A New Round of Trade Negotiation and Dispute Settlements at the WTO

– in relation to some interpretative problems of WTO Agreements –

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The WTO's New Round

Although the prospect of a new round of World Trade Organization (WTO) talks is not quite certain yet, there are a number of items proposed for the agenda for the new round. These include, inter alia, agriculture, trade in services, e-commerce, investment, intellectual properties, competition policy and labor. These topics will be covered by other articles in this issue. This writer was engaged in dispute settlements at the WTO as a member of the Appellate Body from 1995 to 2000. Based on the experience as an arbiter of disputes at the WTO, he would like to mention a few issues that he thinks the WTO should deal with in the upcoming round.

The dispute settlement mechanism of the WTO is reputed to have been quite successful. The number of cases brought to the WTO's dispute settlement body since Jan. 1, 1995, the year the WTO started, is about 250 while 300 cases were brought to the old General Agreement on Tariffs and Trade (GATT) from 1947 to 1995. This figure confirms that the WTO's dispute settlement mechanism has gained confidence among Members of the WTO. After six and half years, however, some problems have become clear in the dispute settlement process. Some problems are unpredictable at the time of the conclusion of the Uruguay Round, and others are traditional issues. Issues such as genetically modified organs (GMO) were not predicted at the time of the Uruguay Round. On the other hand, although issues such as anti-dumping were much discussed and a new agreement was formulated, the result has not been entirely satisfactory.

There are a variety of issues in relation to the dispute settlement process. There are, for example, the issues relating to the implementation and compliance of the recommendations of the Dispute Settlement Body (DSB), the acceptance of amicus curiae briefs by panels and the Appellate Body, a possible change of Appellate Body members to full-time positions and so on. It is impossible to cover all of them in this paper, so the writer will analyze the following topics, and put them on the table for consideration by negotiators and the general public: (a) environment and food safety, (b) bilateral and regional trade agreements and (c) trade remedies with an emphasis on anti-dumping.

Environment and Food Safety Issues

The relationship between the protection of the environment and food safety and the principle of free trade in the WTO has been controversial even before the WTO was initiated. A committee to discuss this matter was established within the WTO when the Uruguay Round was concluded. However, this committee has been unable to offer any effective proposal to improve the relationship between environment and trade. Meanwhile, environmental issues have become more and more serious and begin to threaten the sustainable economic development and ultimately the existence of human society.

In terms of dispute settlements, the issue is whether the measures taken by governments to protect the environment and food safety which may restrict trade are compatible with free trade or, even if not compatible, can be exempted by Article XX of the GATT 1994. Three dispute cases arose before the WTO's dispute settlement body in respect of this issue. One is the Reformulated Gasoline Case (1996), the second is the Shrimp/Turtle Case (1997) and the third is the Asbestos Case (2001). The Panels and the Appellate Body reported on them and the reports were adopted by the DSB of the WTO.

In the first case, a U.S. measure to control the quality of gasoline was challenged by Venezuela and Brazil for the reason that the measure accorded less favorable treatment to imported gasoline. In the second case, having a policy for protecting sea turtles, the United States imposed an import ban on shrimps from countries which did not take measures to protect sea turtles. Thailand, Malaysia, India and Pakistan challenged this U.S. measure before the WTO. In both cases, the Appellate Body ruled that the U.S. measures fell under an exception provided for in the GATT 1994 (Article XX (g)) which states that measures relating to conservation of exhaustible natural resources are exempted from GATT disciplines. However, the U.S. measures were struck down because they were imposed arbitrarily and unilaterally without any consultation with countries which would be affected by the measures.

In the Asbestos Case, a French measure which prohibited the manufacture, use and import of asbestos was challenged by Canada. The Appellate Body ruled that asbestos and its substitutes were not "like products," and therefore there was no discrimination between domestic and imported products. It also ruled that the French measure was exempted from GATT disciplines by virtue of Article XX (b) which exempts national measures necessary for the protection of the life and health of human beings, animals and plants.

