

## A Review of Major WTO Jurisprudence

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### Introduction

The WTO celebrated its ten year anniversary in 2005. The WTO was created as a result of the Uruguay Round Trade Negotiation which is the 8<sup>th</sup> round under the GATT 1947. Although 10 year period is not long, still it makes a short history and it is time to reflect on its accomplishment in establishing WTO jurisprudence.

The WTO has encountered difficulties in international negotiation. Ministerial Conferences in Seattle (1999) and Cancun (2003) failed. At this time, it is difficult to predict the outcome of the Doha Development Round. Although the Hong Kong Ministerial Conference adopted a resolution to continue international negotiations on agriculture, market access of non-agricultural products, trade rules such as antidumping and trade in services, the resolution contains a relatively small package. At the same time, free trade agreements (FTA) and regional free trade agreements (RTA) have proliferated and presented challenges to multilateral trading system as incorporated in the WTO.

In sharp contrast to this, the WTO dispute settlement system has accomplished a high degree of success. The WTO dispute settlement system has dealt with almost 400 cases since its establishment and, in about 80 cases, Panels and the Appellate Body rendered their decisions. Although there are a handful cases in which there was difficulty in implementing WTO recommendations<sup>1</sup>, in the majority of cases, WTO recommendations were successfully implemented. The WTO dispute settlement system has established itself probably as the most successful international tribunal not only in international trading areas but also in the resolution of any international disputes.

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<sup>1</sup> 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

In the following passages, some panel and appellate decisions are taken up and critically reviewed. Decisions rendered by panels and the Appellate Body are many and the totality of decisions cannot possibly be dealt with in this short paper. Cases taken up are entirely on the basis of a subjective choice of the writer and this paper does not claim that it covers decisions of the Appellate Body comprehensively.

## 1. Advantages 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 has contributed much toward the establishment of 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 bilateral or plurilateral negotiations. In a power-oriented international trading system, what counts is the bargaining power of parties. On the other hand, a rule-oriented international trading system, what counts is rules and the legitimacy of legal claims under the rules, e.g., a set of internationally agreed rules of trade prevail over bargaining powers of the parties. This system ensures stability, equity, fairness and predictability in international trade relationships. This system should benefit every trading nation. But especially this 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 can present good legal arguments under WTO agreements. In a bilateral trade negotiation, the economic, political and sometime even military power inevitably affects the negotiating positions of the parties and developing country Members which are often a weaker party in negotiation has to endure disadvantage.

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. Good examples are: the U.S.-Underwear Case (Costa Rica v. U.S.)<sup>2</sup>, the U.S.- Shirts and Blouses Case (India v. U.S.)<sup>3</sup>, the U.S.- Shrimp/Turtle Case (India, Pakistan, Thailand and Malaysia v. U.S.)<sup>4</sup>, the EC-Sardines Case (Peru v. EC)<sup>5</sup> and the EC-Tariff Preferences Case (India v. EC)<sup>6</sup> and the US-Cross Border Gambling Regulation Case (U.S. v. Antigua-Barbuda).<sup>7</sup>

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 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 U.S. 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 U.S. 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

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<sup>2</sup> United States-Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R, 25 February 1997

<sup>3</sup> United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 23 may 1997

<sup>4</sup> United States – Import Prohibition of Certain Shrimps and Shrimp Products, WT/DS58/AB/R, 6 November 1998

<sup>5</sup> European Communities – Trade Description of Sardines, WT/DS231/AB/R, 23 October 2003

<sup>6</sup> European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 20 April 2004

<sup>7</sup> United States-Measures Affecting the Cross Border Supply of Gambling and Betting Services, WT/DS285/AB/R, 20 April 2005

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 restraint 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<sup>8</sup>, 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 U.S. and Japan, 1986) and the Automobile Disputes (between U.S. and Japan, 1995) are well known.

