



Universität
Zürich^{UZH}

Rechtswissenschaftliches Institut

Trade – WTO Law

International Economic Law

Prof. Seraina Grünewald / Prof. Christine Kaufmann

13/20/27 March 2014



Universität
Zürich^{UZH}

Rechtswissenschaftliches Institut

III. Dispute Settlement



1. Principles

- Prompt and amicable settlement of disputes between members
 - Legal security and predictability
 - Credibility of international treaties
 - Development of an actual case law
- Annex 2 WTO Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
- Scope: all multilateral and plurilateral agreements (Art. 1.1, Appendix 1 DSU)

3



1. Principles

Objectives

- Conciliation of parties to the dispute (“mutually agreed solution”)
- In the absence of conciliation
 - Secure the withdrawal of measures found to be inconsistent with WTO agreements
 - Provision of compensation (temporary measure)
 - As a last resort: suspension of concessions or other obligations on a discriminatory basis (requires authorization)

4



2. Institutions

Panels

- *Ad hoc*, in case of disputes
- Composition: 3 panelists (exceptionally 5)
 - Independent, well-qualified, governmental/non-governmental
 - By party agreement within 20 days (indicative list)
 - If no agreement, decision by Director-General
- Function: Assist the Dispute Settlement Body (General Council)
 - Objective assessment of the facts
 - Objective examination of the legal claims

5



2. Institutions

Appellate Body

- Standing body
- Composition: 7 members (max. 2 four-year terms)
 - Recognized authority, demonstrated expertise, unaffiliated with any government
 - Broadly reflects WTO membership
 - Appeals are heard by 3 members of the AB (rotation)
- Function: uphold, modify or reverse panels' findings upon appeal
 - Issues of law, legal interpretation
 - No new evidence, no new issues

6



2. Institutions

Dispute Settlement Body

- Highest organ
- Functions
 - Establishment of panels
 - Adoption of panel and Appellate Body reports
 - Surveillance of implementation of rulings and recommendations
 - Authorization of “retaliation” (trade sanctions)
- Mostly decision-making by “negative” consensus → quasi-automaticity of DSB decisions

7



3. Proceedings

- Consultations (60 days) (Art. 4 DSU)
- Panel process (6 months) (Arts. 12-15)
- Adoption of panel report by DSB (Art. 16 DSU) **or**
- Appellate review (2 months) (Art. 17 DSU)
- Adoption of Appellate Body report by DSB (Art. 17.14 DSU)
- Implementation within “a reasonable period of time” (Art. 21 DSU)
- Compensation or limited trade sanctions (Art. 22 DSU)

8



3. Proceedings

Consultations

- Request for consultations
- Private and confidential process
 - No involvement of WTO bodies (unless requested by parties)
 - Third parties with “substantial trade interest” → right to be heard and to written submissions
- Informal, party-controlled, settlement-oriented process (diplomacy)
→ not subject to panel review

9



3. Proceedings

Disputes by Country/Territory

Country	as complainant	as respondent	as third party
USA	106	121	109
China	12	31	105
EU	90	77	138
Japan	19	15	139
Brazil	26	15	80
Botswana	0	0	0
Switzerland	4	0	11

http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

10



Trade and Environmental Protection International Economic Law

Prof. Seraina Grünewald / Prof. Christine Kaufmann

3 April 2014



A brief introduction...

- Environmental policies will often constitute trade restrictions
 - Primarily environmental objective?
 - Primarily protectionist objective?
- Jurisdictional scope of environmental policies?
- Tolerable risk? Scientific justification?
- Relevance of consumer concerns?



Overview

- I. Tuna/Dolphin
- II. Shrimp/Turtle
- III. Retreaded Tyres
- IV. SPS Agreement and Hormones Controversy



- I. Tuna/Dolphin



1. Case History

- U.S. Marine Mammal Protection Act (1972)
 - Ban of yellow-fin tuna (and products thereof) caught with purse-seine nets → Problem: Bycatch of dolphins
 - Secondary-nations embargo: Ban of yellow-fin tuna from “intermediary nations” without equal primary ban



- Harvesting practices of primary nations
- Import policies of secondary (“intermediary”) nations

15



1. Case History –Tuna/Dolphin I (1991)

- Complainant: Mexico
 - Violation of Art. XI GATT
- Defendant: U.S.
 - Applicability of Art. III:4 GATT → non-discriminatory application of internal regulation
 - Measure justified under Arts. XX(b), XX(d), XX(g) GATT
- Report was never presented for approval and thus not adopted

