

Using WTO Case Law in the Classroom

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DSU Law and Procedures

- “The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the "covered agreements". (Art. 1)

Steps in Dispute Settlement

- Request for consultations (Art. 4)
- Good offices, conciliation, etc. (Art. 5)
- Request for panels (Art. 6)
- Panel process: “objective assessment of the matter before it” (Arts. 7-16)
- Appeal to the Appellate Body (Arts. 17-18)
- DSB adoption of Panel/AB recommendations (Art. 19)

- Implementation within a “reasonable period of time” (Art. 21.3)
- Review of compliance (Art. 21.5)
- Compensation/suspension of concessions (Art. 22)

Limitations

- “Prompt compliance with recommendations of rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members. (Art. 21.1)
- The recommendations of the panel and AB cannot “add to or diminish the rights and obligations provided in the covered agreements.” (Arts. 3.2, 19.2)

- “The Ministerial Conference and the General Council shall have exclusive authority to adopt interpretations of this Agreement and the Multilateral Trade Agreements. (Marrakech Agreement, Art. IX:2)
- Determination by the DSB in a particular case is not binding on non-parties or on the same parties in subsequent actions.

Precedent

- Nothing in the Marrakech Agreement or DSU requires the AB to follow its earlier recommendations in subsequent cases.
- Concept of binding precedent, while usual in common law jurisdictions, is relatively unknown in the civil law jurisdictions that comprise the majority of WTO Members.

Informal Precedent

- Appellate Body approach could be termed “informal precedent.” AB tends either to follow earlier rulings or distinguish them, as would a common law court.
- Why does AB do this?
 - Provide guidance to members regarding future disputes and likely handling procedural issues
 - Take into account well-reasoned analyses of the law in earlier decisions
 - Discourage multiple actions involving the same issues

Implications for Law Teachers

- Given ambiguity of and gaps in provisions of covered agreements, AB, like any court, must fill in the gaps so that it can decide each case before it.
- Given inability of Ministerial Conference and General Council to issue interpretations of the covered agreements, this function has fallen *de facto* to AB.

- Consequently, learning the “law” of the WTO requires, among other things:
 - Study and analysis of the covered agreements
 - Study of AB decisions applying and interpreting provisions of the covered agreements to specific cases.

Challenges for the Classroom

- Appellate Body decisions are often long and confusing; teaching them well takes considerable class time.
- Some are also repetitive and poorly drafted
- They are difficult to edit and time-consuming to translate.
- Students need a firm introduction to the DSU before they can benefit from case study.

- ITL can be viewed as a course in statutory interpretation (with the “statutes” being the covered agreements), supplemented by cases as appropriate
- U.S. law and European law professors use different techniques; for most case study is only a limited part of the curriculum.
- Most casebooks (e.g., Bhala, Jackson) use cases only sparingly and provide relatively short excerpts.

- Context, including historical development of GATT and the covered agreements, is also important.
- In U.S. we also discuss federal court (CIT, CAFC) cases and decisions of Commerce and USITC when teaching AD/CVD, safeguards and customs law.

Sources for Abridged AB Decisions or Case Summaries

- Institute of International Economic Law (John Jackson):

<http://www.law.georgetown.edu/iiel/students/materials/materials.html>

- Arizona Journal of International and Comparative Law, Bhala & Gantz WTO Case Reviews (since 2000; published the year following adoption, usually in issue 2):

<http://www.law.arizona.edu/Journals/AJICL/archive.cfm>

- WTO's Dispute Settlement Website, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes, normally provides one page summaries of the disputes
- JHH Weiler et al, The Law of the WTO Through Cases, <http://www.jeanmonnetprogram.org/wto/Units/index.html>
- Textbooks, such as Raj Bhala's International Trade Law (2nd ed., Vietnamese edition)

Writing and Using a Case Study

- Form may vary depending on the instructor's needs and the underlying legal system
- In the U.S. many of us focus on the following:
 - Principal issues raised by the Parties and the arguments for each
 - Arguments and analysis of the AB on each issue
 - Reliance if any on prior AB jurisprudence
 - Procedural or substantive issues that appear significant beyond the immediate decision

- For example, with *Japan – Alcoholic Beverages*, AB provided extensive discussion of issues going well beyond this proceeding:
 - Treatment of GATT panel decisions
 - Reliance on VCLT arts. 31-32
 - Limited importance of Member’s intent in taking challenged actions
 - Methodology for applying GATT Art. III, including distinction between “like” and “directly competitive”

Usage in Class

- In common law classrooms, using Socratic or modified Socratic methods, focus is on student responses to instructor questions:
 - What are the facts that led to the panel request?
 - What provisions of the covered agreements are raised?
 - What are the principal arguments of the Complainant?

- What are the principal arguments of the Respondent?
- How did the Panel rule (only on major issues not appealed) and on what legal grounds?
- How did the AB rule on each issue, and on what rationale?
- How is the AB ruling likely to affect future WTO litigation, particularly in terms of precedential value and general rules of interpretation?
- Socratic teaching methodology is difficult to do well; few U.S. law professors use it exclusively.

Using Cases

- May be difficult because of time limitations to study more than a few cases (6-8) in depth in a semester course.
- U.S. professors tend to concentrate on AB decisions rather than study panel decisions:
 - Panel decisions are not really “precedent”
 - Panel decisions are unmanageably long in many situations.

Choosing cases

- Lessons regarding AB methodology:
 - *Japan – Alcoholic Beverages*
- AB reasoning on specific issues:
 - GATT, Art. XIX and SA: *US – Steel Safeguards*
 - GATT, Art. III: *Japan – Alcoholic Beverages*
 - GATT, Art. XX: *US – Shrimp*
 - GATT, Art. II: *India – Additional Duties*
 - GATT, Art. XXIV: *Turkey – Textiles*

- Agreement on Agriculture: *EU – Sugar Exports*
- SCM Agreement: *US – Softwood Lumber (CVD)*
 - *US – DRAMS from Korea*
- Antidumping Agreement: *US – Byrd Amendment;*
 - *US – Zeroing and Sunset Reviews (Japan)*
- TRIPS: *Canada – Patent Term*
- GATS: *US – Gambling Services*

Writing a Book

- Review the better known U.S. and European international trade law texts
- If the case summaries or excerpts seem useful, negotiate permission to reproduce them in Vietnamese
- Review experiences of Vietnamese LLM/SJD/PhDs from U.S. and Europe as to their experiences.