The rulings in the above case teach us that, if environmental issues are related to natural resources and the life and health of humans, animals and plants, they can be dealt with by applying Article XX (b) and Article XX (g).

In other words, environmental measures are given a place within the WTO regime if exercised properly. However, Article XX only reaches narrowly defined issues when environment and health measures address present and immediate dangers to the society. There are a great variety of such measures, and some of them are outside the scope of these articles. There will be a time in the near future when issues will arise which cannot be addressed within the present WTO agreements.

Take the GMO issue, for example. Views regarding whether GMO plants and foods should be banned or strictly controlled are sharply divided among trading nations. The European Communities (EC) maintain that the use and trade of GMOs should be banned or strictly controlled. Japan inclines toward this side. The United States asserts that GMOs have advantages, and to entirely prohibit the international trade of GMO substances is wrong. The problem of GMOs is the unpredictability of their future consequences. They may not cause any immediate danger to humans or the environment. However, GMOs are artificial substances that are created by using biotechnology. They may be contrary to the law of nature and, in the near or far distant future, they may cause unpredictable harm to humans and the environment. On the other hand, GMOs may revolutionize agriculture and may be the only solution to a future food shortage that may come with the explosion of the world population and climatic change.

It is predictable that, in the near future, disputes will arise among Member nations of the WTO with regard to the question of whether such substances should be prohibited or tightly restricted in international trade. This is a question of whether a restriction of international trade is allowed on the basis of the "precautionary principle." The precautionary principle is not sufficiently recognized in WTO agreements. The most relevant WTO agreement on this issue is the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). This agreement allows restrictions on international trade of foods, animals and plants only when the Member exercising such restriction performs risk assessment and proves that the measure is necessary to control risks that would be caused by imports of the substance in question. The agreement allows a measure based on the precautionary principle only on a temporary basis.

The Biosafety Protocol (the Cartagena Protocol signed on Jan. 29, 2000) which is part of the United Nations Biodiversity Convention to which many WTO Members are participants, allows the control of international trade of GMO substances on a much more lenient precautionary principle. According to this protocol, a contracting party can exercise a prohibition or control of GMO substances even though there is no immediate evidence of present danger to human health and the environment. There is a conflict between the SPS Agreement which is part of the WTO and the Cartagena Protocol which is part of a UN convention. Parties which participate in both are caught by inconsistent treaty conditions.

In this view, it is desirable for negotiators to engage in discussions of the relationship between environmental issues in a broad sense on one side and free trade on the other, and to eventually come up with some reconciliation between them. For example, negotiators can consider the idea that a provision should be added to Article XX (Article XX (k)) which would prescribe that a measure taken pursuant to a requirement of a UN convention (or any other international convention) is deemed to be consistent with WTO obligations. Such an improvement will avoid a conflict of treaty obligations and thereby contribute to a more stable international trade order.

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

:

(b) necessary to protect human, animal or plant life or health;

:

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

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Source: World Trade Organization

Free Trade Agreements

A striking trend in the world today is a proliferation of free trade agreements (FTAs) which include bilateral and regional FTAs and customs unions. They include important entities such as the European Union (EU), the North America Free Trade Agreement, the

Mercado Común del Cono Sur (MERCOSUR) and the Association of South East Asian Nations. In the near future, there may be the Free Trade Area of the Americas which includes North and South America with a total population of 800 million. FTAs are by their own nature discriminatory vis-à-vis outside parties, and consequently there is always an intrinsic tension between FTAs and the principles of the WTO, such as the tension between the most favored nation treatment and the national treatment. An excessive proliferation of FTAs may undermine the basis of the WTO principles.

Japan and Korea are two of the few countries which have not entered into FTAs with other countries. However, Japan will enter into an FTA with Singapore, and study groups in Japan and Korea will conduct a study on whether an FTA between those two countries is possible.

