Accomplishment of the WTO Dispute Settlement system
- A Review of Some WTO Jurisprudence[1]

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Introduction

More than 10 years have passed since the establishment of the WTO and it is time to reflect on its accomplishments and challenges with which it is confronted. Generally the WTO is facing political difficulties as shown in the failures of the Ministerial Conferences in Seattle (1999) and Cancun (2003). Even today negotiations at the WTO in agriculture, NAMA, trade in services and rules are stalemated. Also free trade agreements (FTA) and regional free trade agreements (RTA) have widely spread. This could cause erosion of the principle of multilateral trading system which is the foundation of the WTO.

On the other hand, it is recognized that the WTO dispute settlement system, has been highly successful. More than 400 cases have been brought to the forum of the WTO dispute settlement system since the establishment of the WTO and, out of this number, in about 80 cases, Panels and the Appellate Body rendered their decisions. In a small number of cases, there was difficulty in implementing WTO recommendations[2]. However, in the majority of cases, losing parties implemented WTO decisions in one way or other. It is commented that the WTO dispute settlement system is probably the most successful international tribunal in international dispute resolution.

1. A picture of WTO agreements

Largely classified, WTO agreements consist of (a) the GATT 1994 and 12 subsequent agreements, (b) the GATS (The General Agreement on Trade in Services), (c) the TRIPS (The Agreement on Trade-related Aspects of Intellectual Property Rights), (d) DSU (Dispute Settlement Understanding), (e) the TPRM (The Trade Policy Review Mechanism) and (f) The Plurilateral Agreement). The GATT 1994 and 12 subsequent agreements, the GATS and the

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2 Examples of cases in which implementation did not go smoothly are: European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26.48/AB/R, 13 February 1998 and United States – Tax Treatment For “Foreign Sales Corporations”, WT/DS108/AB/R, 20 March 2000; United States-Continued Dumping and Subsidy Offset Act of 2000, WT/DSD217.234/AB/R, 27 January 2003

TRIPS provide for substantive rules on trade in goods, trade in services and trade-related aspects of intellectual property rights. The DSU is a set of procedures for resolution of disputes. The TPRM is a set of rules for review by the WTO of trade policies of Members. The Plurilateral Agreement contains the Agreement on Government Procurement and the Agreement on Civil Aircraft.

The GATT 1994 and subsequent 12 agreements set forth rules on trade in goods and contain such principles as the MFN (the most favored national treatment), the national treatment, the tariff concessions, the prohibition of quantitative restriction on imports. The 12 subsequent agreements contain, *inter alia*, the Agreement on Agriculture, the TBT Agreement, the SPS Agreement, the Antidumping Agreement, the SCM Agreement (The Agreement on Subsidies and Countervailing Measures) and the Safeguards Agreement. The GATS sets forth the principles of MFN and transparency. Under the GATS, Members negotiate on concessions in trade in services and the concessions made by Members are inscribed into the schedule of liberalization. Members must abide by the concessions which they made and are inscribed into the schedule.

The TRIPS provide for the minimum standards of protection of intellectual property rights and procedures for realization of rights such as civil damage and injunctive relief, administrative procedure and criminal procedure to deal with infringement of intellectual property rights. At this time, there are only two plurilateral agreements, e.g., the Agreement on Government Procurement and the Agreement on Civil Aircraft.

All of WTO agreements as above described except for plurilateral agreements are mandatory and Members must join in all of them. This is called “the single undertaking”. However, Members can decide whether to join the plurilateral agreements or not.

2. What is the WTO dispute settlement system?

It is appropriate here to explain briefly the system of dispute settlement at the WTO. The basic legal instruments of the dispute settlement at the WTO are Articles XXII and XXIII of the GATT and the Dispute Settlement Understanding (The DSU) which amplifies Articles XXII and XXIII of the GATT and sets out details of the procedure for dispute settlement. According to those instruments, disputes concerning WTO agreements must be resolved in the following ways.

When a dispute arises between WTO Members, the complaining party requests the party whose measures are complained about to conduct consultation. When the consultation fails, the parties can request the DSB to establish a Panel to resolve the issue. A Panel is composed of three experts in international trade. It issues the report on the dispute in which the claim of the complaining party is successfully recognized or rejected for the lack of legitimate legal claim.

