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CONTENTS

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I. ABOUT THE QUARTERLY

International trade dispute settlement is now prominent. In particular, WTO dispute settlement has become a very important part of the multilateral trading system and is playing an increasingly crucial role in WTO rule interpretation. The panel and Appellate Body reports show how the provisions of the various WTO agreements should be interpreted and applied to real cases in real life. The developing jurisprudence might support the process towards a fairer market oriented trading system but it can also undermine the carefully negotiated and drafted texts of the Uruguay Round agreements. It is therefore important for developing countries to be aware of the potential utility, as well as the potential adverse impacts, of the WTO dispute settlement mechanism vis-à-vis their concerns in the negotiations.

The main purpose of this quarterly is to provide analyses, from a developing country perspective, of the various legal, political and process-related issues arising from WTO dispute settlement. However, the coverage will also extend, where necessary, to bilateral and regional trade disputes. By being equipped with such analyses, developing countries will be better positioned to understand how they can use the rules to ensure that their benefits are maximized under the multilateral trading system.

The quarterly is divided into several parts, namely: concise analyses of WTO panel and Appellate Body reports or of international trade disputes in other forums – this part will sometimes carry general articles pertaining to trade disputes; brief descriptions of notable dispute settlement reports or new or pending disputes; and, sometimes, updates on WTO Dispute Settlement Understanding review negotiations. It is hoped that the publication will be useful not only to developing country officials engaged in international trade negotiations and trade policy formulation, but also to scholars, academics and others interested in WTO matters and international trade law generally.

II. CASE ANALYSES

This issue of the quarterly has two case analyses, on *EC – Frozen Boneless Chicken* and *EC – Geographical Indications*. Each case analysis sets out the facts very briefly and discusses selected findings and their possible implications for developing countries in particular, and for the WTO system in general.

1. EC–Frozen Boneless Chicken[1]

Main Facts

The EC changed its classification of imports of frozen boneless chicken from the category of "salted meat" to that of "frozen chicken". Brazil and Thailand claimed that the reclassification resulted in the products being accorded treatment less favourable than that provided for in the EC Schedule of concessions, thereby violating Article II of the GATT 1994. They asserted that frozen salted chicken had previously been subject to an ad valorem tariff of 15.4% and that, after the reclassification, it is subject to a tariff of 58.9%, as well as being potentially subject to special safeguard measures pursuant to Article 5 of the Agreement on Agriculture.

Decision

The Panel found that the EC was in violation of GATT Article II because the frozen boneless chicken was being accorded treatment different from that prescribed in the Schedule of concessions, and because the products were subject to a tariff that was potentially higher than that provided under the initial heading. The parties have since appealed to the Appellate Body.

Analysis

Jurisdiction of panels (7.52 – 7.59)[2]

Article 13 of the DSU allows panels to seek information from any individual or body deemed appropriate. The Panel requested the World Customs Organization (WCO) to provide it with information pursuant to this article. In addition to its replies to the Panel request, the WCO mentioned that the dispute involved a classification question concerning several contracting parties to the International Convention on the Harmonized Commodity Description System (HS Convention). The WCO stated that the HS Convention requires such disputes to be settled by negotiation between the parties. Any dispute that is not settled in that way has to be referred to the HS Committee which then considers the dispute and makes recommendations for its settlement. The WCO suggested that these procedures should be followed by the parties before the panel makes a decision.

The Panel recognized the jurisdiction and competence of the WCO. However,

[1] *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R, WT/DS286/R.

[2] The numbers in brackets denote the relevant paragraph numbers in the Panel report.

it noted that the dispute raised the question of whether or not the measures at issue violate Article II of the GATT and required interpretation of WTO treaty terms. The Panel also noted that all the parties to the dispute appeared to consider that the case should be decided by the Panel. The matter was therefore properly before the Panel, and, by virtue of Article 11 of the DSU, once a panel is seized of a matter, it has to make an objective assessment of the matter in order to assist the DSB to make recommendations or rulings.[3] A panel cannot abdicate this responsibility. The DSU does not provide panels with the authority to refer a dispute to the WCO or to any other body. The Panel found support in Article 23 of the DSU, which stipulates that Members should have recourse to and abide by the rules and procedures of the DSU when they seek to resolve disputes involving the WTO covered agreements. This article affirms the exclusivity of the jurisdiction of the WTO dispute settlement system, and it would be a violation of the article for a Member to submit a dispute concerning rights and obligations under the WTO Agreement to an international dispute settlement body outside the WTO framework.[4]

However, Article 23 raises a more profound issue. If a dispute arises between WTO Members and the dispute concerns not only matters under the covered agreements but also under another international agreement to which the disputing Members are party, and the other international agreement also has exclusive dispute settlement procedures, which procedures should the parties submit to? If they decide to resolve the dispute using the procedures under the other international agreement, would they be violating Article 23 of the DSU? If it is a violation, can the parties successfully invoke the other international agreement as justification for violating WTO rules? This involves the difficult question of conflict in public international law, an issue that cannot be dealt with in this short note. Suffice to say that the parties should be free to choose the forum in which they want their dispute to be adjudicated. By saying that the parties considered that the case should be decided in the WTO, the Panel in *EC – Frozen Boneless Chicken* suggests that there may well be other cases in which parties might rightly consider another forum as the proper place for resolving a dispute involving both WTO and extra-WTO issues.

Since the WTO requires its Members to resolve their disputes in accordance with the DSU, and since the DSU does not authorize panels to submit disputes to other bodies, the issue of jurisdiction does not raise problems in WTO dispute settlement. This should be contrasted with other international tribunals, like the International Court of Justice, where jurisdiction issues take up a lot of time because disputes rarely proceed to the substantive phase without one of the

[3] Article 11 provides that: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…"

[4] *European Communities – Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, paras. 7.175– 7.195.

parties objecting to the jurisdiction of the court. By circumventing jurisdictional issues, the WTO dispute settlement system is in a much better position to achieve one of its stated objectives, namely, the prompt settlement of disputes.

Reclassification

During the Uruguay Round of trade negotiations, Members agreed to limit their tariffs to maximum levels known as "tariff bindings". Charging tariffs that are higher than the bound levels is a violation of the GATT. However, there are no WTO rules on how Members should classify their products for the purpose of imposing tariffs. Most Members use the WCO's Harmonized System, but these are not binding in the WTO. The situation is somewhat similar to that in the GATS where there is no binding classification system and most Members use the UN Central Product Classification Code, the 1993 Scheduling Guidelines, and the WTO's W/120.

The problem with not having a binding system is that there is room for Members to use disingenuous means to circumvent their WTO obligations. That is what the EC seems to have done in this case. The EC reclassification of frozen boneless chicken from the category of salted meat to that of frozen chicken increased the applicable tariff by almost four times. The Panel found that the EC action had resulted in the imports from Brazil and Thailand being accorded treatment less favourable than that provided for in the EC Schedule. The EC was therefore acting inconsistently with its obligations under Article II of the GATT, which requires each WTO Member to accord to the commerce of other Members treatment no less favourable than that contained in its Schedule, and also not to impose duties in excess of those set out in the Schedule.