FTAs are a fact of life in the international trading world, and the WTO must find a way to co-exist with FTAs. Article XXIV of the GATT 1994 provides for the relationship between the WTO disciplines and FTAs. According to this article, an FTA is allowed if "substantially all" of the trade within the FTA is liberalized and the trade restrictions with trading partners outside the FTA are not strengthened after its formation. Since the formation of the European Economic Community in 1957, there have been some 60 working parties established by the GATT to examine the compatibility of FTAs with GATT rules. In the majority of working party reports, views are sharply divided – some holding that the FTA was incompatible with the GATT and others maintaining that it was consistent with the GATT. This situation has not been improved since the coming of the WTO.

An important task for the WTO in the future is to accommodate FTAs within its system with sufficient disciplines on them so that they would not be unduly restrictive of trade against outside countries. Some clarifications of Article XXIV were made in the Uruguay Round, but there still remain ambiguous issues.

The key point is how to determine the meaning of Article XXIV of the GATT 1994 in respect to: (a) "substantially all," i.e., whether it establishes a quantitative test (such as 80% liberalization as suggested by the EC, 90% or 95%) or a qualitative test, i.e., an important sector (such as agriculture) should not be left out of liberalization, (b) the level of trade restrictions in relation to outside parties before and after the formation of the FTA and (c) whether trade remedies such as anti-dumping, countervailing duties and safeguards can be applied to the participants of an FTA.

In the view of this writer, the interpretation of "substantially all" should mean both quantitative and qualitative tests, and the quantitative test should set up the standard as high as 90% with the purport of exercising a sufficient degree of WTO discipline on FTAs. With regard to the level of trade restrictions to outside before and after the formation of an FTA, one important aspect is rules of origin. It is not clear at all, under what circumstances, rules of origin after the formation of an FTA are not more stringent than before. There are WTO dispute cases in which the rules of origin were at issue such as the Canada Automotive Case in which Canada's discriminatory treatment of imported cars in favor of some designated producers was at issue. Clarification of this aspect is important to keep FTAs at bay.

Finally a non-discriminatory application of trade remedies such as a safeguard, anti-dumping and countervailing duty measure to parties both inside and outside an FTA should be required. If a country imposes a safeguard measure to imports coming from outside the FTA while not applying it to imports from inside it, it would impose a disproportionate burden on outside parties. This was one of the issues of the Argentina/Footwear Case decided by the Appellate Body in 2000 in which the Appellate Body held that it was wrong for Argentina to have excluded the members of MERCOSUR from the application of a safeguard measure on imports of footwear. However, when a customs union has reached the degree of integration when it can be regarded as one economic unity, there is no room for trade measures within that customs union.

The issues mentioned above have been partly addressed by panels and the Appellate Body through dispute settlements. However, it is desirable that negotiators come up with amendments of WTO agreements, ministerial decisions, ministerial declarations or simply adding some interpretive notes attached to Article XXIV to clarify such issues.

Trade Remedies – with Special Emphasis on Anti-Dumping

We have seen a recent proliferation of anti-dumping measures among trading nations including both developed and developing countries. Only the "big four" (the United States, the EC, Canada and Australia) made use of anti-dumping laws before, but anti-dumping has now become a universal phenomenon. Although, under some circumstances, there are unfair dumping practices by exporters against which a state is justified in imposing anti-dumping duties, there are many who hold the view that the anti-dumping laws of trading nations have been much abused. Abuses have taken the forms, inter alia, of calculating excessively high dumping margins by anti-dumping authorities and consequently high anti-dumping duties imposed and unduly complex and detailed enforcement procedures ("devils in the details") which impose a heavy burden on the exporters and importers of the product concerned.

In the Uruguay Round, some key anti-dumping issues (such as averaging and non-symmetry in reduction of expenses) were addressed, and the Anti-dumping Agreement which is part of the WTO agreements approved some provisions that show improvements. Moreover, in the recent panels and the Appellate Body rulings in dispute cases on anti-dumping, some problems were resolved – for example, in the Indian Linen Case (2001), averaging practices

exercised by the EC were outlawed. There have been a number of anti-dumping and safeguard cases that are pending before the panels and the Appellate Body, and those that have been decided recently. Some issues have been and will be resolved through them.