The report is submitted to the DSB for adoption. The DSB adopts the report by negative consensus by which the adoption of the report is denied only when there is consensus that the report should not be adopted. This means that the report is adopted if there is one vote in favor of adoption and the winning party is always in favor of adoption. In this way, the adoption of report is automatic and this decision making formulae is called “automaticity”.

When a party to a dispute is not satisfied with the Panel report, it can appeal the case to the Appellate Body. The Appellate Body is composed of seven standing members and three out of which form a division to deal with a dispute. When the Appellate Body comes up with a report in which the Panel report is upheld, modified or reversed, as the case may be, it is submitted to the DSB for adoption. Here again the adoption is made by negative consensus. The review of the Appellate Body of Panel reports is limited to “legal issues” as opposed to “factual issues”. In other words, the Appellate Body deals with only interpretation of WTO agreements and not new fact-finding of the case.

The reserve consensus for adoption of Panel and Appellate reports was a great invention because, in this way, the losing parties in dispute cannot block the adoption of the report by voting against its adoption as it was the case with the dispute settlement system under the old 1947 GATT.

When reports of Panels and the Appellate Body are adopted by the DSB (the Dispute Settlement Body, a part of the General Council of the WTO), the WTO requests a violating party to make the measures in question conform to the principles of WTO agreements. If there is no compliance, the winning party can request the WTO to grant the right to suspend concessions (retaliation).

3. Accomplishment of the WTO dispute settlement system

(1) Increasing number of dispute cases brought to the WTO

During the old GATT period (1947-1994), a period of close to 50 years, about 300 dispute cases were brought to the dispute settlement procedure. As compared with this figure, about 400 cases were brought to the WTO dispute settlement system in about ten year period. This figure seems to indicate that the WTO dispute settlement procedure has gained confidence of Members.

(2) The rule-oriented international trade order and protection of interests of developing country Members

The WTO trading system can be characterized as a "rule-oriented international trade order" as opposed to a "power-oriented international trade order". In a power-oriented international trading system, parties to a dispute must resort to individual negotiations among them on a bilateral or plurilateral basis. In a power-oriented international trading system, the party with stronger economic, political and even military power has more leverage than the other party with less economic, political and military power. Therefore, in this trading system, weaker states with less economic resources and political influence must suffer disadvantage when negotiating with stronger states. When the resolution of dispute is negotiation between a party with more economic and political power and another party with less of such power, the weaker party often is pressed to make concession against its will.

However, in the WTO dispute settlement system which is a rule-oriented international trading system, Panels and the Appellate Body do not take into account when resolving disputes. All that counts is the legitimacy of legal claims of the parties under the WTO rules. This system provides more stability, fairness and predictability in international trade relationships than does a power-oriented international trading system.

A rule-oriented international trading system is beneficial to developing country Members. A developing country Member can bring a case against a powerful developed country Member in the WTO dispute settlement procedure and prevail over it as long as the developing country Member makes good legal arguments.

There are some examples in which developing country Members successfully challenged measures of powerful developed country Members such as the United States and the European Communities which they thought were in breach of WTO agreements. Examples include, among others, the US-Underwear Case (Costa Riva v. US)[3], the US- Shirts and Blouses Case (India v. US)[4], the US- Shrimp/Turtle Case (India, Pakistan, Thailand and Malaysia v. US)[5], the EC-Sardines Case (Peru v. EC)[6] and the EC-Tariff Preferences Case (India v. EC)[7] and the US-Cross Border Gambling Regulation Case (US v. Antigua-Barbuda).[8]

The U.S. Underwear Case is briefly touched upon as an example. In this case, the United States imposed a quota on imports of underwear from Costa Rica under the ATC (Agreement on Textile and Clothing). Costa Rica brought a claim against this quota to the WTO and argued

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3 United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R, 25 February 1997

4 United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 23 may 1997

5 United States – Import Prohibition of Certain Shrimps and Shrimp Products, WT/DS58/AB/R, 6 November 1998

6 European Communities – Trade Description of Sardines, WT/DS231/AB/R, 23 October 2003

7 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 20 April 2004

8 United States-Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 20 April 2005

that the U.S. imposition of quota did not satisfy the requirements of safeguard under the ATC. Both the panel and the Appellate Body approved the claim of Costa Rica and held that the U.S. imposition was contrary to the provisions of the ATC. Thereupon, the U.S. uplifted the quota.