In the Semiconductor Dispute<sup>9</sup>, the United States and Japan concluded an agreement to resolve a dispute on semiconductor issues. The United States argued that the Japanese market was foreclosed to U.S. (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%

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<sup>8</sup> 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, 421 U.S. 1004 (1975)

<sup>9</sup> On the U.S./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 Reporter, Vol. 3, No. 32, August 6, 1986, p. 994, *et seq*; U.S. International Trade Commission, Erasable Programmable Read Only Memories from Japan, Investigation No. 7312-TA-288, USITC Publ. No. 1778 (1985); U.S. International Trade Commission, Dynamic Random Access Memory Semiconductors of 256 Kilobytes and Above from Japan, Investigation No. 731-TA-300, USITC Publ. No. 1803 (1986).

market share to U.S. made chips. The United States invoked Section 301 and prohibited import of certain items from Japan.

In the Automobile Dispute<sup>10</sup>, 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

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<sup>10</sup> On the U.S./Japan Auto Dispute, see Mitsuo Matsushita, “Section 301 of the Trade Act of 1974: The Impact of U.S. Unilateral Trade Sanctions on Japan & Asian Countries,” in *North American & the Asia-pacific in the 21<sup>st</sup> Century* (ed. K.S. Nathan, Asean Academic Press, 1999), pp. 131-154

the ground 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.<sup>11</sup>

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

Since 1995, panels and the Appellate Body have turned out more than 70 decisions and those decisions established important principles in interpreting WTO agreements. These decisions constitute a set of rules which govern trade policies and measures of WTO Members. This WTO jurisprudence is the basis of rule-oriented international trading order and provides stability and predictability to international trade. In the passages below, some of such principles are discussed.

### (a) Like products

The WTO prohibits Members from discriminating against one Member while favoring other (the MFN principle) and discriminating against foreign products and enterprises while favoring domestic products and enterprises (the national treatment principle). The basic principle is that Members should provide foreign products of different Members and foreign and domestic products equal competitive conditions so that they can compete in market on equal terms. The key concept here is “like products”. Discrimination against a foreign product is issue only when the foreign and domestic products are like products. If a foreign product of a Member and a product of another Member are not like products, these products are not in competition with each other. Differential treatment between non-like products does not give rise to the difference in competitive conditions since they are not in competitive relationships. Likewise if a foreign product of a Member and a domestic product are not like products, any differential treatment between them does not create any inequality of competitive conditions. 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

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<sup>11</sup> United States – Section 301 of the Trade Act of 1974, WT/DS152, 27 January 2000

concerning this principle in such cases as the Japan- Alcohol Case<sup>12</sup>, the Korea-Alcohol Case<sup>13</sup>and the EC-Asbestos Case<sup>14</sup>. 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 another 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. 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: (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

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<sup>12</sup> Japan – Taxes on Alcoholic Beverage, WT/DS8.10,10.11/AB/R, 1 November 1996

<sup>13</sup> Korea – Taxes on Alcoholic Beverages, WT/DS75.84/AB/R, 17 February 1999

<sup>14</sup> European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 5 April 2001

Body clarified the interpretation of the scope of applicability of this provision through its reports in the U.S. – Gasoline Case<sup>15</sup> and the U.S. - Shrimp/Turtle Case<sup>16</sup>. Especially important is the U.S.-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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 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

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<sup>15</sup> United States –Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 20 May 1996

<sup>16</sup> See note (4), *supra*.

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 U.S. Cross Border Gambling Case<sup>17</sup> 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 U.S. 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 U.S. measures are qualified to be regarded as measures to protect good moral and public order.

Here again, however, the Appellate Body held that the U.S. 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) Burden of proof

Burden of proof is a rule in the dispute settlement process which determines who is responsible to prove what. It plays a crucial role in dispute settlement because often the question of whether one of the parties prevail or the other depends on who is responsible to prove what. The Appellate Body held in the U.S. – Shirts and Blouses Case<sup>18</sup> that a party which asserts the affirmative of a matter has the burden of establishing a *prima facie* case for it and then the burden shifts to the other party which is responsible to rebut it. On the other hand, panels and the Appellate Body recognized that a party which invoked an exception clause of Article XX of the GATT bears the burden of proving that this invocation is justified.<sup>19</sup> Subsequently the Appellate Body elaborated on the issue of whether a provision of a WTO agreement belongs to an exception similar to those in Article XX of the GATT or it is a provision which merely excludes the matter in question from the prohibition contained in the same provision.