The decision affirms that Members cannot take advantage of the absence of binding classification rules to circumvent their obligations.

Time frame for interpretation (7.95 – 7.103)

One of the issues that arose when determining the ordinary meaning of the EC Schedule was the relevant time at which the meanings of the Schedule should be assessed. Brazil and Thailand argued that the relevant time was the date when the GATT Contracting Parties signed the Final Act of the Uruguay Round and when Members' Schedules were annexed to the Marrakesh Protocol, that is, 15 April 1994. The EC counter-argued that the meaning of its concessions should be assessed as of the date of the Panel establishment.

The Panel found no support for the proposition that the date of the interpretation of WTO treaty obligations should be the date of establishment of a panel. Instead, it cited several leading international law commentators to substantiate its view that the meaning of a treaty provision should in principle be the one attributed to it at the time of the conclusion of the treaty. Thus the Panel said it would examine the ordinary meaning of the EC Schedule as at 15 April 1994, because the Schedule was concluded when the Final Act of the Uruguay Round negotiations was signed and when Members' Schedules were annexed to the Marrakesh Protocol.

The finding of the Panel should not be read as establishing a general principle that the meaning of WTO agreements will always be assessed as at the date on which the agreements were concluded. As the Panel acknowledged, some WTO jurisprudence suggests that an evolutionary approach to treaty interpretation is required in certain cases in order to take into account of changing circumstances. For instance, in *US – Shrimp*, the Appellate Body mentioned that the term "natural resources" in Article XX(g) is not static in its content or reference but is by definition evolutionary, so that it could not be interpreted to mean only non-living resources, as may have been understood in the past. The Appellate Body noted that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.[5]

The Panel was not obliged to follow the Appellate Body's evolutionary approach. Interestingly, it appears that the Panel did not to follow the evolutionary approach partly because, as it stated in a footnote, "none of the parties to the dispute advocated such an evolutionary approach for the EC concession in question"[6]. If the Panel is suggesting that it will only follow interpretative approaches that have been advocated for by the parties, it could be mistaken or misguided as to the functions of panels and the parties. It is not the responsibility of the parties to provide panels with the legal interpretation to be given to treaty provisions, or with the approach to be used in interpreting, or to prove the relevant applicable law. The principle of *jura novit curia*[7] entails that it being the duty of a panel itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the panel.[8] Therefore, it is immaterial that none of the parties wanted the Panel to use the evolutionary approach; if the circumstances were such that an evolutionary approach was required, the Panel should have adopted that approach. Perhaps this was not necessary in the present case.

Object and purpose of the WTO Agreement (7.304 - 7.328)

The Preamble to the WTO Agreement has been invoked in a number of cases as evidence of the object and purpose of the Agreement.[9] Most famously, the Appellate Body in *US – Shrimp* said that the Preamble demonstrates WTO negotiators' recognition that optimal use of the world's resources should be made in accordance with the objective of sustainable development. It also stated that, as the preambular language reflects the intentions of negotiators of the WTO Agreement, it must add colour, texture and shading to the interpretation of the agreements annexed to the WTO Agreement.[10]

[5] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 130.
[6] Footnote 144.
[7] "The court knows the law".
[8] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 105.
[9] See "WTO Appellate Body Repertory of Reports and Awards 1995-2004", available at www.wto.org.
[10] Para. 153.

Brazil and Thailand argued that the security and predictability of tariff concessions is the main object and purpose of the GATT 1994. Such predictability and security means that concessions must not be changed unilaterally without a proper remedy, for, if it were otherwise, Members would not enter into trade negotiations. They argued that by unilaterally changing the concession it provided in its Schedule, the EC had disrupted the essential object and purpose of the WTO Agreement.

The Panel recalled that according to its preamble, one of the purposes of the WTO Agreement is to expand trade in goods and services. The Panel also said that Members can contribute to this purpose by entering into reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs and other barriers to trade. It proceeded to cite *Argentina – Textiles and Apparel*[11] to the effect that a basic object and purpose of the GATT 1994 as reflected in Article II is to preserve the value of tariff concessions negotiated by a Member with its trading partners and bound in that Member's Schedule. The Panel then concluded that concessions made by WTO Members should be interpreted so as to further the general objective of expansion of trade in goods and substantial reduction of tariffs. The terms of concessions should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties.

The Panel finding assures Members because it stresses the primacy of the security and predictability of concessions. It would be a waste of time for Members to spend substantial time and financial resources negotiating concessions that are later on interpreted in a way that renders them meaningless.

Subsequent practice (7.246 – 7.257)

Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) provides that "subsequent practice" shall be taken into account together with the context when interpreting treaties. One of the issues in this case was: whose subsequent practice should be considered?

Quoting earlier WTO case law, the Panel stated that subsequent practice entails a concordant, common and consistent sequence of acts or omissions which is sufficient to establish a discernible pattern. This does not mean that all WTO Members must have engaged in the practice; rather, it suffices if it is shown that all Members have accepted the practice. Such acceptance may be deduced from a party's lack of reaction to the practice at issue. The panel considered the EC classification practice as subsequent practice partly because there was no evidence that WTO Members protested against the practice. The other reason was that the EC was the only Member with any practice classifying these products that also imports them.

It is surprising that the actions of one Member were taken to amount to practice, especially after the EC itself had argued that the practice of one party alone cannot determine the interpretation of a treaty. Among other things, the Panel relied on the Appellate Body statement in *EC – Computer Equipment*

[11] *Argentina – Measures Affecting Imports of Footwear, Textiles and Other Items*, WT/DS56/AB/R, para. 47.

that the prior practice of one of the parties may be relevant in establishing the common intention of the parties to the treaty.[12] The Panel's broad approach to determining whether one Member's practice constitutes "subsequent practice" should be contrasted with that of the Appellate Body in *US – Gambling*. The Appellate Body said that a US classification practice did not establish a common, consistent, discernible pattern of acts or pronouncements by Members as a whole, and that the US practice could not be taken to demonstrate a common understanding among Members.[13]

The Panel was probably right to say that it is not necessary to show that all signatories to a treaty must have engaged in a particular practice in order for it to qualify as subsequent practice under the VCLT. Likewise, the Panel might be right to state that it may be sufficient to show that all parties to the treaty have accepted the relevant practice. The Panel also said that in its view, such acceptance may be deduced from a party's reaction or lack of reaction to the practice at issue.