If there had not been the WTO dispute settlement system and Costa Rica had had to resolve the issue by negotiation, Costa Rica would have been in a weaker position in relation to the bargaining power of the United States and the outcome of negotiation would have been uncertain. Thanks to the WTO dispute settlement system, Costa Rica was able to prevail over the United States.

One more example will be briefly discussed. This is The US Cross Border Gambling Case. In this case, Antigua-Barbuda challenged measures of the United States which prohibited cross-border supply of gambling and betting. The Appellate Body ruled that the US measures were contrary to the principle of national treatment because, whereas the United States prohibited international cross-border supply of gambling and betting, it allowed by the Interstate Horse Racing Act domestic (interstate) supply of gambling and betting. The United States promised that it would implement the WTO recommendation and change the domestic legislation. Here again, small entities such as Antigua-Barbuda would have been in a weaker position when it had had to negotiate with the United States without any international dispute settlement mechanism such as the WTO.

(3) Voluntary export restraints

In 1960's, 70's, 80's and until the middle of 1990's, one of the serious international trade issues was a proliferation of voluntary export restraints whereby an exporting country and an importing country negotiated with each other and the latter restrained export to the former. Often threats were used to pressure the exporting country into a voluntary export restraint agreement. When one looks back to this period, one is impressed with the fact that voluntary export restraint agreements between the United States and Japan and between the European Communities and Japan were the probably most important means of settling trade disputes in areas such as textiles, steel, automobiles, machine tools and semiconductors.

Voluntary export restraints were carried out without rules and consequently often had no time limit and lacked transparency. In the steel area, voluntary export restraint exercised by the Japanese Government started in late 1960's and lasted until 1993. One voluntary export restraint precipitated another voluntary export restraint. One example is that of specialty steel. As mentioned, the Japanese Government engaged in voluntary export restrain in the steel area and thereby restrained the total quantity of steel products to be exported from Japan to the United States. Then the Japanese steel industry concentrated on exporting specialty steel

which was more high valued and in which per unit profit was greater. In this way, export of specialty steel to the United States increased dramatically and this caused a trade dispute in the specialty steel industry. This led to another voluntary restraint agreement in this area. This example shows that once a voluntary export restraint started, a vicious circle began.

Voluntary export restraint causes distortion to the international trading system. A voluntary export restraint agreement is usually entered into between the two trading nations whereby one party restricts export of a product to another. Although the competing industry in the importing nation get a temporary relief, it affects adversely the competitiveness of this industry due to lack of competition from abroad. Export of the product will be diverted to other nations and this may lead to another voluntary export restraint agreement.

Voluntary export restraint often entails export cartels in the exporting country and, as expressed in the Consumers' Union Case in the United States[9], this may come into conflict with competition laws of the importing country.

In light of this experience, Article 11:1(b) of the Agreement on Safeguards (The SG Agreement) prohibits Members from exercising and seeking voluntary export restraints. As the result, voluntary export restraints disappeared from international trade.

In the Protocol of Accession of China to the WTO, special safeguards are provided for and this allows WTO Members to request to China to effectuate a voluntary export restraint. However, this is a transitional measure and will be abolished when the transition period lapses.

(4) Unilateral trade sanctions

Unilateral trade sanctions are an imposition of a trade penalty by a trading nation on another trading nation for the reason that the latter's trade practices are "unfair". In 1980's and early 90's, the United States invoked Section 301 of the Trade Act and imposed trade sanctions on trading partners that the United States judged were exercising "unfair trade practices". Victims included the European Communities, India, Brazil and Japan. Examples such as the Semiconductor Disputes (between US and Japan, 1986) and the Automobile Disputes (between US and Japan, 1995) are well known.

