

# FUTURE CHALLENGES: NEW SUBSTANTIVE AREAS

## Comments

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*GUILLERMO AGUILAR ALVAREZ:* Guillermo Aguilar commented that the WTO rules on investment are insufficient to protect investments. Bilateral investment treaties (BITs) are much more effective in accomplishing this purpose. NAFTA probably is the first international agreement to combine BIT-type rules for protection of investments with GATT-type disciplines for trade in goods and services. The OECD countries have been working on a Multilateral Agreement on Investment (MAI). However, the prospects for a successful MAI are dim.

Aguilar commented that the plurilateral structure of the WTO, the acquired dispute settlement experience, and the existence of WTO rules regulating certain types of investment make the WTO amenable to development of an investment protection regime. However, doing so would require a major overhaul of the GATS. The DSU trade panel mechanism is probably not appropriate for investment disputes. On the other hand, a commercial arbitrator should not be allowed to operate in a vacuum, divorced from the applicable WTO agreement.

Aguilar commented that there are several investment-related issues that arose

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in the NAFTA negotiations that may eventually be relevant to addressing the protection of investments within the WTO context. Would all takings constitute "measures" within the WTO context, for purposes of dispute settlement? How would the trade aspects of the WTO be reconciled with the investment protection aspects? Under what circumstances would an investor be entitled to compensation for a taking? How would investment protection goals be reconciled with measures taken to further antitrust goals? Should a host state tribunal be allowed to consider a dispute between an investor and the host government in the first instance? How should financial service providers be dealt with? Do article XX-type exceptions apply to investment disputes? Finally, how should investment protection interests be reconciled with national security interests?

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*ERNST-ULRICH PETERSMANN*: Environment and competition policies were not explicitly mentioned in the text of the GATT 1947. Yet, the GATT dispute settlement procedures were invoked more frequently for the settlement of disputes among states over trade-related environmental measures (TREMS) than any other dispute settlement system.<sup>1</sup> This GATT dispute settlement practice contributed to the inclusion of a number of explicit rules on TREMS in the 1994 WTO Agreement.<sup>2</sup> The WTO Committee on Trade and Environment continues to examine the many interrelationships between trade and environmental rules and policies. There is, however, no present consensus on whether additional WTO rules on TREMS are needed. Many WTO Members seem to take the view that the WTO legal restraints on environmental policies may be better clarified through WTO dispute settlement proceedings than through political negotiations.

WTO Members have also increasingly invoked the WTO dispute settlement system for disputes over trade-related antitrust measures (TRAMS) so as to clarify the existing WTO legal restraints on competition policies. In the WTO Working Group on the Interaction between Trade and Competition Policy, there is likewise no political consensus on the need for additional WTO rules on TRAMS.

Section I of this article briefly comments on the 1997 panel and Appellate Body reports on the hormone beef dispute, as well as the 1998 panel report on the shrimp/turtle dispute, as the most recent illustrations of the clarification of WTO legal restraints on health and environmental policies through dispute settlement proceedings. Section II discusses GATT and WTO dispute settlement proceedings on TRAMS, including the 1998 panel report on the Kodak/Fuji dispute. The paper concludes that WTO dispute settlement practice: (1) has strengthened the mutual consistency of trade and environmental rules, and (2) confirms the need for additional WTO legal restraints on TRAMS.

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1. For an analysis of this case law, see E.U. PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* at chapter 3 (1997).

2. See E.U. PETERSMANN, *INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND* (1995).

## I. Mutual Consistency of Trade and Environmental Rules: Recent WTO Dispute Settlement Findings on TREMS

In their 1994 Ministerial Decision on Trade and Environment, governments agreed “that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other.”<sup>3</sup> Recent WTO dispute settlement practice tends to confirm the consistency of WTO law with the requirements of health and environmental policies.

### A. THE 1997 HORMONE BEEF DISPUTE

The Appellate Body report on *EC Measures Concerning Meat and Meat Products (Hormones)*, adopted by the WTO Dispute Settlement Body on 13 February 1998, confirmed the previous panel findings that the EC import prohibition was inconsistent with articles 3.3 and 5.1 of the WTO Agreement on Sanitary and Phytosanitary Standards (SPS Agreement). However, the Appellate Body reversed or modified a number of the panel findings in a manner that strengthens the rights of WTO Members to apply health protection measures even if they deviate from relevant international standards.

