

Lecture notes EEP 131
Topic 3 and 4, September 26,
2006

Dispute Settlement

- Dispute Settlement Body: composed of all members. 3-member Settlement Panels selected for individual disputes.
- Ruling of Panel “must” be adopted.
- Country can appeal Panel decision to 3 randomly selected members of permanent Appellate Body (AB) on basis of point of law. AB decision can only be reversed by consensus of Dispute Settlement Body.

Dispute Settlement, continued

- If country fails to implement a Panel decision, parties negotiate on compensation.
- If negotiations fail, prevailing party obtains permission from DSB to retaliate by using trade sanctions (withdrawing “concessions”)
- *Countries cannot be forced to change laws.* Losing parties sometimes accept sanctions rather than changing laws (e.g. EC beef hormones).

Goals of WTO

- Raise living standards, expand production of goods and services.
- “...the optimal use of the world’s resources in accordance with the objective of sustainable development” (Preamble of Marrackech Agreement, which established WTO).
- This language important to legal interpretation of WTO rules; it was invoked by 1998 Appellate Body ruling in Shrimp-Turtle.

WTO Goals, continued

- Although Preamble recognizes principle of sustainable development, this is not a “core principle”.
- Contrast to GATT preamble, which states objective is “a large and steadily growing volume of real income and effective demand [i.e. consumption], developing the full use of resources and expanding the production and exchange of goods.”

Core Principle: Non-discrimination

- Article I Most Favored Nation (MFN): a concession made to any WTO member must be made to all members. (Exceptions: regional trade agreements; developed countries can impose preferential (i.e. lower) tariffs on developing countries exports, without offering the same tariff all countries).
- Article III: Principle of national treatment (NT). Imported products should receive treatment that is "no less favorable" than the treatment given to "like domestic products"

What are “like products”?

- Are vodka and gin "like products"? Similar issue arises in anti-trust litigation. Dominant test to determine whether two goods are "like products" is to ask whether they compete against each other in market as substitutes.
- Does a difference in Production and Processing Methods (PPM) imply that products are different? Are integrated circuit boards produced using a clean technology and ones produced using an ozone-depleting product “like products”? (Like products must be treated in the same way -- regardless of whether both are imported or whether one is imported and the other produced domestically.)
- GATT tuna-dolphin tribunal objected to use of PPM as basis for trade restrictions.
- Shrimp-turtle ruling allowed PPM as a basis for trade restrictions

Basis for environmental challenge to free trade under WTO

- Article XX: (Chapeau) Provided that a national law does not constitute an "arbitrary or unjustifiable discrimination between countries.... or a disguised protection on international trade" laws are permitted that are:

(several specific conditions, including)

b) necessary to protect human, plant or animal 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 and consumption.

Applying Article XX

- To use Article XX to justify an environmental exception, need show that either b or g applies ("provisional justification", and then to show that it does not contravene the chapeau ("final justification").
- Both conditions (the specific and the general) are necessary , so either test could be applied first. The order that is actually used probably makes sense: it might be easier to determine whether the specific condition holds -- it is less of a judgment call, compared to determining whether the condition in the chapeau holds.

Paragraph b

- Measure must be necessary to protect own environment; must show trade-impacting measure is necessary, and that this is the least trade-impacting measure.
- Limitations intended to reduce trade impact of environmental provisions, and prevent disguised protectionism. Early interpretations excluded laws that protect the environment outside of the enacting country's borders.
- The 1998 Shrimp-Turtle Appellate ruling required only that there be a “sufficient nexus” between the law and the environment of the enacting state. The definition of “sufficient nexus” is unclear, but it might include transboundary impacts and impacts on endangered or migratory species.

Paragraph g

- Requires that the law relates to conservation of exhaustible resource. Shrimp-turtle case broadened this definition to include both renewable and nonrenewable resources, and living and non-living resources.
- The primary objective of the law must be conservation, and there must be a close relation between means and ends.

Policies must not be arbitrary

- States can't require another state to adopt specific environmental technology or measure. Must take into account differences prevailing in different countries.
- In order to protect lobsters the US prohibited the sale of 'immature' lobsters, those under a certain size. Lobsters from colder climates become mature at a smaller size. Exclusion based on size, even though it is intended to protect lobsters, does not take into account conditions prevailing in different countries.
- As a practical matter, it would be difficult to tell the "nationality" of a lobster, but easy to tell size.

Prohibition of quotas

- Article XI: Prohibits use of quotas, import and export licenses
- Exception is for ag; goal to reduce use of ag quotas. (GATT included ag exception, introduced at insistence of U.S. in the 1960s.) Textiles and Multi-Fiber Agreement, “ended” in 1/2006.
- Prohibition against quotas might conflict with Basel Convention or CITES, but to date no such conflict has occurred.

Tariffs VS Non-Tariff Barriers (NTBs)

- Long history of opposition to NTBs
- They are less transparent and more difficult to negotiate reductions, relative to tariffs.
- They offer more scope for corruption.
- They may or may not be “less efficient” than tariffs, depending on reason for restriction. (Economic literature on “taxes versus quantities”.)
- Uruguay Round attempted to “tarrify” NTBs.

Agreement on Technical Barriers to Trade (TBT)

- TBTs include government-imposed standards on products, such as energy efficiency, or environmental, health or labor standards that a product must meet during its lifecycle (e.g. the requirement that forest products come from sustainably managed forests.)
- The Agreement on TBT lays out conditions for use of TBT. There must be notification and transparency, and non-discrimination (national treatment). The Agreement encourages the use of international standards but allows a country to deviate from these when the international standard would be inappropriate (e.g. because of climatic conditions).
- The objective of this Agreement is to reduce non-tariff barriers.

The Agreement on Sanitary and Phytosanitary Standards (SPS)

- Deals with standards that are necessary to protect humans, plants and animals from hazards associated with the movement of plants, animals and foodstuffs.
- Rules must be transparent, use international standards where appropriate. Allows the use of temporary measures when current science is insufficient for the adoption of permanent measures (a rare example of the "precautionary principle" in the treaty).

SPS continued

- All the SPS disputes to date have turned on whether the challenged measure is based on sufficient scientific evidence. The evidence requires a risk assessment.
- In 1998 the WTO decided that the scientific evidence did not justify Japan's quarantine of agricultural products.
- In 1998 an Appellate body ruled against the EC ban of hormone-fed beef. The hormone dispute is interesting because the EU legislation was driven by consumer rather than producer pressure.

Do governments need a “commitment device” against domestic consumers?

- By tying its own hands (via WTO membership), a government is less susceptible to political pressure to provide protection for domestic industries. This commitment to free trade increases domestic welfare.
- If the protection is demanded by consumers, it is not clear that a decrease in protection increases welfare. Consumers might object to imports for the "wrong reason" but why give the WTO the right to make this kind of judgment?