In the Semiconductor Dispute[10], the United States and Japan concluded an agreement to resolve a dispute on semiconductor issues. The United States argued that the Japanese

[9] Consumers Union of the United States, Ltd. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973); Consumers Union of the United States , Inc. v. Kissinger, 506 F. 2d 136 (.D.C. Cir. 1974), cert. denied, 421US 1004 (1975)

[10] On the US/Japan Semiconductor Dispute, see Dorinda Dallmeyer, "The United States-Japan Semiconductor Accord of 1986: The Shortcomings of High Tech Protectionism, Maryland Journal of International Law and Trade, 13/2 (1989), p. 179 *et seq*; Federal Register, Vol. 56, No. 152, Thursday, August 1984, p. 28 *et seq*; International Trade Reorter, Vol. 3, No. 32, August 6, 1986, p. 994, *et seq*.; US International Trade Commission, Erasable Programmable Read Only Memories from Japan, Investigation No. 7312-TA-288, USITC Publ. No. 1778 (1985); US International Trade Commission, Dynamic Random Access Memory Semiconductors of 256 Kilobytes and Abvoe from Japan, Investigation No. 731-TA-300, USITC Publ. No. 1803 (1986).

market was foreclosed to US (foreign) manufactured semiconductor chips and that Japanese semiconductor chips were dumped to the United States market. The United States claimed that Japan promised to control export prices of chips abroad to prevent dumping and that there was a secret agreement that Japan would give a 20% market share to US made chips. The United States invoked Section 301 and prohibited import of certain items from Japan.

In the Automobile Dispute[11], the United States again invoked Section 301 against Japan for the reason that the Japanese automobile market was closed to foreign automobiles and that Japanese automobile manufacturers procured parts and components only from domestic subcontractors under their control and thereby excluded foreign-produced parts and components. The United States imposed 100% retaliatory tariff on imports of high valued Japanese automobiles that were imported to the United States. Japan filed a petition with the newly created WTO dispute settlement procedure. Shortly after the petition was filed, the dispute was settled by negotiations.

The problem of unilateral measures is that there is no neutral and objective arbiter to adjudicate disputes and the trade authority of the invoking nation combines the functions of prosecutor and judge within itself. This way of resolving trade disputes lacks objectivity, fairness and predictability.

In the UR, trading nations that had been affected by the invocation of Section 301 such as the European Communities, Japan and Korea formed a coalition and promoted a creation of a mechanism to deal with such unilateral trade actions. As the result of this effort, Article 23.1 of the Dispute Settlement Understanding ("the DSU") was adopted. This provision states that when a Member seeks redress of trade injury (nullification and impairment) caused by a violation of WTO agreements by another Member, it must have recourse to the DSU. This means that a Member of the WTO cannot invoke unilaterally a trade sanction against another Member without resorting to this dispute settlement procedure. A Member must resort to the dispute settlement procedure of the WTO to resolve a trade dispute and only after obtaining WTO approval, it can resort to trade sanction in the form of suspension of concession.

The last time the United States invoked a unilateral trade sanction was the summer of 1995 when it imposed a 100% retaliatory tariff on high value automobiles from Japan. This case was touched upon above. Since then the United States has maintained the policy of resorting to the WTO dispute settlement procedure whenever trade disputes arise between the United States and other Members.

The European Communities petitioned to the WTO against the United States on the ground

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[11] On the US/Japan Auto Dispute, see Mitsuo Matsushita, "Section 301 of the Trade Act of 1974: The Impact of US Unilateral Trade Sanctions on Japan & Asian Countries," in North American & the Asia-pacific in the 21st Century (ed. K.S. Nathan, Asean Academic Press, 1999), pp. 131-154

that the existence of Section 301 was a violation of the DSU even if it is not unilaterally invoked. The Panel held that, although the existence of Section 301 was not a violation of the DSU in itself, Section 301 would be a violation of the DSU depending on the way in which it is applied.[12]

4. Major principles of the WTO jurisprudence established by panels and the Appellate Body

WTO agreements are highly complex and meanings of provisions contained in such agreements are not always clear. This is so because WTO agreements reflect compromise and fine balance among negotiating parties. Much is left to Panels and the Appellate Body to interpret and clarify the meaning of those provisions. Panels and the Appellate Body have turned out more than 70 decisions and some important principles have been established through such decisions. In the following pages, some selected Panel and the Appellate decisions are examined.

