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A Legal Notion of Adverse Inference in WTO Case Law

Abstract: Gathering evidence is of utmost importance in any legal proceeding. However, sometimes, one of the parties may hide specific evidence, which complicates the adjudicators' reaching of a fair conclusion. For such cases, judges or arbitrators can use several tools, one of which is adverse inference. An adverse inference is a negative conclusion that may be drawn from a party's failure to provide some evidence without a valid excuse for non-production. By drawing it, adjudicators assume this evidence would harm the party's interests. At the same time, adverse inference is quite a radical tool because it may strongly impact the final decision. Because of this, adjudicators are sometimes cautious about using it. This paper analyzes the notion of adverse inference in the context of the dispute resolution mechanism available in the WTO. In particular, three cases were summarized in which the Appellate Body made interesting findings regarding the application of adverse inference. As a result of the work, conclusions from these cases are made that can be used by lawyers in future WTO disputes, as well as in other international and national dispute resolution fora.

Keywords: *adverse inference, WTO, fact-finding, dispute resolution*

Introduction

Many years ago, it was said that: "evidence is the base of justice: exclude evidence and you will exclude the justice" (Andrews, 1994, p. 463). This phrase accurately describes evidence's importance in any dispute resolution process. However, sometimes, parties and adjudicators may face difficulties in obtaining evidence. This happens, in particular, when one of the parties acts dishonestly and withholds evidence that may be important.

In such cases, adjudicators have certain tools to "encourage" the party to cooperate. For example, they may issue an order demanding the provision of evidence. Nevertheless, if the party does not comply with such an order and, despite all attempts, does not provide evidence without appropriate justification, the court or tribunal may apply a less popular tool – adverse inference.

Adverse inference – a radical instrument in the hands of adjudicators

An adverse inference is an unfavorable deduction that the adjudicator may draw from a party's unjustified failure to produce evidence. The point is that if "a party, after being ordered to do so, refuses to disclose documents without reasonable excuse, the arbitral tribunal is likely to infer that the party has something to hide and is likely to treat that parry's future evidence with a degree of skepticism" (Redfern, 2004, pp. 217, 240).

A long time ago, Durward Sandifer called it the "most effective sanction [adjudicators] have to impose upon parties negligent or recalcitrant in the production of evidence" (Sandifer, 1939, p. 101).

This notion is quite common in both domestic and international resolution fora. In national courts, it is mainly used in civil litigation. In turn, it has a much lesser scope of use in administrative and criminal cases (Markiyan & Oesch, 2007, p. 20). In particular, this is due to the great weight of the presumption of innocence. For example, in the USA, the Fifth Amendment to the Constitution guarantees criminal defendants the right to silence, blocking the court from drawing adverse inferences from the defendant's silence (Wickelgren, 2008, p. 92).

As for international resolution fora, this tool can be handy for international courts and tribunals, given their limited fact-finding role and their general lack of coercive powers. In contrast to domestic courts, international courts and tribunals cannot generally hold a litigant in contempt and fine or even imprison the litigant to encourage cooperation with a court order and ensure the orderly administration of justice (Kinnear & McLachlan, 2015). Due to this, the burden of proof sometimes is, and occasionally must be, discharged by "the coexistence of sufficiently strong, clear and concordant inferences or other similar unrebutted presumptions of fact" (Sharpe, 2006, p. 550).

Some rules (or laws) of dispute resolution fora expressly allow judges or arbitrators to apply it. For example, Article 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") envisages:

> 5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, **the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.**
>
> 6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, **the**

> **Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party**.

But this is rather an exception to the rule. Usually, the use of adverse inference is not provided for by the rules (laws) of the fora, and adjudicators are, therefore, quite cautious about using it.

It should also be noted that adverse inference is a rather radical instrument in the hands of adjudicators. This instrument's main difference from all others is that the inferences drawn may have a strong impact on the final decision. Given this, adjudicators use it only in exceptional cases.