There are many cases in which panels and the Appellate Body dealt with this issue. However, only a few of them will be touched upon below. These are the

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<sup>17</sup> See note (7), *supra*.

<sup>18</sup> See note (3), *supra*.

<sup>19</sup> For cases in which the application of Article XX of the GATT 1994 was an issue, see the U.S. Gasoline Case (note (15), *supra*.) and the U.S. Shrimp and Turtles Case (note (4), *supra*).

EC – Hormones Case<sup>20</sup> and the EC – Sardines Case<sup>21</sup> and, with regard to the Enabling Clause, the EC – Tariff Preferences Case<sup>22</sup>.

The EC-Hormones Case and the EC-Sardines Case deal with essentially similar issues. 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.

In the EC-Sardines Case, the EC, the respondent party, argued that its regulation satisfied the derogation clause in Article 2.4 of the TBT Agreement which states that a Member can deviate from the obligation provided in Article 2.4 to base its domestic standards on international standards if the relevant international standard would be ineffective or inappropriate for the fulfillment of the legitimate objectives of the domestic regulation. The Panel stated that the burden of proving that the requirement for the derogation clause was satisfied was on the defending party. However, 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 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 line of appellate decisions mentioned above raises a question of how to characterize the derogation clauses in the SPS Agreement and TBT Agreement in contrast to Article XX of the GATT. In both, Members are released from liability which they would incur if they did not invoke them. The Appellate Body has explained that the distinction between the derogation clauses in the SPS Agreement and the TBT Agreement and Article XX of the GATT lies in the fact that, while the derogation clauses give the right to Members to take measures

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<sup>20</sup> See note (1), *supra*.

<sup>21</sup> See note (5), *supra*.

<sup>22</sup> See note (6), *supra*.

which would be contrary to the other part of the Agreement but for the derogation clauses, Article XX does not confer any right to Members except for the exemption from the application of GATT disciplines which would apply if they did not invoke the exemption.

This distinction is not entirely clear. Although there are some differences in the ways Article XX of the GATT and the derogation clauses are drafted, there is similarity between the structure of Article XX and the derogation clauses incorporated in the TBT Agreement and the SPS Agreement. Article XX of the GATT exempt certain items from the disciplines of the GATT (Articles I and III etc) provided that certain conditions are met. As long as Members are exempted under Article XX, they are allowed to take measures which would otherwise violate the disciplines of the GATT. Therefore, Article XX is said to provide exception. Likewise the derogation clauses of the TBT Agreement and the SPS Agreement allow Members to take measures which would be contrary to the other part of the Agreement if they did not rely on the derogation clauses.

The EC-Tariffs Classification Case is especially interesting in respect of the distinction between exceptions and positive rights. In this case, the Panel held that Enabling Clause was an exception to Article I of the GATT and the defending party had the responsibility to invoke it. The Appellate Body upheld this finding. However, the Appellate Body made the following comments.

It noted that Enabling Clause uses the words “Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, ...” and that such treatment would otherwise be inconsistent with Article I:1. Therefore, Enabling Clause excepts Members from complying with the obligation of Article I:1 for the purpose of providing differential and more favorable treatment to developing countries. The Appellate Body concluded that, for this reason, Enabling Clause is an exception in relation to GATT obligations.

However, the Appellate Body did not stop there. It further noted that, given the fundamental role of Enabling Clause in the WTO system, the Enabling Clause is not a typical exception and that particular circumstances of this case dictated a special approach. The Appellate Body found that, in its request for the establishment of panel and submissions, the complaining party challenging a measure must not only allege an inconsistency of the measure with Article I:1 but also identify the relevant provisions of the Enabling Clause which it claims are not satisfied by the measure. Once the case has been made for this, the responding

party is responsible to raise a defense that the measure in question is justified by the Enabling Clause.

Although the Appellate Body characterizes the Enabling Clause as an exception, it is not a mere exception but a special exception. In relation to the Enabling Clause, the burden of proof of the complaining party is aggravated as compared with that of complaining parties in regular GATT Article XX cases where the responsibility of complaining parties is just to make a case for inconsistency of a measure with GATT obligations. Then it is incumbent on the defending parties to invoke Article XX and argue successfully that the measure complained about satisfies the requirement of Article XX of the GATT.