(a) Like products

One of the fundamental principles of the WTO is non-discrimination. This includes the MFN principle whereby WTO Members are prohibited from according less favorable treatment to products and enterprises of a Member than that accorded to products and enterprises of another Members. This also includes the principle of national treatment whereby a WTO Member is prohibited from imposing less favorable condition on products and enterprises of a WTO Member than that which applies to domestic products and domestic enterprises. A discrimination in treatment occurs only when a product and another product are “like products” or “directly competitive products”. If, for example, a domestic product and a foreign product are not like products and are not in competitive relationship, differences in treatment in terms of taxation and other terms of trade do not create competitive disadvantage to the foreign products *vis-à-vis* the domestic products. Therefore, discrimination against a foreign product is a problem only when the foreign and domestic products are like products. Therefore, “like products” is the key provision when applying the MFN principle and the national treatment principle.

Panels and the Appellate Body have developed interpretive principles concerning this principle in such cases as the Japan- Alcohol Case[13], the Korea-Alcohol Case[14]and the

12 United States – Section 301 of the Trade Act of 1974, WT/DS152, 27 January 2000
13 Japan – Taxes on Alcoholic Beverage, WT/DS8.10,10.11/AB/R, 1 November 1996
14 Korea – Taxes on Alcoholic Beverages, WT/DS75.84/AB/R, 17 February 1999

EC-Asbestos Case[15]. In the Japan-Alcohol Case, the issue was whether or not a Japanese alcoholic beverage called Shochu on one hand and vodka and gin on the other were like products. The Appellate Body denied "the aims and effects test" which had been established by a Panel under the GATT 1947 and decided that like products should be decided on the basis of comparing physical characteristics, the end use and tariff classification.

In the EC-Asbestos Case, the Appellate Body held that asbestos and three other substitutes were not like products for the reason that, whereas those products shared common physical characteristics and end use, the risk of asbestos had been widely known among users of construction materials and, in deciding whether a product was a like product in relation to anther product, users' and consumers' perception needed to be taken into account.

The decision in the Asbestos Case may open the way to tackle environmental and product/food safety issue by using the like products concept. There will be need to deal with a conflict between WTO disciplines and environmental protection. For example, a Member may apply a differential taxation on large and small engines used in automobiles and impose a higher tax on large engines and lower tax on smaller engines in order to encourage the use of small engines and discourage the use of large engines. Large engines generate more carbon dioxide and small engines less and the taxation favors small engines rather than large engines. If large and small engines are domestically produced and imported, there may be the MFN and national treatment issues because large engines imported from other Members are discriminated against in comparison with small engines domestically produced and also imported from third country Members. If public perception is sufficiently deepened to recognize the importance of emphasizing small engines rather than large engines, one might argue that large and small engines are not like products and, therefore, the principles of MFN and national treatment do not apply, thereby severing this issue from WTO disciplines.

(b) Exceptions - Article XX: (g) of the GATT

Article XX of the GATT provides for exceptions to GATT disciplines. Although the basic principle of the WTO is freedom of trade, there are circumstances that require governments to impose measures on activities of private enterprises for the sake of, *inter alia*, the maintenance of public order and good moral, the protection of life and health of humans, animals

[15] European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 5 April 2001

and plants and the conservation of natural resources. A question here is how much deviation from the principle of free trade is allowed under exceptions as provided for in Article XX. Panels and the Appellate Body have struggled to find reconciliation between the principle of free trade and exceptions as provided for in Article XX. Some examples of important decisions are explained below.