The Appellate Body rejected the panel’s interpretation of article 3.1 of the SPS Agreement. This interpretation would have transformed the goal of harmonizing SPS measures on the basis of international standards into a legal obligation to conform SPS measures with international standards. Article 3.1’s requirement that Members “shall base” their (phyto)sanitary measures on international standards, does not mean that such measures must “conform to” international standards. An SPS measure based on relevant international standards “may adopt some, not necessarily all, of the elements of the international standard.”<sup>4</sup>

The “right of a Member to establish its own level of sanitary protection under article 3.3 of the SPS Agreement is an autonomous right and *not* an ‘exception’ from a ‘general obligation’ under article 3.1.”<sup>5</sup> Article 3.3 also requires “risk assessment” procedures consistent with article 5.1. The requirement that an SPS measure be “based on” a risk assessment signifies “that the results of the risk assessment must sufficiently warrant—that is to say, reasonably support—the SPS measure at stake.”<sup>6</sup> There must be “a rational relationship between the

3. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1267 (1994) [hereinafter Final Act].

4. *EC Measures Concerning Meat and Meat Products (Hormones)—AB-1997-4—Report of the Appellate Body*, WT/DS26/AB/R, para. 171 (Jan. 16, 1998) (visited July 13, 1998) <<http://www.wto.org/wto/online/ddf.htm>> [hereinafter WTO Website].

5. *Id.* para. 172.

6. *Id.* para. 193.

measure and the risk assessment;" yet, "the risk assessment could set out both the prevailing view representing the 'mainstream' of scientific opinion, as well as the opinions of scientists taking a divergent view."<sup>7</sup>

The risk evaluated under an article 5.1 risk assessment is not only "risk ascertainable in a science laboratory operating under strictly controlled conditions, but also the risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."<sup>8</sup> The "object and purpose of the SPS Agreement justify the examination and evaluation of all such risks for human health whatever their precise and immediate origin may be."<sup>9</sup> The concept of "risk management" is not mentioned in any provision of the SPS Agreement and, as such, cannot be used to sustain a more restrictive interpretation of "risk assessment" than is justified by the actual terms of the SPS Agreement.<sup>10</sup> Hence, risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes may be taken into account as well as risks arising from difficulties of control, inspection, and enforcement of the requirements of good veterinary practice.

The adoption of the Appellate Body report has confirmed and strengthened the right of WTO Members to apply SPS measures necessary to protect human, animal, or plant life or health, even if they deviate from relevant international standards and result in a higher level of SPS protection. Unlike the panel, the Appellate Body avoided an interpretation that would have attributed quasi-legislative powers to adopt legally binding standards by majority votes to international standard-setting procedures. This interpretation is to be welcomed in view of the fact that standard-setting procedures in international expert committees, such as the Codex Alimentarius Commission of the Food and Agriculture Organization, are often inadequately controlled by parliaments and the public at large, and may lack democratic legitimacy and sufficient legal guarantees of "due process." The beef hormone dispute illustrates that the SPS Committee should use its power under article 3.5 of the SPS Agreement to "develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations."<sup>11</sup>

The Appellate Body also reversed the panel's finding of an inconsistency of the EC's SPS measures with article 5.5. The latter provision pursues "the objective of achieving consistency in the application of the concept of appropriate level of

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7. *Id.* paras. 193, 194.

8. *Id.* para. 187.

9. *Id.* para. 206.

10. *Id.* paras. 187, 206.

11. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 78 (1994) [hereinafter SPS Agreement].

sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health;”<sup>12</sup> it prescribes that “each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.”<sup>13</sup> The Appellate Body’s application of article 5.5 of the SPS Agreement leaves open under what conditions arbitrary or unjustifiable differences or distinctions in levels of protection do in fact “result in discrimination or a disguised restriction on international trade.”<sup>14</sup> According to the report, an answer to this question must be sought in the circumstances of each individual case; in this dispute, the criteria and evidence relied on by the panel did not justify a finding of inconsistency with article 5.5. This Appellate Body finding illustrates again that certain WTO rules may be clarified more easily through jurisprudence rather than through political negotiations on additional general rules.

## B. THE 1998 SHRIMP/TURTLE DISPUTE

The 1998 panel report on US—Import Prohibition of Certain Shrimp and Shrimp Products found that the import prohibition was inconsistent with GATT article XI:1 and not justified by GATT article XX because the measure at issue did not satisfy the conditions contained in the chapeau of article XX. The panel stated that:

if an interpretation of the chapeau of Article XX were to be followed which would allow a Member to adopt measures conditioning access to its market for a given product upon the adoption by the exporting Member of certain policies, including conservation policies, GATT 1994 and the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened . . . if one WTO Member were allowed to adopt such measures, then other Members would also have the right to adopt similar measures on the same subject but with differing, or even conflicting, requirements. If that happened, it would be impossible for exporting Members to comply at the same time with multiple conflicting policy requirements . . . Market access for goods could become subject to an increasing number of conflicting policy requirements for the same product and this would rapidly lead to the end of the WTO multilateral trading system.<sup>15</sup>

The panel inferred from this interpretative principle, already formulated by similar terms in earlier GATT panel reports, that the U.S. measure at issue was inconsistent with the context and purpose of the WTO Agreement and was “not within the scope of measures permitted under Article XX.”<sup>16</sup> The panel noted in this context that the United States had not claimed that its unilateral measure

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12. *Id.* art. 5.5.