Drawing of adverse inference in WTO law

If some rules of international or national dispute resolution forums contain clear provisions for drawing adverse inferences, the situation in WTO law is somewhat different. As of today, none of the articles of the DSU (Dispute Settlement Understanding – a set of rules of the WTO dispute settlement system) contain clear norms about the possibility of panels drawing such inferences.

At the same time, the drawing of adverse inference is unbreakably connected with the issues of the fact-finding powers of the adjudicators, the evaluation of evidence, and general working procedures (Jackson, 2020, p. 180).

Fact-finding powers of panels are prescribed in Article 13 of the DSU:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member, it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information that is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.

Thus, Article 13 of the DSU requires the disputing parties to cooperate with panels regarding the provision of documents and other information. The parties to the dispute

must fully cooperate with the panel and provide documents and other information at its request.

In addition, panels are generally given broad flexibility in the governance of the procedure. This follows, in particular, from Article 11:

> The function of panels is to assist the DSB (Dispute Settlement Body) in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Such provisions of the DSU open wide the door for panels to conduct their procedures and reach a fair conclusion.

They also gave rise to a discussion about the possibility of applying adverse inferences in WTO cases in the past, but this question was finally analyzed in the Canada – *Aircraft* case, where the Appellate Body (the "AB") clarified this issue.

WTO case law on adverse inference

Canada – Aircraft[1]

The dispute concerned Brazil's claim regarding Canada's provision of subsidies to its domestic aircraft companies.

Consideration of the Case by the Panel

The Panel asked Canada to provide details of the terms and conditions of the subsidy that might be given to the company. Still, Canada refused to provide such information because it is business confidential information. To protect confidential information, the Panel created a particular procedure and restrictions regarding the production of documents. However, Canada refused to supply them (Panel Report, 1999, paras. 9.175 – 9.178).

Brazil contended that Canada must bear the consequences of its decision to withhold requested information and that the Panel should adopt adverse inference. In justification of this, Brazil argued that the adoption of adverse inference is not prohibited in the DSU and is entirely consistent with the practice of international tribunals such as the Iran-US Claims Tribunal, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. In addition, Brazil stated that adverse inference provides a panel

[1] The full name of the case is *Canada – Measures Affecting the Export of Civilian Aircraft*.

with the only practical means of upholding (i) the duty of collaboration and (ii) the duty to respond where a party fails to produce information specifically requested and within the party's exclusive possession and control (Panel Report, 1999, para. 4.148).

However, the Panel refused:

> In certain circumstances when direct evidence is not available, we consider that a panel may be required to make such inferences when there is sufficient basis to do so. This is especially true when direct evidence is not available because it is withheld by a party with sole possession of that evidence. In the present instance, however, we do not consider that there is sufficient basis for an inference (Panel Report, 1999, para. 9.181).

This then became one of the reasons why Brazil submitted an appeal.

Findings of Appellate Body

Among other things, the AB had to answer the issue of whether the Panel erred in law in declining to draw adverse inferences from Canada's refusal to provide information to the Panel.

Canada maintained that the Panel did not err. Canada argued that adverse inferences may only be drawn by a panel in the event of one party's refusal to provide information if the other party has made out its case on a prima facie basis. Canada also argued that the Panel should not have requested information under Article 13.1 since Brazil had not established a prima facie case (Appellate Body Report, 1999, para. 182).

AB noted the fact that Annex V of the SCM Agreement envisages that:

> 1. Every Member shall cooperate in the development of evidence to be examined by a panel in procedures under paragraphs 4 through 6 of Article 7.
>
> …
>
> 6. If the subsidizing and/or third-country Member fails to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on the evidence available to it, together with facts and circumstances of the noncooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.
>
> **7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.**

AB concluded that there was no good reason why a panel could use them in some cases and not in others. Finally, the AB noted that it believes panels have the legal authority and the discretion to draw inferences from the facts before it.