However, there are some issues which still need to be addressed. It is very important that negotiators in the upcoming round discuss those issues. Among the many issues we need to consider, the paper discusses a few important points here.

Some argue that anti-dumping laws should be replaced by competition laws, and that only "predatory pricing" in international trade as defined in competition laws should be prohibited. Although this may seem attractive, it is probably utopian for the reason that anti-dumping and competition laws have different constituencies, and a mere replacement of anti-dumping laws by competition laws would only prompt domestic industries seeking relief to find something equivalent to anti-dumping in some other ways. It seems more realistic to incorporate some competition principles into anti-dumping laws, and thereby to mitigate their harshness.

The current Anti-dumping Agreement contains a provision recommending that the anti-dumping authority collects a lesser anti-dumping duty (a duty less than the dumping margin) if the collection of that lesser duty remedies the injury to a domestic industry suffering from dumped imports. This provision is exhortative and not mandatory. It is recommended that this provision should be made mandatory. In the EC, the anti-dumping authority uses the lesser duty rule (or an injury margin approach). In the United States, however, the anti-dumping authority must collect the amount of anti-dumping duty which is equal to the dumping margin regardless of whether it is necessary to remove the injury. This seems to exceed what is necessary to remove injury to a domestic industry.

In the current enforcement of anti-dumping laws, the balance is too much tilted toward the protection of interests of domestic producers and not enough attention has been paid to the sacrifices that importers of dumped products, their domestic users, consumers and society in general have to make. In order to protect their interests in the decision-making of anti-dumping, it is highly desirable that the Anti-dumping Agreement obligate that Members shall incorporate the "public interest requirements" in their domestic anti-dumping laws, whereby they are required to take the views of importers, users, consumers and other interested parties into account before deciding whether anti-dumping duties should be imposed.

As part of such requirements, the Anti-dumping Agreement might obligate Members to incorporate a procedure in their domestic anti-dumping laws for the "competition and consumer protection advocacy" whereby the voices of competition policy authorities and consumer interests advocacy groups can be heard by the anti-dumping authorities.

The Anti-dumping Agreement states that if an exporter exports a product at a lower price than it charges in the domestic market when selling a like product, an injury is caused to a domestic industry in the importing country and a causation can be established between the dumped import and the injury to a domestic industry, such dumping is to be "condemned," that is, unfair. The reason why this is unfair has never been clearly explained and many economists challenge this position. If this is "to be condemned," there should be sufficient reasons for this, and the reasons need to be clarified somewhere in the Anti-dumping Agreement.

Some advocates of anti-dumping measures claim that a trading state or exporters in that state foreclose its domestic market from imports by government restrictions and/or private restraints of competition, thereby allowing their domestic exporters to wield dominant positions in their domestic market, allowing them to reap monopoly profit to enable the financing of dumped exports and engage in the dumping of products to another state's market. They claim that this is unfair. If so, why don't they make this a requirement for invoking anti-dumping duty, that is, the requirement in the Anti-dumping Agreement that the "market foreclosure" of the domestic market of the exporting country must be shown before an anti-dumping duty is imposed on imports. This will call for a close cooperative relationship between the anti-dumping authority and the competition authority.

Conclusion

As stated initially, the dispute settlement mechanism of the WTO has been operating successfully. It is hoped and predicted also that it will continue to perform well in the future. However, the dispute settlement mechanism of the WTO may have been overburdened. Panels and the Appellate Body have been engaged in a formidable task of seeking consistency and clarity through the labyrinth of ambiguities of WTO agreements which inevitably result in a political compromise among negotiating parties. There may be issues too political and difficult for the dispute settlement mechanism to cope with. In some cases (such as the Hormones Case in 1997), the enforcement of the DSB recommendation came to a deadlock. It may be time to consider some alternative dispute settlement mechanisms which will operate parallel to the present WTO's mechanism. It has been reported that the United States proposed to the EU that they would create a bilateral mechanism through which they engage in "mediation" of disputes rather than seeking a legal decision. Such a mediation concept may be pursued in the context of a multilateral trading system as well. JJTI

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