13. *Id.*

14. *Id.*

15. *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Panel*, WT/DSS8/R, para. 7.44 (May 15, 1998), at WTO Website, *supra* note 4.

16. *Id.* para. 7.48.

was allowed or required by any international agreement other than GATT 1994; moreover, "general international law and international environmental law clearly favour the use of negotiated instruments rather than unilateral measures when addressing transboundary or global environmental problems, particularly when developing countries are concerned. Hence, a negotiated solution is clearly to be preferred, both from a WTO and an international environmental law perspective."<sup>17</sup> As the United States had not entered into international negotiations before it imposed the import ban, the panel did not find it necessary to examine "whether parties entered into negotiations in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures."<sup>18</sup> The panel made the explicit reservation that "our findings regarding article XX do not imply that recourse to unilateral measures is always excluded, particularly after serious attempts have been made to negotiate; nor do they imply that, in any given case, they would be permitted."<sup>19</sup>

The panel findings confirm, and give precision to, certain principles relating to TREMS which have been progressively elaborated in GATT dispute settlement practice in conformity with recommendations in various UN resolutions (such as "Principle 12" in the 1992 Rio Declaration). The case-oriented concretization of the pertinent GATT rules through dispute settlement practice promoted a progressive development of WTO law which might not have been possible in political negotiations on additional WTO rules.

## II. Need for Additional WTO Rules on Anticompetitive Practices: WTO Dispute Settlement Findings on TRAMS

Just as GATT and WTO law have always focused on governmental market access barriers and distortions, GATT and WTO dispute settlement procedures have been used almost exclusively for reviewing governmental trade restrictions and trade distortions. In less than two percent of the more than 350 GATT and WTO dispute settlement proceedings, governments also challenged private anticompetitive business practices and their alleged support by the government concerned. For instance, the 1988 panel report on Japan's export restrictions and "voluntary import expansion commitments" in the context of the Japan-US Semiconductor Agreement described the close interrelationships between the private cartel of Japanese producers and exporters of semiconductors and the supplementary governmental export restrictions; yet, the panel report only found the governmental export restrictions to be inconsistent with GATT article XI:1.<sup>20</sup> In addition, the 1988 *Good Offices Report by the Personal Representative of the Director-General on the Dispute Between the EC and Japan Concerning Certain*

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17. *Id.* para. 7.60.

18. *Id.*

19. *Id.*

20. Japan—Trade in Semi-Conductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 162 (1989).

*Pricing and Trading Practices for Copper in Japan* did not uphold the EC's claim that the Japanese government had supported alleged cartel practices by Japanese copper smelters in violation of GATT law.<sup>21</sup> Finally, the 1998 panel report on Japan's measures affecting consumer photographic film and paper<sup>22</sup> likewise did not uphold a U.S. claim that Japanese governmental measures, including "self-regulating standards and rules" and "fair competition codes" enacted by business associations in close consultation with governmental entities had violated WTO rules or otherwise nullified legitimate U.S. market access expectations based on Japanese tariff concessions.

The GATT Contracting Parties have explicitly recognized that "the activities of international cartels and trusts may hamper the expansion of world trade . . . and thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement."<sup>23</sup> However, the repeated proposals—in 1948, 1954-55, 1958-60, 1980 and 1986—for introducing into GATT law additional substantive and procedural rules on restrictive business practices were never adopted by the GATT Contracting Parties.

The WTO Agreement includes a large number of provisions explicitly addressing private anti-competitive practices.<sup>24</sup> In view of the widespread governmental and private anticompetitive practices—for instance in former state-trading countries applying for WTO membership, in international services trade, and in the exercise of intellectual property rights—the WTO Annual Report 1997 rightly concluded: "the issue is not whether competition policy questions will be dealt with in the WTO context, but how, and in particular, how coherent will the framework be within which this will be done."<sup>25</sup> The various approaches to the regulation of anticompetitive practices in WTO law vary. For instance, the attempt at strengthening the ineffective legal disciplines in GATT article XVII on state-trading enterprises and monopolies through the 1994 *Understanding on the Interpretation of Article XVII* has only led to a few procedural improvements.<sup>26</sup> Also, the (draft) protocols for the accession of former state-trading countries to the WTO provide for country-specific liberalization and deregulation commitments.