However, the AB did not satisfy the appeal because Brazil had not done enough to compel the Panel to make the inferences requested by Brazil. Nonetheless, in this case, the AB clarified the question of whether adverse inferences may be used in WTO cases, which gave rise to its application in the following disputes.

Other WTO cases with conclusions on adverse inference

It should be noted that although 20 years have passed since the decision in the *Canada – Aircraft* case was made, there were not many decisions where the question of applying adverse inference was raised. Despite this, it may be helpful to consider the following cases as they contain exciting conclusions on this issue: *US – Wheat Gluten* and *US – Large Civil Aircraft (Second Complaint)*.

US – Wheat Gluten[2]

The European Communities alleged that the Panel had acted inconsistently with its obligations under Article 11 of the DSU in failing to draw adverse inferences from the refusal of the United States to provide the Panel with some confidential information. Due to the position of EC, the Panel's failure to obtain the information withheld by the United States based on its allegedly confidential nature, coupled with its inability to draw the necessary adverse inferences from the refusal of the United States, amounted to an error of law (Appellate Body Report, 2000, para. 28).

While reviewing this case, the AB reached a number of interesting conclusions, which, in part, echo the conclusions from the *Canada – Aircraft* decision.

The AB emphasized that adverse inference is a "discretionary" task falling within a panel's duties under Article 11 of the DSU (Appellate Body Report, 2000, para. 173). A panel must draw inferences on the basis of all of the facts of the record relevant to the particular determination to be made (Appellate Body Report, 2000, para. 174).

Where a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be taken into account in determining the appropriate inference to be drawn. However, if a panel ignored or disregarded other relevant facts, it would fail to make an "objective assessment" under Article 11 of the DSU (Appellate Body Report, 2000, para. 174).

[2] The full name of the case is *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities.*

Also, the AB stated that:

> In reviewing the inferences the Panel drew from the facts of record, our task on appeal is not to redo afresh the Panel's assessment of those facts, and decide for ourselves what inferences we would draw from them. Rather, we must determine whether the Panel improperly exercised its discretion, under Article 11, by failing to draw certain inferences from the facts before it. In asking us to conduct such a review, an appellant must indicate clearly the manner in which a panel has improperly exercised its discretion. Taking into account the full ensemble of the facts, the appellant should, at least: identify the facts on the record from which the panel should have drawn inferences; indicate the factual or legal inferences that the panel should have drawn from those facts; and, finally, explain why the failure of the panel to exercise its discretion by drawing these inferences amounts to an error of law under Article 11 of the DSU (Appellate Body Report, 2000, para. 175).

By this, the AB established a minimum three-step process for proving that the Commission erred in law by not adopting adverse inference: (i) the facts on the record from which the panel should have drawn inferences should be identified, (ii) the factual or legal inferences that the panel should have drawn from such facts should be indicated, and (iii) explain why the failure of the panel to exercise its discretion by drawing adverse inferences amounted to an error of law (Appellate Body Report, 2000, para. 175).

US – Large Civil Aircraft (Second Complaint)[3]

The European Communities submitted to the Panel a request for preliminary rulings concerning the information-gathering procedure contained in Annex V to the SCM Agreement and two alternative requests. First, it requested the Panel to rule that the information-gathering procedure under Annex V had been initiated and that, consequently, the United States had an obligation to respond to specific questions put to it by the European Communities. In the alternative, the European Communities asked the Panel to exercise its discretion under Article 13 of the DSU to put some or all of these questions to the United States (Panel Report, 2011, para. 7.19).

However, the Panel declined to initiate the procedure as it refused to satisfy both requests, explaining that it did not, in the circumstances of this dispute, consider it necessary or appropriate to exercise its discretion under Article 13 of the DSU to seek information from the United States before having reviewed the parties' first written submissions (Panel Report, 2011, para. 7.23). The European Union submitted an appeal.

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[3] The full name of the case is *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*.

