

Publication: CNA Online

Date: 15 July 2019

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This one case might well be remembered as the last case; ending the WTO and the rules-based multilateral trading system, say SMU's Henry Gao and UNSW's Weihuan Zhou.



SINGAPORE: In June, the World Trade Organisation (Organisation) issued a communication announcing that the panel proceedings on a case initiated by China against the European Union had been suspended at the request of China.

Called by US Trade Representative Robert Lighthizer as the “most serious litigation matter that we have at the WTO right now”, the case could affect billions of dollars of Chinese products. But its significance rises beyond commercial interests.

THE CURIOUS CASE AT HAND

This case concerns Section 15 of China's WTO Accession Protocol, which allows other WTO members to treat China as a non-market economy (NME) in anti-dumping investigations.

Anti-dumping, typically in the form of import tariffs, addresses the practice of dumping where an exporter sells goods to another country at a lower price than its normal value in its home country.

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The WTO earlier ruled that China's market price for wheat and certain types of rice were above allowed limits. (Photo: AFP/STR)

When calculating normal values, Section 15 allows investigating authorities to disregard domestic prices in China and use surrogate prices from a third country instead — known as the NME methodology. This methodology can greatly increase the likelihood of positive findings of dumping, leading to exaggerated dumping margins sometimes as high as over 1,700 per cent.

Section 15(d) states that the NME provision shall expire 15 years after the date of accession. China took this to mean that the NME methodology would not be continued beyond Dec 10, 2016.

Come Dec 11, 2016, however, neither the United States nor the European Union (EU) was willing to give up such a convenient tool. Therefore, the day after, in an unprecedented move, China filed separate WTO cases against the US and the EU.

One may argue that regardless of whether Section 15 allows the continuation of the NME methodology beyond 2016, WTO members have other ways to inflate anti-dumping duties.

For example, Australia has been using a so-called particular market situation method after it granted full market economy status to China in 2005. Amid the NME dispute, the EU amended its anti-dumping regulation to replace its discriminatory NME list with a country-neutral methodology which mirrors the NME methodology in every way but name.

WHY CHINA WITHDREW ITS CASE

Why did China quit? There are several possible explanations.

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One explanation is that it was to avoid the public humiliation associated with their potential defeat. This is understandable, given how much importance China has attached to the case.

Indeed, in his opening statement at the first panel hearing, Chinese Ambassador to the WTO Zhang Xiangchen warned that the case “concerns the credibility of the dispute settlement mechanism, the integrity of the WTO and the membership’s faith in the multilateral trading system”.



Xiangchen Zhang Chinese Ambassador to the WTO looks on before the start of the General Council meeting at the World Trade Organization (WTO) in Geneva on July 26, 2018. (File photo: AFP)

But there is one problem with this theory: No matter how bad the panel ruling is, China could have always appealed it. So, couldn't China have just waited for the panel report to come out and then, if necessary, filed an appeal?

THE WTO APPELLATE BODY ON ITS LAST BREATH

The answer is they couldn't. The Appellate Body is barely surviving on its last breath after two years of slow killing' by the US through blockage of the appointment of new judges.

In fact, since a year ago the Appellate Body has not held hearings on new appeals, citing heavy backlog of cases and dwindling capacity.

So even if China files a notice of appeal, the case might never get heard by the Appellate Body, which means the US and the EU could just continue what they have been doing.

Another possible explanation is that the panel supported the EU's position that the 15-year deadline merely shifts the burden of proof and does not terminate the substantive right to apply the NME methodology.

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This would raise serious political and systemic implications. Politically, such a ruling may well be interpreted by the public as the WTO court confirming that China remains an NME.

This, however, would be a complete misunderstanding of the nature of this dispute as the WTO has no definition of what an NME is and the panel was not requested to decide whether China is an NME.



The flags of China and the US hanging outside a Chinese store. (Photo: AFP)

This misinterpretation would reflect badly on China's progressive achievements in opening up and economic reform. Coupled with calls for WTO reform to deal with China such a ruling could further weaken China's negotiating position.

A ROCK AND A HARD PLACE

At a systemic level, such a ruling would also call into question the legitimacy of the WTO. On the one hand, China views a decision supporting the EU's position as essentially institutionalising alleged discrimination against China, which it deeply resents and regards as non-negotiable.

On the other hand, the United States and the EU regard any ruling that might be in China's favour as cataclysmic for the WTO.

If this speculation is correct, then the panel has made a huge mistake. The panel could have handled the dispute more diplomatically by simply letting the NME methodology expire while still allowing WTO Members to employ similar methodologies under the WTO Anti-Dumping Agreement.

Finally, it is also possible that China suspended the case to contain domestic anti-WTO sentiment and maintain political support for the WTO. Since its accession, China has gradually built up confidence in the fairness of the multilateral trading system.

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Given the current crisis in the WTO, especially when it comes to its dispute settlement mechanism, China's continued support for the system is critical.



A logo is pictured outside the World Trade Organization (WTO) headquarters next to a red traffic light in Geneva, Switzerland, October 2, 2018. (File photo: REUTERS/Denis Balibouse)

But this is not something that should be taken for granted, as there have been calls for China to withdraw from the system and build an alternative international economic order. If China were to withdraw, it would be much harder to get it back within the system.

And if such a scenario does come to pass, this one case might well be remembered as the last case; ending the WTO and the rules-based multilateral trading system.

Henry Gao is Associate Professor at the School of Law, Singapore Management University. Weihuan Zhou is Senior Lecturer and Member of the Herbert Smith Freehills China International Business and Economic Law Centre, Faculty of Law, University of New South Wales. This commentary first appeared in East Asia Forum.

Source: CNA/si