The standard of acceptance used here is not applicable universally. In some instances, silence alone cannot be read as signifying acceptance of a factual or legal situation. There must be clear and unambiguous facts or statements to show that there is acceptance. According to prior WTO jurisprudence, the fact that a Member does not complain about a measure at a given point in time cannot by itself deprive that Member of its right to initiate a dispute at a later stage.[14] An oft-cited GATT dispute settlement report also stated that it would be erroneous to interpret the fact that a measure has not been challenged over a number of years as tantamount to its tacit acceptance.[15] It would require more than mere silence to take away a Member's right to invoke the DSU to challenge other Members' practice or measures.[16]

Appeal

Both the EC and the Complainants have appealed the Panel report.[17] The EC contends that, among other things, the Panel improperly applied the notion of subsequent practice by misinterpreting "subsequent practice" and also by considering that the unilateral practice of one party could have a bearing on a multilaterally agreed text. Further, the EC says that by relying on "security and predictability", the Panel failed to properly apply the notion of object and purpose of the treaty. Given the discussion above on "subsequent practice" and on "object and purpose of a treaty", it will be interesting to see how the EC will develop its arguments and how the Appellate Body will treat the issues. For example, will the Appellate

[12] *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, para. 93.

[13] *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, paras. 190-194.

[14] *European Communities – Export Subsidies on Sugar*, WT/DS266/R, para. 7.69, affirmed by the Appellate Body in WT/DS266/AB/R.

[15] *European Economic Community – Quantitative Restrictions on Certain Products from Hong Kong*, BISD 30S/129, para. 28.

[16] See "The South Centre Quarterly on Trade Disputes" Vol. I Issue I at p. 17 for a discussion on estoppel in the *EC – Sugar* case, available at www.southcentre.org.

[17] WT/DS269/6, WT/DS286/8 (EC), dated 13 June 2005, WT/DS269/7 (Brazil) and WT/DS286/9 (Thailand), both dated 27 June 2005.

Body affirm the Panel's broad approach to "subsequent practice" or will it prefer the narrower approach that it has applied in previous cases?

Brazil and Thailand seek appellate review of the Panel's findings that some of the measures were outside the terms of reference. The Complainants are also querying the Panel's contextual interpretation of the EC Schedule. The Appellate Body would be required to complete the legal analysis if it reverses the Panel findings on these two issues. Completing the legal analysis will depend on the availability of sufficient uncontested facts pertaining to these issues in the Panel report.

2. EC – Geographical Indications[1]

Main Facts

The European Communities has a special taste for using the protection of geographic indications and designations of origin (GIs) of EC wines, spirits, agricultural products and foodstuffs in order to maintain the competitive advantage of these products. The GIs protection regime for agricultural products and foodstuffs aims at securing high value for products in the market that covers consumers around the world who have developed sophistication and selectivity about the food and drink they consume. The trade-related concerns arising from GIs include the extent to which product names should be protected like brands when some of the GIs have become generic terms. The EC expanded the use of GIs protection by creating a registry of names that protects over 700 agricultural products and foodstuffs in accordance with the Regulations 2081/92 of July 14, 1992 on the protection of GIs for agricultural products and foodstuffs.

The application of the Regulations is considered as a valid means of implementing the Common Agricultural Policy of the EC. GIs protection grants all producers from a specific region a monopoly right to use the registered GIs. The only limitation is the MFN and national treatment requirements, as well as the prior rights of trademarks under the TRIPS Agreement.

In the dispute, Australia and the United States claimed that the Regulations violate various provisions of the TRIPS Agreement; the Paris Convention for the Protection of Industrial Property (Paris Convention (1967)); the GATT and TBT. The claims primarily underscored the fact that geographical indications and designations of origin located in the territory of a WTO Member outside the EC can only be registered under the Regulations if that Member adopts a system for GIs protection that is equivalent to that in the EC and provides reciprocal protection to products from the EC. In response, the EC argued that Article 12 of the Regulation on equivalence and reciprocity does not apply to WTO Members, but only to other third countries.[2] As a result, the dispute focused on:

[1] *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R (Australia) and WT/DS174/R (United States)

[2] Australia Report, paras. 7.89-94, U.S. Report, paras. 7.38-43.

- legal principles that require equivalent protection in other states as a condition for enjoying the protection available in the country adopting such principle; and
- legal principles that require reciprocal treatment as a condition for availability of protection, continued existence of such protection and availment to the procedures for protection.

Australia and the US argued that the EC's GI system violates national treatment standards in various ways. They claimed that the system does not give the same protection to non-EC products that it provides to EC products. In addition, they alleged that it is administratively too burdensome and costly for a foreign company to register a GI. The complaint targeted provisions under EC Regulation 2081/92 setting out additional conditions for non-EC producers and processors seeking registration for their GIs in the EC.

Argentina, Brazil, China, Colombia, Guatemala, India and Mexico participated as third parties in support of the Complainants.

Decision

After considering the text of the Regulation and the EC's own statements concerning the Regulations, the Panel found that Australia and the US had made a prima facie case that the equivalence and reciprocity conditions of the Regulations apply to the availability of protection and the registration procedure for GIs located in third countries, including WTO Members.[3] Based on this factual finding, the Panel made its conclusion on claims of MFN and national treatment, trade restrictiveness and priority rights of trademark owners.

It is necessary to set out the findings on particular claims before proceeding to the analysis.

National Treatment and MFN

The EC Regulation was challenged on the grounds of national treatment under Article 3.1 of the TRIPS Agreement and Article III:4 of the GATT (1994) with regard to the availability of protection and various procedural requirements for application, objection and inspection.

The most important finding of the Panel is that by the equivalence and reciprocity conditions, as applicable to *the availability* of GIs protection, the EC Regulation accords to the nationals of other Members treatment less favourable than that it accords to its own nationals, inconsistently with Article 3.1 of the TRIPS Agreement.[4] The Panel observed that the Regulation creates a "link" between "persons, the territory of a particular Member, and the availability of protection." As a result, it said, the Regulation discriminates with respect to the *availability* of protection between GIs based on location and it formally discriminates between persons producing, processing and/or preparing a product, in accordance with a specification, in the EC, or in third

[3] Australia Report, para. 7.152, U.S. Report, para. 7.102.
[4] Australia Report, para. 7.249, U.S. Report, para. 7.213.

countries, including WTO Members.[5] However, the Panel found that "with respect to the availability of protection application, the Regulation does not impose a requirement as to domicile or establishment inconsistently with Article 2(2) of the Paris Convention (1967)…"[6]

Further, the EC Regulation was deemed to be a "law or regulation affecting the internal sale and offering for sale of products"; and, because products from WTO Members face an "extra hurdle" in obtaining GIs registration, "less favourable treatment" has been accorded to imported products, inconsistently with Article III:4 of GATT."[7]

The Panel reached the following findings on the national treatment requirement claims:

- On *application procedures*, insofar as they require examination and transmission of applications by governments on behalf their nationals, the Panel found that the Regulation accords other WTO Member nationals and imported products less favourable treatment than it accords the EC's own nationals and domestic products inconsistently with Article 3.1 of the TRIPS Agreement and Article III:4 of GATT;[8]
- The *objection procedures* violate national treatment requirements insofar as they require the verification and transmission of objections by governments inconsistently with Article 3.1 of the TRIPS Agreement.[9] But, the Panel found no violation of Article 2(2) of the Paris Convention (1967), with respect to the objection procedures, and concluded that the Regulation does not impose a requirement of domicile or establishment inconsistently with the Convention as incorporated by Article 2.1 of the TRIPS Agreement.
- With respect to the government participation required in the *inspection structures*, and the provision of the declaration by governments, the Regulation accords less favourable treatment to the nationals of other Members than to the EC's own nationals, inconsistently with Article 3.1 of the TRIPS Agreement."[10]
- The requirements of government participation in the inspection structures, and the provision of the declaration by governments make the Regulation accord less favourable treatment to imported products than domestic products, inconsistently with Article III:4 of GATT".[11]

As to Paris Convention Article 2(1), the Panel exercised judicial economy with respect to the availability of protection, application procedures and objection procedures (for verification and

[5] Australia Report, paras. 7.225-226, U.S. Report, paras. 7.189-190.
[6] Australia Report, paras. 7.250-254, 7.317, U.S. Report, paras. 7.214-218.
[7] Australia Report, paras. 7.262 and 273, U.S. Report, paras. 7.226 and 238.
[8] Australia Report, paras. 7.316 and 7.326-327, U.S. Report, para. 7.281 and 7.291-292.
[9] Australia Report, para. 7.378, U.S. Report, para. 7.345.
[10] U.S. Report, paras. 7.421-431.
[11] U.S. Report, paras. 7.440-441.

transmission). However, it adjudicated on and found no violation for objection procedures under equivalence or reciprocity conditions and standing requirements, labeling requirements and prescriptive requirements based on nationality for access to the inspection structure.[12]

The Panel also exercised judicial economy and made no findings on the MFN treatment claims under Article 4 of the TRIPS Agreement and Article I:1 of GATT with regard to the availability of protection. However, it did address the claims under Article 4 of the TRIPS Agreement concerning application procedures under the Regulations and found that there was no violation.

Relationship between GIs and Prior Trademarks

The relationship between prior trademarks and GIs is one of the important issues that the Panel was requested to address. Article 16 of the TRIPS Agreement protects owners of registered trademark from third parties using identical or similar signs for goods or services where such use would result in a likelihood of confusion. But, Article 17 of the TRIPS Agreement allows limited exceptions that take into account the legitimate interests of owners of trademarks and third parties.

Australia and the US claimed that the EC Regulation is inconsistent with the right to prevent uses of GIs which would result in a "likelihood of confusion" with a valid prior trademark. The EC argued that the Regulation prevents the registration of GIs, the use of which would result in a likelihood of confusion with a prior trademark, and in any event the Regulation would be justified as a limited exception under Article 17 of the TRIPS Agreement.[13]

The Panel noted that the right provided in Article 16.1 of the TRIPS Agreement is an exclusive one. Accordingly, WTO Members are required to make available to trademark owners a right against certain uses, including uses as a GI. On this basis, the Panel found that "[t]he Regulation limits the availability of that right for the owners of trademarks".[14]

However, the Panel accepted the EC argument that the Regulation is justified under Article 17 of the TRIPS Agreement. The Panel stated that, "Article 17 expressly permits Members to provide limited exceptions to the rights conferred by a trademark, which include the right provided for in Article 16.1 of the TRIPS Agreement, "subject to a proviso that 'such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.'"[15]

The Panel found that the Regulation creates a 'limited exception' within the meaning of Article 17 of the TRIPS Agreement and takes into account the legitimate interest of the trademark owner in preserving the distinctiveness, or capacity to distinguish, of its trademark so that it can perform that

[12] Australia Report, paras. 7.379-380, U.S. Report, paras. 7.346-347.

[13] Australia Report, paras. 7.516-517, U.S. Report, paras. 7.512-513.

[14] Australia Report, para. 7.625 and U.S. Report, para. 7.625.

[15] Australia Report, paras. 7.646-648, U.S. Report, paras. 7.646-648.

function, as well as the relevant third parties' interests.[16]

Based on the above analysis the Panel concluded that "with respect to the coexistence of GIs with prior trademarks, the Regulation is inconsistent with Article 16.1 of the TRIPS Agreement but, on the basis of the evidence presented to the Panel, this is justified by Article 17 of the TRIPS Agreement." It added that TRIPS Agreement Articles 24.3 and 24.5 are inapplicable.[17]

Analysis

The Future of Equivalence and Reciprocity Conditions under the IP System

Reciprocity and equivalence have always been designed as instruments to dictate the domestic regime of countries, which do not provide for a certain, higher level of protection. This function of reciprocity has been employed in the intellectual property regime, outside the TRIPS Agreement, in the cases of the EC Database Directive and Semi-Conductor Chip Protection Act of the U.S.A. Both the EC Directive and the US Statute force other countries to adopt protection in order to fulfill the reciprocity requirement.

The major contention in the *EC – Geographical Indications* case was the reciprocity and equivalence conditions of protection for the GIs regime covered under the TRIPS Agreement. On the one hand, the Panel made several findings that have rendered the reciprocity and equivalence conditions inconsistent with the national treatment obligation under TRIPS Agreement and the GATT. On the other hand, the Panel suggested that the EC could easily bring its legislation in line with global trade rules by explicitly excluding WTO Members from the reciprocity requirement. This seems to have been one of the underlying intentions of the EC in its defence throughout the proceedings.

As a result, the decision is not decisive in undermining resort to 'reciprocity' and 'equivalence' for protection of IP rights covered under the TRIPS Agreement or for products that fall under the GATT in favour of national treatment. Grey areas remain on the use of reciprocity to dictate policies to other countries, namely, non-WTO Members. It is also not clear whether the decision will be relevant for subjects not covered under TRIPS, like *sui generis* protection of databases.

A more general question on the outcome of the case is: what is the relevance of this case for developing countries and geographical indications originating in developing countries? The answer might depend on more fundamental issues like the importance of the weakening of reciprocity and equivalence requirements in the IP system, and the importance of GIs for developing countries and consumers.

The decision will be favourable for developing countries that have the capacity to aggressively market their agricultural products and foodstuffs as recognized GIs. The EC system for the protection of non-EC GIs could also be

[16] Australia Report, paras. 7.661, 668 and 684, U.S. Report, paras. 7.661, 668 and 686.
17 Australia Report, para. 7.686, U.S. Report, para. 7.688.

administratively less burdensome than it was for developing country nationals registering recognized GIs.