The AB stated that irrespective of whether the information-gathering procedure was initiated or conducted, a panel would always have the authority, during the panel proceedings, to seek additional information according to Article 13 of the DSU and to draw adverse inferences from a party's failure to produce requested information (Appellate Body Report, 2012, p. 217 (footnotes)).

Nonetheless, the AB also noticed that the European Union failed to answer whether there had been a failure to cooperate or a refusal to submit essential information and whether there was a resulting need to use adverse inferences because of a lack of information:

> [T]he European Union has not provided us with such details in connection with its requests that we find that the United States failed to comply with its obligations under the first sentence of paragraph 1 of Annex V to the SCM Agreement and that the Panel was entitled to rely on best information otherwise available, and to draw adverse inferences in accordance with the provisions of paragraphs 6 and 7 of Annex V" (Appellate Body Report, 2012, para. 542).

> In any event, we do not see that this request is sufficiently supported to allow us to make the requested finding. To the extent that the European Union is asking us to draw adverse inferences, we would have expected it to have provided us with a more precise indication of the areas in which the factual record is incomplete, how the lack of information relates to the United States alleged non-cooperation and the specific inferences that it is requesting us to draw. This is because, as a general matter, the need to and justification for drawing adverse inferences relates to particular instances of non-cooperation or withholding of evidence and is context-specific (Appellate Body Report, 2012, para. 548).

This paragraph is interesting as the AB determined the information the party must provide when requesting to draw an adverse inference. Therefore, a party has to provide (i) a precise indication of the areas in which the factual record is incomplete, (ii) how the lack of information relates to the other party's non-cooperation, and (iii) the specific inferences that it is requesting to draw (Appellate Body Report, 2012, para. 548).

However, although the AB partially satisfied the appeal in this case, it disagreed on the question concerning drawing adverse inferences.

Outcome of these decisions for future cases

These three decisions clarified the issue of applying adverse inference in WTO disputes. Suggest considering the primary outcomes:

- *Regarding the "silence" of the DSU.* As the DSU does not contain any provisions on adverse inference, it gave rise to discussions about the possibility of applying it in WTO cases. Nonetheless, this issue was clarified by the AB in the decision in the *Canada-Aircraft* case. In this case, the AB noted that another WTO Agreement – SCM Agreement, Annex V of this Agreement, contains an explicit provision that "the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process". Due to that, the AB concluded that there is no reason why a panel can use adverse inference in one case and not in another and, therefore, that panels should have the authority to draw adverse inferences.
- *Regarding the "discretionary" task of a panel.* In all these landmark cases, the AB emphasized that adverse inference is a "discretionary" task derived from the panel's duties under the DSU. A panel may make such inferences in certain circumstances when direct evidence is not available, but only when there is sufficient basis to do so. At the same time, as the AB concluded in *the US – Wheat Gluten, a failure of the panel to draw adverse inferences in the cases* where it is appropriate may constitute an error in law.
- *Regarding conducting an "objective assessment" by a panel.* A panel must draw inferences based on all of the relevant facts of record. It is interesting to note, however, that a party refusing to provide information requested by a panel is, although important, only one of the facts to be taken into account. In *the US – Wheat Gluten case, the AB emphasized that if a panel were to ignore other relevant fats, it would fail to make an "objective assessment".*
- *Regarding different roles of a panel and the AB.* An adverse inference is one of the instruments that the panel may use to reach a fair conclusion. The panel must draw inferences from instances of non-cooperation by any party. As noted by the AB in *US-Wheat Gluten*, the AB's task on appeal is different. Its task is not to redo the panel's assessments of the facts and decide what inferences the AB would draw from them; the task of the AB is to determine whether the panel improperly exercised its discretion or not.