In the Appellate Body's scheme, the Enabling Clause is somewhere between GATT Article XX situations and TBT/SPS situations. In Enabling Clause cases, the complaining party must make more claims and adduce more evidence than complaining parties in regular GATT Article XX cases. A question is what is the difference between the Enabling Clause and Article XX of the GATT to justify the different in treatment in respect of the burden of proof. One explanation may be that developed country Members are encouraged to use the Enabling Clause and therefore to "deviate" from non-discrimination in tariffs as far as trade with developing country Members is concerned whereas, in regular GATT XX cases, Members are not only not encouraged to use exceptions as incorporated in Article XX of the GATT but also to admonished to refrain from avoiding GATT obligations by invoking it. If this argument is correct, it may be inappropriate to classify the Enabling Clause as an exception since developed country Members are encouraged to make exceptions. Then it seems more natural to characterize the Enabling Clause as a provision establishing a special right for developed country Members to deviate from GATT obligations for the purpose of promoting the purpose of the WTO regime which is the economic development of developing countries.

Although economic development of developing countries is one of the fundamental purposes of the WTO regime, the matters listed in Article XX of the GATT relate to vital national and international values. Article XX: (b) states that measures necessary to protect life and health of humans, animals and plants are exempted. Article XX(g) of the GATT has been interpreted to cover environmental protection including the protection of endangered species. One can hardly say that these values are less important than the economic development of developing countries.

When one reviews major decisions of panels and the Appellate Body on the

issue of allocating burden of proof, one begins to wonder whether or not there is a qualitative distinction between Article XX on one hand and the derogation clauses in the TBT Agreement and the SPA Agreement on the other to justify the difference in imposing the burden of proof on the disputing parties. The Enabling Clause issue complicates the matter further. Is it not more natural to allocate the burden of proof on the disputing parties according to the same principles in all of those situations? If one applies the principle that the party asserting an affirmative of a claim has the burden of establishing that the claim is justified, a natural consequence seems to be that, as stated in the U.S.-Shirts and Blouses Case, the complaining party has the burden of establishing a *prima facie* case for a violation on the party of the defending party. Once this burden is met, the defending party is responsible to overturn this presumption by establishing that the measure complained of falls under an exemption provided in Article XX of the GATT, the derogation clauses of the TBT Agreement or the SPS Agreement or the Enabling Clause, as the case may be. If looked at this way, one wonders whether there is any reason to distinguishing between Article XX of the GATT, the derogation clauses of the TBT Agreement and the SPS Agreement and the Enabling Clause and apply different rules with respect to the burden of proof.

(c) Zeroing

Zeroing is a practice in the imposition of antidumping duties whereby an AD authority regards minus dumping margins as zero when calculating dumping margins of the product under investigation and thereby artificially raises dumping margins. India challenged the EC practice of zeroing and both the Panel and the Appellate Body held that zeroing was contrary to the AD Agreement.<sup>23</sup> In Soft Lumber Case<sup>24</sup>, the Appellate Body again stated that zeroing was inconsistent with provisions of the AD Agreement. Zeroing is an extension of “averaging” which was a serious trade problem before the WTO came into being. It seems that the rule that zeroing is contrary to the AD Agreement has been firmly established. However, given the fact that some AD authorities have shown strong inclination toward zeroing, it may be necessary to inscribe the prohibition into the

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<sup>23</sup> European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India, Report of the Panel, 30 October 2000, WT/DS141/R; Report of the Appellate Body, 1 May 2001, WT/DS141/AB/R

<sup>24</sup> United States-Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, 31 August 2004

AD Agreement.

(d) The relationship between domestic standards and international standards

One of the important objectives of the WTO is to harmonize economic institutions of Members including harmonization of TBT and SPS measures. Article 2.4 of the TBT Agreement states: “When technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climate or geographical factors or fundamental technological problems.”

