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By Simon Lester …….. 9.25.17

INTERNATIONAL ECONOMIC LAW AND POLICY BLOG

Is International Economic Law International?

Following up on my earlier posts, I want to talk briefly about U.S. Trade Representative Robert Lighthizer's response to a question about WTO dispute settlement:

... We've had other provisions where the WTO has taken – really, I think, took the position that they were going to strike down something they thought shouldn't happen rather than looking at these – the GATT agreement as a contract.

So what we've tended to see is that Americans look at the WTO or any of these trade agreements and we say, OK, this is a contract and these are my rights. Others – Europeans, but others also – tend to think they're sort of evolving kinds of governance. And there's a very different idea between these two things. And I think sorting that out is what have to do.

If your appellate body or your dispute-settlement process really thinks that we're trying to evolve into what's good for trade, that's one thing. If what you're going to do is look at the exact words and say here's what was bargained when Ambassador Hills sat down and negotiated, she had a very precise idea of what it was that the United States was giving and what it was we were getting. And anything that doesn't enforce that in that way is troubling.

And I think that the DSU has evolved in a way that it creates new obligations and it has reduced a lot of our benefits. ...

I was struck by the way he contrasted the American view of trade agreements as a "contract" with the European/other view of them as "evolving kinds of governance." This makes me think of Anthea Roberts' new book on international law ("Is International Law International?"), where she argues -- convincingly, in my view -- that there are very different conceptions of and approaches to international law around the world ("international lawyers in different states, regions, and geopolitical groupings are often subject to distinct incoming influences and outgoing spheres of influence in ways that reflect and reinforce differences in how they understand and approach international law"). Is it really the case that Americans

view trade agreements as contracts and others view them as governance? And what are the implications of this distinction?

At the outset, let me note that, of course, treaties and trade agreements are contracts between nations, so it shouldn't really be controversial to refer to them that way. Nevertheless, there are (at least) two fundamental -- and related -- questions here: (1) how are trade agreements to be interpreted by third party adjudicators? and (2) what is the purpose of this dispute process, with implications for the appropriate institutional arrangements?

With regard to the interpretive process, I think what Lighthizer is suggesting is that Americans want a narrow interpretation, perhaps focusing on what is clearly set out in the text, and which does not fill gaps and address issues that are not explicitly covered by the terms of the agreement. By contrast, he suggests that Europeans and others hope for these adjudicators to do more gap filling and development of the law (and thus governing), taking the broad principles of the agreement and applying them to support the agreement's objectives more broadly, regardless of the specific obligations in the text.

First of all, I'm not sure that this characterization of American and European views is completely accurate. I can think of WTO cases brought by the U.S. (e.g., EC - Aircraft) where the U.S. asked the panel/AB for a broad interpretation of WTO rules on export subsidies, in order to find a violation. I'm not sure that fits with his idea of a narrow interpretation. In order to buy in to this distinction, I'd want to hear more from specific actors, and see some data on this. Who in U.S. trade policy believes in a narrow contract theory of interpretation, and who in other countries believes in a broader governance theory? Based on the cases they bring, what specific interpretive methodology does each set of actors actually support? I can definitely think of a few cases where the EU perhaps wanted to establish some general principles, but on the whole isn't everyone just trying to win the case at hand? Once you've decided to bring the case (or were forced to defend), you just make all the arguments that you can think of that might help you win.

Second, what exactly is the distinction between the two approaches? There are a number of factors interpreters could take into account, including text, context, object and purpose of the agreement, drafters' intent, drafting history, original meaning, public policy goals, etc.. What specific balance does Lighthizer see as reflecting the contract approach? And what does he see the Europeans asking for, or the Appellate Body doing, instead?

Turning to the purpose of the dispute process, and the required institutions, the U.S. has seemed, and seems even more so under the Trump administration, skeptical of strong, permanent international judicial institutions. For example, it prefers investment arbitration to an investment court; and it is worried about the way the Appellate Body has approached its role. What the U.S. seems to want is a narrow procedure that resolves disputes, with as little resulting "governance" as possible. It may see the development of strong international courts as undermining its own power.

The EU, by contrast, is pushing its multilateral investment court idea, and has not raised the same concerns about the Appellate Body. How do other countries feel about these issues? I'm not sure.

There is a fine line here, and the distinction is probably one of subtle degree, rather than widely diverging views of the ideal system. Even in the "contract" world, the courts will be "making some law." And the "governance" world isn't really governing all that much -- the Appellate Body make strike down zeroing, but anti-dumping is here to stay (unfortunately!). Again, I wonder how much these distinctions related to the nature of the system matter in practice, as actors engaged in the system mostly seem concerned about winning the cases they are involved in.

To some extent, the "contract" versus "governance" distinction reminds me of the "precautionary principle" versus "cost-benefit analysis" distinction some people talk about in relation to EU and U.S. regulation. I tend to think that this latter distinction is overblown, with the U.S. being more cautious in some areas and the EU more cautious in others (although, overall, the EU probably regulates more). A contract versus governance distinction may oversimplify the views of different countries in a similar way.

But even so, the language matters here. If U.S. government officials talk about international economic agreements a certain way, and others talk about them a different way, that may be enough to make Anthea's point. What would be interesting now is to hear from EU and other government officials on how they see the distinction between contract and governance in this area, and how they would like WTO dispute settlement panels and the Appellate Body to approach interpretation. The U.S. seems to want to raise these issues in the DSB. I think it would be a useful exercise for the WTO Members to put their views out there. We need a system that everyone is (mostly) happy with, and a clear expression of what each side is looking for from the system may help with that.

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