Implications for Negotiations

The EC indicated its interest to include GIs in the definition and market access provisions of the Agreement on Agriculture, and to create an annex that lists GIs protected by the Agreement[18]. Although Annex 'A' paragraph 49 of the July Package indicated that GIs are among other issues of interest but not agreed for discussion in the agriculture negotiations, the EC submitted updated proposals demanding amendment of the TRIPS Agreement to introduce 'extension' of coverage of goods and establishing a multilateral registry for GIs.[19]

The major immediate concerns for developing countries, in addition to the priority of trademarks, include:

- What will be the effect on developing countries' competitiveness in agricultural trade when there is protection of domestic EC agricultural industry by creating GIs for agricultural products and food stuffs?
- What will be the extent of support of rural "less favoured or remote" economies and commercial benefits to farmers and producers unable to qualify for trade protection?
- What will be the impact for the competitiveness of agricultural sectors of developing countries where EC is able to maintain economic support of rural "less favoured or remote" economies and commercial benefits to farmers and producers unable to qualify for trade protection?
- Could the protection of GIs serve as a new strategy to implement the Common Agricultural Policy in a manner that undermines the benefit of agricultural reform in the WTO?

The application of the GIs protection system currently covers more than 700 products in different categories including meat and meat based products, cheeses, oils, fruits, vegetables, cereals, fish, beer, pasta, bread, pastry, cakes, confectionery, biscuits, chocolate and other food preparations containing cocoa, among others. These categories virtually create monopolies for agricultural products and foodstuffs based on GIs. This will help the EC to expand its market share and to gain an advantage over non-EU products from more competitive producing countries.

The EC arguments linking GIs and agricultural negotiations might jeopardize the possibility of progress in eliminating export subsidies, improving market access and reducing trade-distorting domestic programs, and might also complicate the debate for reform of agricultural sector in the WTO.

Test Case: The Columbian Application for the Protection of 'Café de Colombia'

On 8 June 2005, the Colombian government sent the EC an application from the "Federación Nacional de cafeteros de Colombia" to register "Café

[18] JOB(03)12, 5 February 2003
[19] WT/GC/W/26 (TN/C/W/26-TN/IP/W/11) on 14 June 2005

de Colombia" as a Protected Denomination of Origin (PDO) in the Community Register of Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI). This is the first application made from a third country to register a GI in the EC. It is noteworthy that the application comes from an association of producers in a developing country.

One of the implications of the *EC – Geographical Indications* Panel report is that the EC cannot deny registration based on reciprocity and equivalence of protection for GIs from EC in Colombia. This is also applicable to procedures of application and objection. Although the Colombian government has filed the application on behalf of the federation of coffee growers, the Panel report has cleared the administrative hurdle that required government participation in the application and objection procedures for non-EC nationals.

The question that remains is whether Café de Colombia will fulfill the criteria for GIs protection under the EC Regulation and the extent to which the possibility of direct access for non-EC nationals will open up opportunities for protection of other products from developing countries.

III. DEVELOPMENTS IN THE WTO DSU REVIEW NEGOTIATIONS SINCE JULY 2004

Introduction

The Doha Ministerial Declaration mandated WTO Members to negotiate with a view to clarifying and improving the Dispute Settlement Understanding (DSU). These negotiations present an opportunity for developing countries to push for rules that are development-friendly and that might enhance their effective participation in the dispute settlement system. By taking part in the review process, developing countries might learn more about WTO dispute settlement without having to be involved in an actual dispute.

On 1 August 2004 the General Council adopted a recommendation that Members should continue the DSU negotiations.[1] The purpose of this note is to highlight the proposals that have been submitted and/or discussed since then in order to flag the important issues arising there from. It is hoped that by presenting a general overview of the submissions, the note will help developing country delegates and officials who are not active in the DSU negotiations to get a general understanding of the state of play in the DSU review process; and possibly to encourage them to submit their own new or revised proposals.

Proposals Submitted or Discussed after July 2004

Sequencing

[1] This is part of WT/L/579, commonly known as the July Package.

A group of six delegations presented a joint informal proposal covering, among other things, sequencing between compliance proceedings and retaliation procedures.[2] The issue involves Articles 21.5 and 22.6 of the DSU. Under Article 21.5, a complaining Member can request a panel to be established to assess the consistency of a measure taken by a respondent to comply with the recommendations and rulings of the DSB. This means a Member cannot unilaterally decide that the implemented measures do not comply with the DSB recommendations or rulings. However, under Article 22.6, if a responding Member fails to bring its measures into compliance within the reasonable period of time and the parties fail to agree on compensation within 20 days after the expiry of the reasonable period, the complaining Member can request authorization from the DSB to suspend concessions or obligations (retaliate), regardless of whether or not Article 21.5 proceedings have been instituted.

The *EC – Bananas*[3] case illustrated the inconsistency between the two articles. The EC had lost a dispute in which Ecuador and other complainants were challenging the EC banana regime. At the compliance stage, the EC and Ecuador separately requested the establishment of panels under Article 21.5 to determine whether measures implemented by the EC were consistent with the recommendations of the DSB. The United States, on the other hand, had requested authorization under Article 22.6 to suspend concessions to the EC before the compliance of the measures could be determined under Article 21.5. The question was, and is, whether there should be a multilateral determination of non-compliance under Article 21.5 before Article 22.6 can be invoked to authorize retaliation on the basis of the respondent's alleged non-compliance. Thus, should there be a sequence between Articles 21.5 and 22.6?

Ideally, Members should not resort to the Article 22.6 procedure before the consistency of measures taken to implement DSB recommendations has been determined under Article 21.5. In practice, Members agree not to request retaliation before a determination of non-compliance is made under Article 21.5.[4] The group of six seeks to codify this practice as it proposes that the procedure under Article 21.5 should be exhausted before recourse can be made to Article 22.6.

The EC and Japan have recently made a submission building on the proposal of the group of six. Their submission and the proposal stipulate that retaliation should be requested only in the following situations: when a Member concerned has not informed the DSB of its intention to comply with a ruling; where the Member has notified the DSB that it does not intend to comply with the ruling; where the Member has not submitted a notification of compliance within the given time; and where it is established under Article 21 that the

[2] JOB(04)/52, 19 May, 2004. The group was composed of Argentina, Brazil, Canada, India, New Zealand and Norway.

[3] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R.

[4] Zimmermann, T., (2005) "WTO Dispute Settlement at Ten: Evolution, Experiences, and Evaluation" in *Aussenwirtschaft – The Swiss Review of International Economic Relations*, Vol. 60 (2005) No. I, pp. 27-61, at p. 50.

Member has failed to bring its measure into compliance with the covered agreements.[5]

The proposal of the group of six avoids lengthening the time frames for dispute settlement by indicating that consultations are not required under the Article 21 procedure, and also by providing that there is no entitlement to an additional reasonable period of time under Article 21.5. Sequencing appears to be in line with the spirit of the DSU. The DSU stresses that mutually acceptable solutions are preferred, and that the first objective of the dispute settlement system is to secure the withdrawal of the measures concerned.[6] Compensation and retaliation are only the last resort.