An important case in which the Appellate Body made a judgment on the meaning of Article 2.4 of the TBT Agreement is the EC – Sardines Case.<sup>25</sup> In this case, European Communities enacted a rule that the name “sardines” can be used only in connection with canned foods made from fish caught in the North Sea, the Mediterranean Sea, and the Black Sea. On the other hand, Codex Alimentarius which is the international standard on representation of foodstuff allows the use of “sardines” for canned foods made from similar fish which inhabit areas other than those three sea areas as long as the prefix “X” (such as “Pacific”, “Indian Ocean” etc) is used. In this sense, therefore, the EC regulation and Codex Alimentarius were in conflict.

Peru took the European Communities to the WTO and argued that Article 2.4 of the TBT Agreement requires Members to base their domestic standards on international standards and, therefore, the EC rule in question was inconsistent with Article 2.4 of the TBT Agreement. The EC rule in question was enacted before the coming into effect of the TBT Agreement and one of the questions with which the Appellate Body had to deal was whether or not the European Communities had to modify its rule which had existed before the TBT Agreement came into existence on the basis of Codex Alimentarius. The Appellate Body rules that the European Communities was obligated to base its domestic regulation on international standards even if the domestic rule had been enacted before the TBT Agreement.

This reading of Article 2.4 of the TBT Agreement raises a question of

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<sup>25</sup> See note (5), *supra*.

whether or not it accords with the wording of Article 2.4 of the TBT Agreement. Article 2.4 of the TBT Agreement simply provides that a domestic standard must be based on an international standard “[w]here technical regulations are required and relevant international standards exist or their completion is imminent... .” This wording seems to suggest that Members need only to base their domestic standards on international standards when the relevant international standards already exist or their completion is imminent. If read in this way, domestic standards which has already existed when the international standards were promulgated should not be affected by the promulgation of a new international standard. This seems to be a natural reading of Article.

There is also a question of allocation of power between the WTO and Members. Some provisions of WTO agreements (such as Article 2.4 of the TBT Agreement) cut deeply into the realm of domestic jurisdiction. On one hand, there is need to harmonize domestic standards among Members on the basis of international standards and, on the other, there is need to respect the police power of Members in protecting their citizens by establishing standards for product safety, product representation and product testing. The question is where the dividing line should be drawn between the realm of WTO disciplines and that of domestic authorities. The point at which compromise is reached among negotiators of Members in concluding the TBT Agreement is reflected in the wording of Article 2.4 which states that domestic standards need to be based on international standards when they exist or their completion is imminent but this is the limit of the control by the TBT Agreement upon domestic regulatory authority of Members. If one interprets Article 2.4 in light of the wording and its purposes and objectives, this seems to be a reasonable conclusion.

Although there is no case yet in which Panels and the Appellate Body spoke on the question of whether or not there is a similar issue with regard to the SPS Agreement, there seems to be no reason for taking different view. Although the SPS Agreement contains no wording such as that in Article 2.4 of the TBT Agreement, the issues involved in the SPS Agreement are essentially similar to those in the TBT Agreement. Therefore, the ruling relating to the TBT Agreement should apply *mutatis mutandi* to the SPS Agreement.

(e) Enabling Clause

The burden of proof aspect of the Enabling Clause has been already touched

upon earlier. Here some substantive issues of the Enabling Clause will be discussed. The Enabling Clause 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<sup>26</sup>, 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 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

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<sup>26</sup> See note (6), *supra*

be more included 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.

(f) Mandatory/discretionary doctrine

A number of panel and appellate decisions established the doctrine of mandatory/discretionary distinction according to which domestic legislation is classified into mandatory legislation and discretionary legislation. Mandatory legislation denotes a law or other regulation according to which the enforcer of this law or regulation is mandated to apply it in the way in which this application is inconsistent with the requirement of WTO agreements. On the other hand, discretionary legislation means a law or other regulation which gives discretion to the enforcer as to whether it applies the law or regulation in the way in which this application is contrary to WTO agreements or it applies it in the way in which this application does not infringe the prohibition of WTO agreements.

WTO jurisprudence as expressed in a number of panel and appellate decisions has established the doctrine that a mandatory legislation which requires the enforcer to act in the way contrary to WTO agreements is incompatible with the WTO requirement and a discretionary legislation allowing the enforcer to act either in the way incompatible with WTO agreements or in the way consistent with

them is not *per se* inconsistent with WTO. A discretionary legislation is inconsistent with the WTO requirement only when it is applied in such a way as to violate the WTO requirement. Important decisions of panels and the Appellate Body include, *inter alia*, the U.S.-Section 301 Case<sup>27</sup>, the U.S.-1916 Antidumping Act Case<sup>28</sup> and the U.S. Section 211 of the Omnibus Act<sup>29</sup>.

