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Judicial Activism and the Shrimp-Turtle Case

Draft Discussion Paper

Drafted by: Veena JHA, UNCTAD project coordinator, New Delhi
Please send comments to: veena.jah@undg.org

Dispute settlement is a mechanism through which the carefully created balance of the CTE may be disturbed. Successive interpretations by Panels and Appellate bodies have expanded the scope of sub-paragraphs b and g in article XX, where there is no consensus to do so through the CTE. It is important to examine the impact of this evolutionary interpretation of Article XX, sub-paragraphs b and g on the debate on trade and environment. While members of the WTO are not bound by Appellate bodies and Panels, their precedent setting value is immense. Other Panels and Appellate bodies may find it difficult to ignore these interpretations especially because of pressure groups, which have developed around trade and environment. This article investigates the evolutionary aspects of the shrimp turtle panel and how proposals in the DSU seek to rectify some of the imbalances created by the shrimp turtle Panel.

In 1997 Malaysia, India, Pakistan and Thailand requested the establishment of a WTO panel to consider U.S. trade restrictions on shrimp imports. Under the authority of the Endangered Species Act (ESA), the U.S. imposed embargoes on the import of shrimp from a number of its trading partners for the purpose of protecting the sea turtle population.² Under the ESA, access to U.S. shrimp markets is conditional on a certification that a country has adopted conservation policies that the U.S. considers to be comparable to its own in terms of regulatory programs and incidental taking. Again, the U.S. unsuccessfully argued that this trade measure satisfied Article XX(g). The panel issued its final report to the parties on 6 April 1998.

The panel rejected the U.S. argument on the basis of its interpretation of the chapeau to Article XX, and Article XX(g) was not considered in the particular. The panel found that the US measure constituted unjustifiable discrimination between countries where the same conditions prevail. The U.S. appealed the panel's interpretation of Article XX(g). The Appellate Body delivered its report on 12 October 1998.

The Appellate body, finding fault with the panel's interpretation, considered Article XX(g) and decided that although the embargo served an environmental objective that is recognized as legitimate under the Article, the measure was applied in a manner which constituted arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX.

The appellate body accepted that Art XX (g) about Exhaustible natural resources, applied not merely to mineral resources, but also to living natural resources. The appellate body has held that the treaty interpreter must interpret the treaty in the light of Contemporary concerns of the community of nations about protection and conservation of the environment, and that while Art XX of GATT 1947 (reflecting the understanding of mineral and living resources of that time) was not modified by the GATT 1994 in the Uruguay Round, the WTO preamble has added "the objective of sustainable development" in its own preamble, and thus the term "natural resource" used in Art XX (g) is not static but "by definition, evolutionary".

EC, Switzerland and Norway are of the opinion that unnecessary burden on the DSU can be avoided by a clarification of the WTO rules. They seek a legal clarity on the relationship, through Article XX between WTO rules and trade measures taken pursuant to an MEA. They feel that this would increase predictability and decrease uncertainty. Acknowledging that MEAs are the best way of solving international environmental problems and that any trade measure they contain were negotiated and agreed in a multilateral context, they feel that such a clarification would be a guarantee against unilateral action and their use for protectionist purposes. They also feel that a consensus should be found for taking this into account in WTO rules. They also contend that the proliferation of environmental policies worldwide has resulted

in the increased use of trade measures for environmental purposes. This is evidenced by a surge in the number of panels which have been raised in the WTO regarding Environment.

While there is no consensus on the need to change Article XX, panels and appellate bodies may nonetheless change the balance of rights and obligations. Without touching Article XX, the members may provide some guidelines under the current DSU to Panels and Appellate bodies in such cases in order to avoid such evolutionary approaches.

Evolutionary approach to the interpretation of law

The Appellate body in the shrimp-turtle case made several determinations on the interpretation and application of Article XX(g). Measures to conserve living or non-living exhaustible natural resources may fall within the Article, and therefore sea turtles constituted an exhaustible natural resource. The means-to-an-end relationship between the trade measure and the policy of conserving an exhaustible, endangered, species, was observably close and real and therefore a measure "relating to" the conservation of an exhaustible natural resource. The body also determined that the imposition of the embargo was an even-handed measure, in that it was made effective in conjunction with restrictions on domestic harvesting of shrimp, as required by Article XX(g).

In justification of the wider meaning to be given to "natural resource" in Art XX (g) used in GATT 1947 (incorporated by reference as GATT1994), the appellate body has cited the UNCLOS treaty, the CITES, and other bilateral and multilateral actions to protect living natural resources and adopted GATT 1947 panel rulings that fish was an "exhaustible natural resource". In this view, the appellate body has held XX (g) as covering both living and non-living natural resources.

According to the defendants of the case, the Appellate Body ruling has carried further forward the ruling in the US gasoline case (relating to imports of gasoline from Venezuela and other countries) and has opened the way for the United States to adopt national measures operating beyond its legal jurisdiction to protect Environment and conserve "natural resources" and enforce them through trade barriers, provided it goes through a process of getting countries to negotiate with it on bilateral, regional or multilateral Environmental agreements.

Following this interpretation, there have been several suggestions from developing countries on the scope of the Appellate bodies functions. Many developing countries have expressed the view that while no consensus has been achieved in the Committee on trade and environment on the interpretation of Article XX, Appellate bodies should not interpret rules in such an evolutionary manner that it overturns the consensus. According to Pakistan's proposal submitted to the General Council, (WT/GC/W/162), it is necessary to clarify the relevant provisions of the DSU to make clear that the responsibility for clarifying or modifying the provisions of the WTO Agreements clearly rests with the WTO member countries and that it would not be appropriate for Appellate bodies to usurp these functions under the guise of interpreting law on the basis of contemporary developments. Pakistan adds that the appellate body should refer to the General Council for making modifications in the relevant rules as the member countries consider appropriate.