Article XX: (g) of the GATT exempts measures relating to conservation of exhaustible natural resources from GATT disciplines on the condition that these comply with the requirement of the introductory part (Chapeau). The Appellate Body clarified the interpretation of the scope of applicability of this provision through its reports in the US – Gasoline Case[16] and the US - Shrimp/Turtle Case[17]. Especially important is the US-Shrimp/Turtle Case in which the Panel did not examine whether the U.S. measure fell under Article XX (g) of the GATT which provides that a measure relating to the conservation of exhaustible natural resources is exempted from GATT disciplines. It stated that the US measure was arbitrary and did not satisfy the requirement of Chapeau of Article XX which requires that a measure which falls under one of the exempted items should not be arbitrary, discriminatory and a disguised restriction of foreign trade. The Appellate Body reversed this portion of the Panel's ruling and stated that the first question that needed to be answered was whether or not the US measure designed to prevent accidental catching of sea turtles when fisher boats harvest shrimps fell under Article XX(g). The Appellate Body held that the US measure fell under this category because this helped preservation of endangered species (sea turtles). Although the Appellate Body stated that the U.S. measure was arbitrary and did not satisfy Chapeau of Article XX, it is noteworthy that the U.S. measure to deal with environmental protection was regarded as an exempted item.

Both the Panel and the Appellate Body reached the same conclusion, i.e., that the US measure in question was inconsistent with the requirement of Chapeau of Article XX in the sense that it was imposed unilaterally. However, the logical steps to reach this conclusion were different. Whereas the Panel took the position that it was not necessary to examine whether the US measure fell under Article XX(g), the Appellate Body disagreed with this rationale and held that the U.S. measure was qualified to be regarded as falling under Article XX(g) exception and then held that the U.S. measure was contrary to Chapeau for the reason that it was arbitrary and unilateral.

This decision of the Appellate Body seems to have a far-reaching impact on the relationship between environmental issues and the WTO disciplines. By the holding of the Appellate Body in this regard, environmental protection policy is given a place in Article XX:(g) and this holding is in harmony with Preamble of the Marrakesh Agreement which

[16] United States –Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996
[17] See note (4), *supra*.

states that one of the purposes of the Agreement is "to protect and preserve the environment". The Panel's decision to skip Article XX(g) might be justified for the reason of judicial economy as long as there is no difference in conclusion. However, the decision of the Appellate Body seems to be more in line with the underlying policy of the Marrakesh Agreement.

The US Cross Border Gambling Case[18] is important in that it confirmed that the same principle of interpretation applies to Article XIV of the GATS which provides for general exceptions in trade in services areas. The issue here is whether or not US measures which prohibit cross-border supply of gambling and betting are qualified to fall under Article XIV exception for the reason that they are designed to protect good moral and public order. The Appellate Body stated that the US measures are qualified to be regarded as measures to protect good moral and public order.

Here again, however, the Appellate Body held that the US measures were contrary to Chapeau of Article XIV of the GATS since the United States allowed interstate supply of gambling and betting in horseracing while prohibiting altogether international supply of gambling and betting services.

(c) Food safety issues

Governments take measures to ensure that foods and industrial products sold in their territories are safe. This is an important part of the "police power" of states. However, this may come into tension with the disciplines of WTO agreements because WTO agreements endeavor to maintain free trade whereas government regulations regarding food and product safety impose some measure of restriction on trading goods. Among WTO agreements, the TBT Agreement (The Agreement on Technical Barriers to Trade) and the SPS Agreement (The Agreement on the Application of Sanitary and Phytosanitary Measures) are especially relevant to this issue. The TBT Agreement deals with such items as product safety standards, testing products and labeling and representation of products. The SPS Agreement is concerned with such matters as food safety and agricultural quarantine.

Some examples of cases are given below in which the issue was how to interpret disciplines incorporated in the TBT and the SPS Agreement.[19] Although there are many cases in which panels and the Appellate Body dealt with this issue, only the EC – Hormones

[18] See note (7), *supra.*

[19] For cases in which the application of Article XX of the GATT 1994 was an issue, see the US Gasoline Case (note (15), *supra*.) and the US Shirimp and Turtles Case (note (4), *supra*.).

Case[20] and the EC – Sardines Case[21] are explained. The former is a case under the SPS Agreement and the latter concerns the TBT Agreement.