In the U.S.- Section 301 Case, the Panel determined that Section 301 of the U.S. Trade Act *per se* is not inconsistent with the DSU because the Statement of Administrative Action published by the United States Government which states the implementation policy of WTO agreements announces that Section 301 of the U.S. Trade Act will be enforced in a manner consistent with the DSU. It added, however, that Section 301 of the U.S. Trade Act will be held as inconsistent with the WTO requirement if it is enforced in such a manner inconsistent with the WTO requirement.

In the U.S.-1916 Antidumping Act Case, the Appellate Body held that this law was contrary to the WTO requirement. This law provided for criminal penalty and treble damage against dumping. The Appellate Body held that, since Article VI of the GATT and the Antidumping Agreement provide only the imposition of antidumping duties as a remedy to dumping, the 1916 Antidumping Act which allowed a criminal penalty and treble damage recovery provided for remedy outside the permission of Article VI of the GATT and the Antidumping Agreement and was therefore inconsistent with them. Also the Appellate Body held that, under the 1916 Antidumping Act, the law enforcement agencies in the United States were mandated to apply it in a manner inconsistent with Article VI of the GATT and the Antidumping Agreement. According to the Appellate Body, the 1916 Act is a mandatory legislation requiring the enforcement agencies to act in a manner inconsistent with the WTO requirement and therefore is unlawful.

It seems that the mandatory/discretionary doctrine as enunciated by panels and the Appellate Body may be somewhat artificial and may not reflect the reality. There is hardly any legislation which is 100 % mandatory. Even if a law is couched in language which indicates that the enforcement agency must apply it under certain conditions, there is always some room for interpretation. In the U.S.

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<sup>27</sup> See note (11), *supra*.

<sup>28</sup> United States – Anti-Dumping Act of 1916, WT/DS136/R/DSR 2000:X 4593, DSR 2000:X, 4831 (Panel); WT/DS136.162/AB/R, DSR 2000:X, 4793

<sup>29</sup> United States – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/R/DSR 2002:II, 683 (Panel); WT/DS176/AB/R/D SR 2002:II, 589 (1 February 2002) (Appellate Body)

1916 Antidumping Act Case, the Act provided for a criminal penalty and the recovery of treble damage caused by dumping. The Appellate Body seems to have decided that the U.S. Government had no discretion as to whether or not to prosecute an importer who imported dumped products and therefore the Act was mandatory. However, it is a common knowledge that the U.S. Government which was the enforcement agency of the criminal aspect of this law had discretion as to whether or not to bring indictment. In this respect, it seems that the Appellate Body was mistaken. Even in treble damage actions brought by private parties under the 1916 Act, judges have discretion to decide what pieces of evidence are admissible and to decide whether or not there was a causation between the alleged dumping and damage sustained.

In this way, one can hardly say that there is no discretion on the part of the enforcer of a law which appears to be mandatory as far as the wording of the law is concerned. Just to examine the wording of a law and characterize it as mandatory legislation as opposed to discretionary legislation may be too artificial and may lead to a wrong conclusion.

Also there may be a problem with discretionary legislation which could be used in a way in which it could be applied inconsistently with the WTO requirement but is not applied in such a way. Although a discretionary legislation is not applied in a way inconsistent with the WTO requirement, the very fact that this could be applied in a way inconsistent with the WTO requirement would produce chilling effect on international trade. In some situations, this unpredictability may be as distorting to international trade as the flat prohibition.

When one examines the mandatory/discretionary doctrine, one cannot help but feeling that this doctrine may need reconsideration or at least more elaboration.

## Conclusion

The dispute settlement system of the WTO has accomplished a tremendous success. It has established important principles of jurisprudence which applies to trade rules 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.<sup>30</sup>

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.<sup>31</sup> 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 Cartajena 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

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<sup>30</sup> 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.

<sup>31</sup> 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.

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.