In addition, in the 1997 General Agreement on Trade in Services (GATS) Protocol on the liberalization of telecommunications services, most governments

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21. Measures Affecting the World Market for Copper Ores and Concentrates, GATT B.I.S.D. (36th Supp.) at 200 (1990).

22. *Japan—Measures Affecting Consumer Photographic Film and Paper—Report of the Panel*, WT/DS44/R (Mar. 31, 1998), at WTO Website, *supra* note 4.

23. See Restrictive Business Practices, Nov. 5, 1958, GATT B.I.S.D. (7th Supp.) at 29 (1959).

24. For a survey, see E.U. PETERSMANN, NEED FOR INTEGRATING TRADE AND COMPETITION RULES IN THE WTO WORLD TRADE AND LEGAL SYSTEM (1996) starting at page twenty.

25. *WTO Annual Report 1997*, WT/L/256, at 32, at WTO Website, *supra* note 4.

26. Cf. E.U. Petersmann, *GATT Law on State Trading Enterprises: Critical Evaluation of Article XVII and Proposals for Reform*, in TRADE LIBERALIZATION AND PROPERTY OWNERSHIP: STATE TRADING IN THE 21ST CENTURY (Thomas Cottier & P. Mavroidis eds., 1998).

included commitments on regulatory disciplines based on an agreed "reference paper" which sets out commitments relating to such matters as competition safeguards, interconnection guarantees, licensing, and independence of regulators. If WTO Members should negotiate additional future GATS Protocols, for instance on the liberalization of air transport services or maritime services, such GATS Protocols may need to include competition rules dealing with the widespread cartel practices, market-sharing agreements, and monopolies in these and other services sectors. Yet, it remains to be clarified whether general competition rules in the GATS would not offer a more coherent approach than sector-specific competition rules in GATS Protocols which are exposed to the risk of "regulatory capture" and risk being mutually inconsistent.

Finally, the establishment of the WTO Working Group on the Interaction Between Trade and Competition Policy in December 1996, and the so far more than seventy-five submissions made to this group on national and international competition rules and problems, reflect the increasing awareness of WTO Members for the need to deal in a more systematic manner with anti-competitive market access barriers and distortions. Yet, no consensus has emerged thus far on the various proposals to elaborate, for instance, substantive and procedural competition rules in the framework of a "Plurilateral Agreement" on Trade and Competition to be incorporated into Annex 4 to the WTO Agreement.

The successful liberalization of governmental market access barriers has increased the transnational impact of private market access barriers, such as cartels, monopolization, and abuses of dominant market positions. More than forty developing and transition countries have adopted new competition laws in the past two decades. There is not only a need for international rules on the coordination of national competition policies (e.g., with regard to international mergers and antitrust investigations abroad) and on private anti-competitive practices with transnational effects (such as export cartels and "vertical agreements" on market foreclosure). The international liberalization of services, movements of persons, capital, and intellectual property rights have also revealed the need for additional rules on governmental market distortions (e.g., in the field of international air and shipping transports, telecommunications, and intellectual property). There are also obvious inconsistencies between trade rules (e.g., on dumping) and competition rules (e.g., on price discrimination within countries) that reduce consumer welfare. Hence, while the need for additional WTO rules on TREMS remains unclear, there seems to be a strong case for additional WTO rules for anticompetitive market access barriers and distortions as well as the international coordination of domestic competition policies.

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*GRANT ALDONAS:* In the past, dispute settlement negotiations were held separate from the negotiation of substantive trade issues. However, such an approach may not work if the WTO addresses investment policy and competition policy.



As an illustration of the problems that lie ahead, Aldonas asked how the WTO dispute settlement system would deal with discriminatory conduct by a local zoning board. For example, what exhaustion-of-local-remedies requirement would be imposed? What deference would be paid to decisions made by domestic agencies? Such a case would raise significant questions concerning standard of review. In addressing investment protection, the WTO will need a new set of dispute settlement rules to deal with such questions. The rules would be more like the International Center for Settlement of Investment Disputes (ICSID) rules than the rules that exist under the DSU. This suggests that development of new substantive rules will have to be closely integrated with new rules on dispute settlement.

In addition, the basic GATT rules of MFN and national treatment won't help in negotiating an international policy on competition. Bringing competition policy within the WTO will require a new set of procedural rules for dispute settlements involving anticompetitive behavior. For instance, the WTO has not yet resolved issues surrounding the international system's inability to compel discovery in cases involving anticompetitive behavior. The *Japan—Film* case is a good illustration of this problem.

In sum, the WTO will have to address procedure issues hand-in-hand with substantive rules in approaching the areas of investment policy and competition policy.