Remand procedure

The Appellate Body can only hear appeals on issues of law and legal interpretations by the panel. It cannot be a trier of the facts; and it cannot remand the case to the panel when it needs more facts in order for it to complete a legal analysis.

The lack of remand authority has presented serious problems. In the recent *EC – Sugar* case[7], the panel exercised judicial economy with respect to claims under the Subsidies and Countervailing Measures Agreement. It stated that a decision on those claims was not necessary for the resolution of the dispute because a violation of the Agriculture Agreement had already been established. The Appellate Body reversed the ruling and said that by failing to address the SCM Agreement claims, the Panel had precluded the possibility of a remedy being made in favour of the complainants under Article 4.7 of the SCM Agreement, which requires prohibited subsidies to be withdrawn without delay. However, the Appellate Body could not complete the legal analysis and could not examine the claims because there were insufficient facts. Thus the Complainants were deprived of a remedy, and could only get a decision on the issue if they brought a fresh claim.

The group of six countries proposed that where the Appellate Body finds that the panel report does not provide a sufficient factual basis to complete the analysis with respect to certain issues, it must provide a detailed description of the nature of the findings that would be required to complete the analysis. Any of the disputing parties may then request the Appellate Body to send the issue back to the original panel for more findings of facts. The proponents state that this procedure should not affect the adoption and implementation of reports: for instance, some aspects of a report can be adopted even when one of the issues has been remanded.

Remand procedures would allow the Appellate Body to focus on clarifying the legal provisions of the WTO agreements.[8] It would also prevent the kind of injustice that occurred in *EC – Sugar*. Given the expense and time involved in litigating a dispute in the WTO dispute settlement system, it is

[5] JOB(05)/71, 3 May, 2005.
[6] Article 3, DSU.
[7] *European Communities – Export Subsidies on Sugar*, WT/DS266/AB/R.

[8] Petersmann, E., (2003) "WTO Negotiators Meet Academics – The Negotiations on Improvements of the WTO Dispute Settlement" System, *JIEL* 6 pp. 237-247, at p. 241.

unacceptable for an issue to remain unresolved simply because a panel report does not have sufficient factual findings. The only worry is that the possibility of appealing a remand report could lengthen the time frame for settling disputes.[9]

Post retaliation: procedures for the removal of authorization for suspension of concessions or other obligations

Article 22.8 governs the removal of authorization for suspension of concessions or other obligations. However, it does not address situations where the parties disagree as to whether or not the defending party's proposed implementation measure complies with the WTO rules.

The group of six proposed a way of filling this gap. They suggested that where there is disagreement, a concerned Member should use the procedures under Article 21.5. This procedure would provide for the establishment of a panel to judge whether implementation measures are consistent with the recommendations and rulings of the DSB. If the panel establishes that there is consistency, a Member can use that as a basis for withdrawing the authorization to retaliate.

The burden of launching the proceedings falls on the defending Member, but the complaining Member is also allowed to claim that the measures taken to comply are inconsistent with other provisions of the covered agreements. In a way this proposal enhances the security of the multilateral trading system because it would ensure that the implementation of compliance measures does not lead to more, instead of less, inconsistency with the WTO agreements.

The proposal also affirms that suspension of concessions is a temporary measure which should be applied only until such time as the inconsistent measure is removed or brought into conformity with the WTO agreements. The EC and Japan have suggested a similar procedure, the only difference being that their proposal would enable the initial complainant to initiate the post-retaliation compliance proceedings.[10]

Third party rights

A group of seven Members presented an informal submission for enhancing third party rights.[11]The proposal aims to strike a balance between the rights of the parties to the dispute and those of third parties, and takes into account the difference in resources available to Members taking part in dispute settlement. The proposal has three main elements.

First, the proponents suggest an "all or nothing approach" to the right to be joined in consultations under Article 4.11. This approach entails that the defendant can only reject a third party request to be joined in the consultations if it decides not to accept requests from any other Member. The present rules allow Members to reject requests

[9] Kessie, E., "The 'Early Harvest Negotiations' in 2003", at p. 20 (On file with author)

[10] JOB(05)/47, 24 March, 2005.

[11] JOB(05)/19, 22 February, 2005. The group was composed of Argentina, Brazil, Canada, India, Mexico, New Zealand and Norway. The African Group had proposed extension of third party rights earlier: TN/DS/W/15, 25 September, 2002.

arbitrarily on the ground that the requesting Member does not have substantial trade interest in the case. The proposal therefore seeks to eliminate such arbitrariness and the risk of discriminating against Members.

This is a good proposal because it would increase WTO Members' participation in the consultation stage of disputes that affect them directly and also in disputes that have systemic implications. However, a large number of disputes in the WTO end prior to a panel ruling, and most of them without a request for a panel ever being made.[12] Since privacy is conducive to settlement, it is possible that extending the right to be joined in the consultations could make it more difficult for parties to reach negotiated settlements.[13]It is therefore important to ensure that extending third party rights at the consultation stage does not reduce the effectiveness of the regime in settling disputes prior to the establishment of a panel.

The second element of the proposal recommends that third parties should be allowed to be present at all panel meetings before the issuance of the interim report. The only exceptions would be meetings where confidential business information is disclosed. Similarly, third parties should be given all submissions made before the issuance of the interim panel report – except for the parts containing privileged or confidential business information.
According to the proposal, third parties would have an opportunity to file written submissions and be heard at the special sessions of the first substantive meetings. However, panels would retain their authority over the decision to allow third parties to pose or respond to questions. The proponents felt that it was difficult to justify the current rules and practice whereby third parties can only attend limited panel meetings and can only receive the first written submissions of the parties.

Third, the proponents proposed that Members that were not third parties before the panel should be allowed to appear as third parties at the appellate stage. This is especially important because it would give Members the chance to provide their input in the appeal stage, where the issues of law and interpretation are almost definitively discussed. It would also allow Members with scant resources to skip the panel phase where necessary.

The proposals on third party rights are of special interest to developing countries. Third party participation is a relatively inexpensive way in which developing countries can get acquainted with the WTO dispute settlement system. It gives them a chance to learn by observing. Improved third party rights translate into more learning for the developing countries. On the flip side, more third party rights could also mean a lengthier litigation process and more costs for the main parties. It is therefore important to ensure that the grant of enhanced third

[12] Bursch, M., and Reinhardt, E., (2001) "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" 24 *Fordham International Law Journal*, pp. 158-172, at pp. 158-9. According to the Sutherland Report, less than half of the complaints actually go to a panel process: Sutherland, P. et al, (2004) "The Future of the WTO – Addressing institutional challenges in the new millennium" Report by the Consultative Board to the Director-General Supachai Panitchpakdi, at p. 50.

