectly equipped to deal with the distortive effects of state capitalism is also hard to deny. Yet the wider WTO membership has generally been slow to engage on these issues. And in the case of the latter, now arguably has large and powerful members (and one particular member) with no interest in doing so.

The legitimacy problem

All systems of judicial review have to strike a balance between pursuing the right level of legal clarity and preserving the perceived legitimacy of the rules they are charged with overseeing. Self-aware judges will often choose jurisdiction carefully and impose definition on law advisedly. Especially in a system like the WTO DSM, which depends entirely on member willingness to submit to both, it is a fair question whether 'clarity' at the cost of legitimacy, or even just raw political support, makes much sense.

This is the political problem the US has found itself cornered by, and its attempts to resolve it have been rebuffed by the WTO membership and by the Appellate Body itself. This is not to say that the US is right on every point of methodological detail, or even reasonable in its expectation that the WTO system should preserve discretion where the US wants it. But right and reason are only part of what makes a machinery like the WTO work sustainably. The WTO rulebook is a political project.

To see the political economics at work here, you need to think about where trade defence sits in the wider landscape of trade liberalisation. One way of thinking about trade defence systems are as safety valves, providing a mechanism by which states can act politically and practically to defend 'fair trade'. The capacity to do this facilitates the wider commitment to 'free trade'. The 'collective disarmament' of a system of bound tariffs applied on an MFN basis rests in some part on that discretion at the margin to suspend this wider norm in narrowly defined – but politically important - circumstances.

China is cristalising this problem in an important way for the US and European states. As noted above, the moment of China-related reckoning with the WTO AD rulebook has been delayed to some degree by the framework of the Chinese WTO accession agreement and its unique allowances for idiosyncratic practice. The challenge of asserting scope for at least some aspects of that practice to be carried over to the normal WTO regime is a moment of political jeopardy for the trade politics of both the EU and the US.

With serious concerns about the distortive practice of Chinese state capitalism and electorates seriously worried about what they see as unfair competition, Brussels and Washington will both have a problem with an interpretation of the WTO rulebook that restricts their capacity to demonstrate an ability to deal with state capitalism. Brussels would have preferred a win in its WTO case, but a grey area to work in is better than nothing. It also protects the WTO itself from having to absorb China's open frustration and displeasure at losing.

A parallel test is likely to emerge in the years ahead around the capacity of the WTO system to allow members to make judgements in other areas where both the EU and the US have a growing appetite to attach a wider set of contingent conditions to their trade liberalisation. This is especially the case for environmental and labour issues. The WTO rulebook is notably silent – and can be read as largely hostile - on the scope for members to do this. The scope for such a reading to undermine its wider legitimacy in a political context of climate crisis and widely divergent standards of labour rights protection has been clear enough for some time.

This is where the current efforts at WTO reform become of some importance. Via its blocking of replacements to retiring Appellate Body members, the US is confronting the WTO membership with a stark choice between gridlock and negotiating new rules to address its concerns. It wants the confirming of some legal room for policy discretion and reducing the scope for future judicial overreach, or is willing to risk the dispute settlement system grinding to a halt. The second of these would de facto imply a world in which routes to judicial recourse in all areas have been closed down to protect narrow discretion in some. The rest of the membership will need to choose.

Stepping back, we can see that the debate over the EU's new anti-dumping methodology and US obstruction on the Appellate Body are in fact linked. What links them is the theme of contingent legitimacy. The US is simply much further down the road of disillusion and defensiveness with the WTO rulebook. Brussels' instinctive fealty to the WTO system is much stronger, and will have been burnished in this case. But it could still easily be politically tested in evolving debates on its desire to project its norms via trade policy. It is far from too late to change either picture. But it may take a major dose of fresh pragmatism from the WTO membership and the WTO itself. The WTO rulebook is a political project - and needs to evolve as such.

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