In the EC-Hormones Case, the EC imposed a ban on the use and import of hormone treated beef and the United States and Canada objected to this ban. The United States and Canada argued that the EC measures were contrary to Articles 2,3 and 5 of the SPS Agreement. One of the arguments made by the EC was that the EC measures should be allowed under Articles 3.1 and 3.3 of the SPS Agreement which provide that Members can establish a higher standard of protection by a SPS measure than that provided in international standards.

The Appellate Body ruled that Articles 3.1 and 3.3 are not an exception to the general rule in the SPS Agreement and that it is incumbent on the complaining party to prove that the derogation on the part of the respondent party from the mandate of the SPS Agreement is not allowed.

An international standard – the Codex Alimentarius – provided that there was no sign of risk with respect to hormone treated beef as long as the residue of hormones in beef remained below the level stipulated in the Codex. The Appellate Body reached the conclusion that the EC did not adduce sufficient scientific evidence to show that the EC prohibition on hormones treated beef was based on a proper scientific risk assessment.

In the EC-Sardines Case, the EC regulation imposed a rule that the term “sardines” could be used only in connection with canned foods made of fish caught in the Black Sea, the Mediterranean Sea and the North Sea. Peru could not export canned foods made of fish caught in the Pacific Ocean with the name “sardines” on them and brought a claim against the EC in the WTO on the ground that the Codex Alimentarius – an international standard which provides rules on representation of product – stipulated that canned foods made of fish caught in the sea other than the above three areas could be represented as “X sardines” (such as “Peruvian sardines” or “the Pacific sardines” and the EC rule which prohibited this representation was contrary to Article 2.4 of the TBT Agreement which states that a Member should base its mandatory regulation on international standard if there exists any. Although Article 2.4 of the TBT Agreement provides that Members can deviate from this principle if the reliance on international standard was not appropriate due to unique situations in the country, the Panel stated that the burden of proving that the requirement for the derogation clause was satisfied was on the defending party. The Appellate Body reversed this finding of the Panel and held that it was incumbent on the complaining party to establish not only that the defending party’s measure was not based on the relevant

[20] See note (1), *supra*.
[21] See note (5), *supra.*

international standard but also that the measure in question was not entitled to be covered by the derogation clause in Article 2.4 of the TBT Agreement. The Appellate Body stated that the claimant, Peru, proved that the EC was not justified to invoke this deviation clause and held the EC measure to be contrary to Article 2.4 of the TBT Agreement.

(d) Preferential tariff treatment - Enabling Clause

One of the basic principles of the WTO is the MFN principle whereby Members are prohibited from discriminating products of some Members by giving them better treatment as compared with like products of other Members. However, the Enabling Clause permits an exception to this rule and authorizes developed country Members to grant preferential tariffs to developing countries. A question here is whether or not a developed country Member must grant identical preferential tariffs to all developing countries when granting a preferential tariff or it can select a category of developing countries according to a certain criterion and give preference only to those. In the EC – Tariff Preferences Case[22], the EC granted tariff preferences only to those developing country Members that had drug problems. India brought a claim against the EC on the ground that this treatment was discriminatory and violated the non-discrimination principle.

The Appellate Body allowed a selection by the European Communities of a category of developing country Members for preferential tariff treatment based on a certain criterion. The European Communities decided to grant preferential tariff treatment only to developing country Members that had serious drug problems and excluded other developing country Members from this privilege. India which had been excluded from the list of this privileged countries brought a claim against the European Communities and argued that this treatment was contrary to the principle of non-discrimination. The Panel held that this treatment was contrary to the principle of non-discrimination because non-discrimination should mean an identical treatment and India did not enjoy identical treatment as the privileged developing countries.

The Appellate Body reversed this Panel decision and held that the non-discrimination principle can be interpreted more flexibly and a grant of preferential tariff treatment only to those Members were allowed as long as developing country Members under the same condition were eligible for such grant. This interpretation provides flexibility to the employment of the Enabling Clause.

This could be used by a developed country Member as “carrot and stick” to induce

[22] See note (6), *supra*

some developing country Members to go along with a policy of the developed country Member giving such privilege. This may make a group of privileged developing countries and another group of non-privileged developing countries and create uneven conditions for economic development.