[13] Kessie, supra, at p. 13.

party rights should not impose an undue burden on the main disputants.

Panel composition

Suggestions for a permanent panel were made as early as 1979 by Professor John Jackson and by the Leutweiler Commission in 1985.[14] Panel composition has become one of the EC's favourite subjects in the DSU review negotiations. Seeing that its earlier proposal for a permanent panel did not attract much support, the EC has now presented a discussion paper proposing the introduction of a roster of dedicated and experienced panelists that would be broadly representative of the WTO Membership.[15]

Currently, panel composition is a difficult and protracted task whereby the selection process is driven by cross vetoing on nationality and other grounds. Ad hoc panelists are also unable to dedicate the required amount of time to the panel process. The EC opines that a roster would enhance effectiveness, quality and legitimacy, and could also save time both in the selection process and during the proceedings (because the panelists would have more experience).

The roster would be established by a selection committee of the DSB and would have twenty panelists. At least one member of a panel would be drawn from the roster either by lot or by agreement of the parties. The member from the roster would not necessarily chair the panel; but the parties would not have the power to veto panelists from the roster, except in accordance with the Rules of Conduct.

The discussion paper appears to have addressed Members' concern that a permanent panel would deprive the WTO of the knowledge and expertise of people who are not on the roster. It might also circumvent fears about the constitutional implications of a permanent panel – that is, that a permanent panel might lead to more judicialisation of the system, and that the adjudicative branches should not be strengthened without addressing the relative inefficiency of the legislative or political bodies in the WTO.

The EC suggestions are in line with the Sutherland Report, which says that a combination of a roster and ad hoc appointments might be commendable.[16] However, since the suggested roster falls short of being a permanent panel, it would still be difficult for the dispute settlement system to deal with remand procedures, issuance of provisional measures and preliminary rulings, if these will ever be introduced in the WTO.

Providing guidance to panels and the Appellate Body

The United States made a contribution on the provision of additional guidance to panels and the Appellate Body concerning the nature and task presented to them and rules of interpretation of the WTO agreements. The contribution was in the form of conceptual questions that Members are requested to discuss and respond to. The questions cover the

[14] Cottier, T., (2003) "The WTO Permanent Panel Body: A Bridge Too Far?" *JIEL* 6 pp. 187-201, at p.189.

[15] See TN/DS/W/1, 13 March, 2002, for earlier proposal and JOB(05)/48, 24 March, 2005 for the discussion paper.

[16] Supra, at p. 57.

exercise of judicial review, the use of public international law, gap filling as an interpretive approach, and the definition of the measures subject to dispute settlement. The intention of the US was to stimulate discussion and not to reflect any particular position on the issues. In the US view, it is better for Members to discuss and address these issues rather than allow them to be left exclusively to the panels and the Appellate Body. Most Members were hesitant to provide responses.

The US questions are linked to the 2002 joint Chile and US proposal to ensure that WTO dispute settlement contributes to resolving disputes and remains sufficiently flexible to accommodate parties' needs.[17] Some developing countries have in the past supported the proposition that the roles of the panel and the Appellate Body should be clearly defined. However, they should be wary about Members providing "guidance" to the panels and the Appellate Body because this could introduce diplomatic and political interference into the dispute settlement system. It could detract from the system's rule-oriented nature and might gradually lead back to the power-oriented approach, which favours only the mighty.

Possible time savings in the dispute settlement procedures

Prompt settlement of disputes is one of the main objectives of the WTO dispute settlement system. That is why the DSU has stricter time frames than most international tribunals. Nonetheless, there is still room for improvement – especially as disputes tend to exceed the standard time frames. Moreover, there are some disputes whereby the challenged measures produce substantial economic harm to the complainant and require speedier resolution than the present time frames would allow.

Australia has proposed ways of saving time in the dispute settlement procedures.[18] The proposal is partly inspired by the need to look for time savings so as to compensate for any additional time that might result from some of the proposed changes to the DSU. The proposed time savings include: halving the minimum period for consultation; establishing a panel at the first DSB meeting at which it is requested; and reducing the time for the filing of the complainant's first submission.

Shorter time frames would be beneficial to developing countries because they would mean less legal costs. And, prompt settlement of disputes means that a Member would not suffer the effects of a WTO-inconsistent measure for too long a time, as is the case at the moment. Nevertheless, Australia recognizes that it might be necessary, as some developing countries have stressed, to make allowances for developing countries whenever they need more time during the dispute settlement proceedings.

In addition to tightening the time frames in the DSU, Australia proposed that there should be an accelerated procedure for disputes involving safeguard measures. The rationale for the proposal is, among other things, that safeguards are imposed against fairly traded goods, and that the temporary and time-limited nature of safeguards means that a

[17] TN/DS/W/28, 23 December 2002.

[18] JOB(05)/65, 29 April 2005.

Member might not be able to obtain a ruling before the withdrawal of the safeguard. The accelerated time frames for safeguards will not apply when a developing country requests the application of the standard DSU time frames.

When discussing earlier proposals on reducing time frames, Members had indicated that they would not agree to any reduction or extension of time periods until the final agreement was reached on all aspects of the DSU.[19] It is not clear what Members' reaction to the new proposals will be.

Procedural Issues and Progress towards Hong Kong

Very few developing countries have submitted proposals after July 2004. Notably, most of the proposals presented and/or discussed since July 2004 are not new, or at least not entirely new. They had been submitted and discussed in earlier meetings of the DSB Special Session. Some of the proposals have been revised to take into account the reactions they received when they were first submitted.

The lesson for developing countries is that they should not hesitate to re-submit proposals that they feel very strongly about. They could refine earlier proposals that did not receive much support in order to address or incorporate the reactions and suggestions that the proposals elicited when they were initially made. This is important because negotiations are dynamic. Members' positions tend to change and the DSU negotiations are no exception.[20] It is possible that proposals that were not supported earlier might find a receptive audience this time around.

Most of the discussions in the Special Session have been in informal mode. In addition, the Chairman has been carrying out informal consultations with the Members. The Members have also been consulting among themselves, thereby leading to the bottom-up approach which resulted in the presentation of joint proposals by groups of Members. Although past informal meetings have been organized within the time frame of the Special Session, the Chairman has said he cannot guarantee that there would be no overlaps between meetings in future. Given their limited human resources, developing countries would be at a great disadvantage in the event of such overlaps.

Paragraph 47 of the Doha Ministerial provides that the DSU review negotiations are not part of the single undertaking. Despite the absence of this formal link, some Members prefer to see DSU negotiations as part of the broader negotiations.[21] The Chairman of the Special Session has stated his assumption that when Ministers at the Davos mini-ministerial meeting called for substantive progress in the negotiations on rules, they were also referring to the DSU review process.[22]

[19] Kessie, supra, at p. 12.