Amicus curae briefs

The defendants of the shrimp turtle case also claim that the ruling regarding the admission of amicus curae briefs, opens the way for non-governmental organizations to file briefs before the

WTO's dispute settlement body on disputes, and for these to be brought to the attention of the dispute panels (by the WTO secretariat and/or by any of the parties to the dispute) and for the panels to take notice of such briefs.

It is feared that while this ruling would help concerns of Egos concerned with "environment and sustainable development" to be reflected in the WTO process, it will in course of time enable other interests and pressure groups, whether of industry or labour, also to use this route. Further, many international environment NGOs are funded by corporate donors, and this method of indirect influencing may now increase. But NGO from developing countries appear to be more interested in transparency in the negotiating processes and the proposals sought to be negotiated

According to Pakistan the participation of NGOS in the DS process has not been authorised by members. With the shrimp turtle dispute a question has arisen as to whether panels should take account of "amicus briefs" submitted to it by public interest groups or by NGOs. The relevant applicable provisions of the DSU (Article 13,2) suggest that Panels may seek (emphasis-added) information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. This does not appear to suggest that the Appellate body could accept unsolicited briefs and thus Article 13.2 should be clarified to state that Panels and Appellate bodies should not take account of unsolicited information. This view is supported by several other developing countries, such as Tanzania, Uganda and Zimbabwe.

Most developing countries are of the view that Amicus Curae briefs and other such procedures would tilt the balance of rights and obligations in the WTO system. They also feel that NGO participation would unnecessarily distort the balance in favour of developed countries that could more easily fund the participation of NGO groups. They have also pointed out that NGOs from developing and developed countries do not concur on issues and therefore their participation does not add anything new to the debate. Any inclusion of their opinions and inputs should be done through national co-ordination. There is no need to internationalise essentially national conflicts

In the DSU review, developed countries have pointed to the need for increased transparency of the panel and Appellate body process, without going into the legal details of such a requirement. US, JAPAN and Canada have contended among others that Amicus Curae briefs should be submitted and the process be made more transparent.

The role of the Appellate body

According to the DSU the Appellate body is only expected to examine issues of law covered by the Panel report. In the shrimp turtle case, the Appellate body examined "de Novo" the facts of the case and "made" a finding on legal issues which were not addressed by the panel. Pakistan has proposed that in all such cases the Appellate body should be required to "remand" the case to the panel for reexamination. It has also suggested that to avoid the settlement of disputes being unnecessarily delayed as a result of such remands the Panel should complete its examination within a period of one month.

Report of the appellate body

However, the Appellate Body went on to conclude that the U.S. embargo was applied in a manner which would constitute a means of both unjustifiable and arbitrary discrimination between countries where the same conditions prevail, contrary to the requirements of the

chapeau of Article XX. The body reasoned that unjustifiable discrimination includes the application of a trade measure, such as the U.S. embargo, that does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries. The failure to engage in serious negotiations to conclude bilateral or multilateral agreements or achieve co-operative efforts for the conservation of sea turtles before enforcing the embargo, and the unilateral application of that embargo, further underscored its unjustifiability. Further, that same rigidity and inflexibility applied to the certification procedures adopted by the United States and this amounts to arbitrary discrimination.

Quoting from the Appellate body's report "perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the special policy decisions made by foreign governments, Members of the WTO". An interesting question would be to examine whether most if not all trade measures would fall in this category of "intended and actual coercive effect" measure.

The Appellate body also ruled that "... It is not acceptable in international trade relations for one WTO member to use an economic embargo to require other WTO members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that within that member's territory, without taking into consideration different conditions which may occur in the territories of those other members". As there is little environmental justification for harmonization of regulatory regimes the test of "same conditions prevail" may be difficult to meet. Added to this is the issue of "appropriateness" of the regulatory programmes of the importing countries when applied to the exporting countries.

Judicial activism or status quo

An interesting dilemma emerges with the Appellate body decision. While its decision appears to have broadened the scope of measures which would be clearly considered as acceptable under the indents of Article XX and has opened the way for seeking inputs from NGOs and perhaps also other lobbyists, it has also brought into the fore the numerous grounds under which such measures would be considered discriminatory. In fact there may be a plethora of reasons by which trade measures for meeting non-trade objectives may be defacto "arbitrary and unjustifiably discriminatory". It is not the Panel or Appellate body decision, which is of great concern, but rather the trend towards judicial activism which Panels may inadvertently encourage. What Committees of the WTO may fail to achieve because of the requirement of a consensus, panels and appellate bodies may defacto overturn the consensus.

And, though the DSU makes clear that the dispute settlement process cannot add to or subtract from the rights and obligations of the members under the WTO and its annexed agreements, by a gradual process of citing earlier rulings and adopting them as their own, panels and the appellate body, may be spearheading a process of judicial activism which may eventually change the balance of rights and obligations. The solution lies in the review of the DSU process which may also consider giving guidelines to the DSB on such issues.

1 Appellate Body report on "United States--Import Prohibition of Certain Shrimp and Shrimp Products", 12 October 1998, WT/DS58/AB/R.
2 16 U.S.C.A. 1531-44.