From the AB's decisions, two "tests" were also identified, which were already mentioned above – in the *US – Wheat Gluten* and *US – Large Civil Aircraft (Second Complaint)*. They can serve as "guides" for future cases:

- *The "US-Wheat Gluten" test is used to prove that a panel erred in law.* The AB established three minimum steps to prove that a panel erred in law by not adopting adverse inference: (i) the facts on the record from which the panel should have

drawn inferences should be identified, (ii) the factual or legal inferences that the panel should have drawn from such facts should be indicated, and (iii) party has to explain why the failure of the panel to exercise its discretion by drawing adverse inferences amounted to an error of law.

– *"US-Large Civil Aircraft (Second Complaint)" test – for proving the need to draw adverse inferences.* In this case, the AB noted that if a party asks to draw an adverse inference, it has to provide (i) a precise indication of the areas in which the factual record is incomplete, (ii) how the lack of information relates to the other party's non-cooperation, and (iii) the specific inferences that it is requesting to draw. Although all these points were said for asking the AB, the test is likely to apply to a panel similarly.

Thus, all these outcomes seem quite interesting and may be taken into account by the parties when preparing and developing a position in subsequent cases and by adjudicators when resolving them.

Conclusion

Therefore, adverse inference can be a pretty helpful tool if one of the parties refuses to provide specific evidence. It may be beneficial even without application since it stimulates parties to be more open and transparent in giving evidence.

However, given the significant impact of adverse inference on the final decision and the fact that its application is usually not provided in dispute resolution rules, adjudicators are somewhat cautious about using it.

The same situation applies to the WTO's dispute settlement system. A review of case law reveals that drawing adverse inferences in WTO cases is rare. Despite this, as can be seen from analyzed cases, neither panels nor the AB has any prejudices regarding its use.

So, analysis of cases can be helpful for the successful application of adverse inference in the future. In the cases considered above, some issues regarding the application of adverse inference in WTO cases were clarified, namely: (i) the possibility of applying adverse inference in WTO cases, (ii) the peculiarities of its application, (iii) the roles of panels and the AB, etc. Also, two "guides" were identified: (i) how to prove that a panel erred in law and (ii) which information a party has to provide when requesting to draw an adverse inference.

Hopefully, these conclusions will be helpful for lawyers in future WTO cases. Additionally, they may be used when requesting to draw adverse inferences in other dispute resolution forums.

References:

Agreement on Subsidies and Countervailing Measures. 1 January 1995.

Andrews, N. (1994). *Principles of Civil Procedure*. Sweet & Maxwell Limited.

Canada – Measures Affecting the Export of Civilian Aircraft. WT/DS70/R. Adopted 14 April 1999; WT/DS70/AB/R. Adopted 20 August 1999.

IBA Rules on Taking Evidence in International Arbitration. Article 9. 17 December 2020. International Bar Association.

Jackson, J. (2020). *The jurisprudence of the GATT & the WTO*. Cambridge University Press.

Kinnear, M., & McLachlan, C. (2015). ICSID Review. *Foreign Investment Law Journal*, *30*(3).

Markiyan, M., & Oesch M. (2007). *Elegantia juris of "adverse inference" in the WTO and other dispute settlement fora: ad impossibilia lex non cogit.*

Redfern, A. (2004). Interim Measures. In L. Newman, & R. Hill (Eds.), *The Leading Arbitrators' Guide to International Arbitration* (pp. 367–404). JurisNet, LLC.

Sandifer, D. V. (1939). *Evidence before International Tribunals*. The Fountain Press.

Sharpe, J. K. (2006). Drawing Adverse Inferences from the Non-production of Evidence. *Arbitration International*, *22*(4). LCIA.

Understanding on rules and procedures governing the settlement of disputes. Annex 2 of the WTO Agreement. 1 January 1995.

United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities. WT/DS166/R. Adopted 31 July 2000; WT/DS166/AB/R. Adopted 22 December 2000.

United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint). WT/DS353/R. Adopted 31 March 2011; WT/DS353/AB/R. Adopted 12 March 2012.

Wickelgren, A. L. (2010). A Right to Silence for Civil Defendants? *The Journal of Law, Economics, & Organization,* 26(1), 92–114.