[20] For example, in contrast to its earlier positions, the US has gradually adopted a defensive approach to the DSU review negotiations after losing some important cases: Zimmermann, pp. 41-45, and 49.

[21] Kessie, supra, at p. 4.

[22] Note that dispute settlement is also negotiated in the Negotiating Group on Rules in relation to the Agreement on Subsidies and Countervailing

Therefore, the Special Session is expected to make progress by the time of the time of the Hong Kong Ministerial.

The Chairman has been consulting on the form that an input into the July 2005 approximations might take. Delegations appear to favour a report to the Trade Negotiations Committee presented under the Chairman's own responsibility, and not as an agreed text. At the 21 June Special Session meeting, the Chairman indicated that he would present a report on his own responsibility to the General Council at the end of July. The report is expected to state that there has been progress on some issues and to stress the need for intensifying the work of the Special Session in order to achieve real results by the end of the year. It is likely that Members will start text-based negotiations over the next few months.

Intergovernmental negotiations are often constrained by special short-term interests and negotiators are usually inclined towards pragmatic proposals aimed at political trade-offs.[23] Such an approach is not ideal for the DSU review process given the importance and centrality of dispute settlement in the WTO system. Developing countries should strive to focus on general principles, legal consistency, systemic implications of negotiating proposals, and alternative perspectives of what should be achieved in the long term.

Measures, the Anti-Dumping Agreement, and the provisions on regional trade agreements.

[23] Petersmann, supra, at p. 238.

IV. NOTABLE PENDING WTO CASES

1. A Possible Contribution to Trade Facilitation Negotiations

European Communities – Selected Customs Measures (WT/DS315)

A panel has been established to hear a US complaint about the EC's administration of laws and regulations pertaining to the classification and valuation of products for customs purposes and its failure to institute tribunals or procedures for the prompt review and correction of administrative action on customs matters. The US alleges that the non-uniform administration of the EC's customs classification and valuation laws, regulations, judicial decisions and administrative rulings results in disparate administration of customs measures in the member States. In addition, the US claims that appeals procedures vary amongst the member States, and that it is possible to obtain review of a customs decision by a tribunal of the EC only after an importer or other interested party has exhausted review by national administrative and/or judicial tribunals. The US submits that the EC is acting inconsistently with its obligations under Articles X: 1, X: 3(a) and (b) of GATT 1994.

This case is important because it centers around Article X, which is one of the articles subject to the ongoing negotiations on trade facilitation. Article X prescribes rules relating to publication and administration of trade regulations. The negotiations are meant to clarify and improve Article X in order to achieve transparency and predictability in publications and administrative trade regulations related to import and export procedures. A thorough analysis of the requirements under Articles X:1, X:3(a) and (b) by the panel would clarify Members obligations under Article X and could be a useful guide in the negotiations.

2. Post Retaliation Problems

Canada – Continued Suspension of Obligations in the EC – Hormones Dispute (WT/DS321) and *United States – Continued Suspension of Obligations in the EC – Hormones Disputes* (WT/DS320)

The EC is complaining against: the Canadian and US failure to remove their retaliatory measures after the EC removal of the measures found to be WTO-inconsistent in the *EC – Hormones* case; the unilateral determinations by Canada and the US that the new EC legislation violates WTO rules; and failure of Canada and the US to follow DSU Article 21.5 procedures to adjudicate the matter. The EC considers that the continued retaliation by Canada and the US is a violation of Articles I and II of GATT 1994, and Articles 21.5, 22.8, 23.1 and 23.2 (a) and (c) of the DSU.

This case highlights the problems that Members face in the compliance and retaliation stage of a dispute. The suspension of concessions or other obligations is supposed to be temporary and should be applied only until such time as the measure found to be inconsistent with a covered agreement has been removed. The current rules do not

address situations where parties disagree on whether measures taken to comply with a DSB ruling are consistent with the WTO provisions. In the negotiations on clarifying and improving the DSU, WTO Members have proposed ways of filling this gap.[1] Therefore, the decision in this case will contribute to the negotiations because it might either reinforce the views espoused by the proposals or suggest alternative ways of dealing with the problems.

3. An LDC Stands Up for Its Rights

India - Anti-Dumping Measures on Batteries from Bangladesh (WT/DS306)

Bangladesh requested consultations with India regarding India's imposition of definitive anti-dumping duties on imports of lead acid batteries from Bangladesh and certain aspects of the investigation leading to the imposition. The complaint is that India's measures are inconsistent with Article VI of the GATT 1994 and Articles 12.1, 2.4, 3.1, 3.2, 3.7, 3.4, 3.5 and 6.5 of the Anti-Dumping Agreement and that India is acting inconsistently with its obligations under Articles I:1 and II:1 of the GATT 1994. Bangladesh submits further that the benefits accruing to it directly or indirectly under the WTO Agreement are being nullified or impaired.

This is the first case involving a Least Developing Country as a principal party (complainant or respondent) in the WTO dispute settlement process. LDCs have previously participated as third parties only. Therefore, the Sutherland Report's statement that *even some of the poorest* developing countries *are increasingly* taking on the most powerful does not correctly reflect the lack of participation of LDCs in the WTO dispute settlement system.[2] Hopefully, Bangladesh's experience will encourage other LDCs to invoke the system when necessary.

4. A Jumbo Test for the WTO Dispute Settlement System

European Communities and Certain Member States –Measures Affecting Trade in Large Civil Aircraft (WT/DS316/1) and *United States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS317/1)

The US has requested the establishment of a panel to adjudicate on the long-running dispute with the EC regarding subsidies granted to Airbus. Similarly, the EC is also challenging US subsidies to Boeing and has requested the establishment of a panel. Airbus and Boeing are competitors in the manufacture of large civil aircraft. The US and the EC had been negotiating for a long time but the talks broke down at the end of May this year. Each party claims that the other is violating the Subsidies and Countervailing Measures Agreement.

[1] See, for instance, "Developments in the Negotiations to Clarify and Improve the WTO Dispute Settlement Understanding since the July Package", supra, p. 14 at p. 17.

[2] Sutherland, P. et al, (2004) "The Future of the WTO – Addressing institutional challenges in the new millennium", Report by the Consultative Board to the Director-General Supachai Panitchpakdi, at p. 50.

This is probably the most commercially significant WTO case since *US - FSC*[3]. The EC Trade Commissioner, Peter Mandelson, has said that this will probably be the biggest, most difficult and most costly legal dispute in the history of the WTO. There is also concern that the magnitude of the dispute might damage the integrity of, and short-circuit, the WTO dispute settlement system. In addition, tension between the two "trade superpowers" might affect the ongoing negotiations in the Doha Round, especially in the run-up to the 6th WTO Ministerial Conference.

[3] *United States – Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/R.

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