On the other hand, this may be a useful instrument to developed country Members to accomplish important objectives such as environmental protection, combat drug issues and improvement of human rights situations. With this flexibility in giving preferential tariff treatment, developed country Members may be more inclined to granting preferential tariff treatment and, on the whole, economic welfare of the world of developing countries may be greater than otherwise. It is also a right but not an obligation of developed country Member to grant or not grant preferential tariff treatment to developing countries. To induce developed country Members to give more tariff preference to developing country Members, some flexibility is necessary.

The wording of Enabling Clause only requires non-discrimination to be applied by developed country Members to developing countries. Non-discrimination can be interpreted in several ways. Generally non-discrimination is synonymous to equality in treatment. However, as far as the grammatical meaning of the word “non-discrimination” and “equality” goes, it can mean an identical treatment as indicated by the Panel and also a conditional equality as indicated by the Appellate Body. Therefore, a mere grammatical analysis of the wording does not shed much light on this issue. It should be a policy consideration which gives an orientation for interpretation. One may agree or object to the interpretation adopted by the Appellate Body in the EC-Tariff Preferences Case. However, it should be recognized that the Appellate Body has shown an interpretation based on a certain type of policy perspective.

Conclusion

The dispute settlement system of the WTO has accomplished a tremendous success. It has established important principles of jurisprudence which apply to trade measures of Members. The WTO jurisprudence contributes much toward the establishment and maintenance of stable and predictable trade relationships among WTO Members. Therefore, as stated by the Sutherland Report, the WTO dispute settlement system is basically functioning well and we should “do no harm” to this system. However, there is need for fine tuning of some details which include, *inter alia*, the issues regarding remand power of the Appellate Body, sequencing, standing panel, amicus curiae brief and peer review group to review reports of the Appellate Body. Although these are important issues,

there is no urgent need to decide these issues in haste.[23]

There are, however, some areas in which panels and the Appellate Body will face difficult tasks in interpreting WTO agreements. There are many such problems. Among them, however, the following may be representative.

One striking trend in the past several years is a proliferation of FTA/RTA. This is partly due to disillusionment of the multilateralism as expressed in the WTO after the failures of Ministerial Conferences at Seattle and Cancun. At present, there are more than 300 FTA/RAT reported to the WTO.

There is inherent tension between FTA/RTA and the WTO regime since the essence of FTA/RTA is preferential treatment in tariffs and other trade conditions accorded to inside participants.[24] There is necessarily some kind of discriminatory treatment to outside parties. Given the fact that multilateral trade negotiations are so difficult, FTA/RTA will increase and the WTO must face this reality and co-exist with them.

However, FTA/RTA cannot perform the role of establishing and enforcing trade rules that universally apply. This is eminently the realm of the WTO. In order to avoid an excessive compartmentalization of world trade through FTA/RTA, the WTO must exert due restraint. In this respect, it is highly desirable to clarify the interpretation of Article XXIV of the GATT and Article VI of the GATS.

Another issue may be that of environmental protection. Deterioration of environment as exemplified by global warming, disruption of ecological process, disappearance of rain forests and extinction of endangered species is a serious problem for the future existence of human race and various attempts are made to arrest these trends including the Kyoto Protocol and the Cartagena Protocol. These are based on principles different from those in the WTO such as the precautionary principle. It is highly important to formulate some rules to reconcile trade values as incorporated in WTO agreements and non-trade values in those protocols. This may call for clarifying and modifying WTO agreements or other agreements as the case may be.

At the same time, it should be remembered that the relationship is not necessarily exclusive to each other. As exemplified by emission trading, market mechanism as promoted by the WTO can be utilized to deal with global warming issues.

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[23] On DSU issues, see The Future of the WTO, Addressing institutional challenges in the new millennium, Report by the Consultative Board to the Director-General Supachai Panitchapakdi (The World Trade Organization, 2004), Chapter VI).

[24] On the relationship between FTA/RAT and Article XXIV of the GATT, see Mitsuo Matsushita, “Legal Aspects of Free Trade Agreements: In the Context of Article XXIV of the GATT 1994”, in WTO and East Asia (ed. Mitsuo Matsushita and Dukgeun Ahn, Cameron May, 2004), p. 497 et seq.