16



1. Case History –Tuna/Dolphin II (1994)

- Challenge of the same measures (centered on the secondary nations embargo)
- Complainants: European Economic Community and the Netherlands
 - Violation of Art. XI GATT
 - No Art. XX GATT exception applies
- Defendant: U.S.
 - Measure justified under Arts. XX(b), XX(d), XX(g) GATT
- Report was not adopted by the GATT Council

17



2. Decisions

- Art. III:4 GATT (national treatment) does not apply
 - Regulation does not affect tuna as a product → Non-product-related PPMs not in the scope of Art. III:4 GATT
- Even if it applied... (Tuna/Dolphin I)
 - U.S. must not accord less favorable treatment to Mexican tuna *as a product* compared to U.S. tuna *as a product* → “like products”
- Violation of Art. XI:1 GATT (quantitative restrictions)

18



2. Decisions

- Applicability of Art. XX(b), (g) and/or (d) GATT?
 - Art. XX(g) GATT applies to conservation of dolphins within and outside U.S. territory (Tuna/Dolphin II)
 - BUT: Prohibition of measures with extraterritorial effects → U.S. not entitled to use trade measures to force other countries to adopt U.S. policies
 - Measures not covered by the exceptions of Art. XX(b), (g) or (d) GATT

19



II. Shrimp/Turtle

20



1. Case History

- U.S. Endangered Species Act (1973)
 - Import ban on shrimp (products) harvested with technology that may negatively affect certain sea turtles
 - Ban lifted in case of use of “turtle excluder devices” or similar technologies



- Harvesting practices of exporting nations

21



1. Case History

- Complainants: India, Malaysia, Pakistan, Thailand
 - Ban inconsistent with Art. XI GATT
 - Tuna/Dolphin approach
- Defendant: U.S.
 - Ban justified under Art. XX(g) GATT
- Panel report
 - U.S. measures inconsistent with Art. XI GATT
 - Measures not justified under Art. XX GATT → US appealed

22



2. Decision

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 [member] of measures: (...)

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

Art. XX(g) GATT

23



2. Decision

- Provisional justification under Art. XX(g) GATT?
 - Are sea turtles an “exhaustible natural resource”?
 - “Related to” requirement
 - “Even-handedness” requirement
- Arbitrary and unjustifiable discrimination between members (chapeau of Art. XX GATT)?
 - Coercive effect on foreign governments to adopt essentially the same policies and practices as the U.S.
 - Same measure is applied to countries where different conditions prevail
 - Less invasive alternative approaches possible, uneven negotiation efforts, differential technical assistance and phase-in periods

24



2. Decision

*"We have **not** decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. (...)*

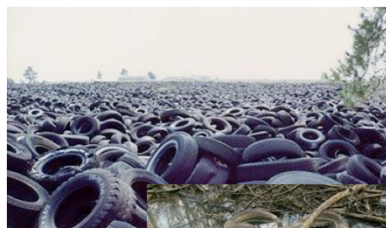
*What we **have** decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, (...)."*

Appellate Body ruling, paras. 185 and 186

25



III. Retreaded Tyres



26



1. Case History

- Brazil's import ban on retreaded tyres
- Complainant: EC
 - Inconsistency with XI GATT
 - Discriminatory and protectionist application of import ban
- Defendant: Brazil
 - Applicability of Art. XX(b) GATT
 - Breeding grounds for mosquito-borne diseases
 - Causing tyre fires, toxic leaching
 - MERCOSUR exemption due to arbitral award
 - Importation of used tyres due to court injunctions

27



2. Decision

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 [member] of measures: (...)

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

Art. XX(b) GATT

28



2. Decision

- Provisional justification under Art. XX(b) GATT (necessity test)?
 - Ban contributes to the reduction of waste tyre accumulation
 - No less trade-restrictive alternative measures
- Arbitrary and unjustifiable discrimination between members (chapeau of Art. XX GATT)?
 - No arbitrary or unjustifiable discrimination of EC compared to MERCOSUR countries → reversed by AB
 - Unjustifiable discrimination arising from used tyre imports
- Rejection of panel's "effect test" by AB → MERCOSUR exemption goes against the measure's objective

29



IV. SPS Agreement and Hormones Controversy



30



1. SPS Agreement

- Agreement on the Application of Sanitary and Phytosanitary Measures
- International treaty of the WTO (Annex to the GATT), in force since January 1995
- Parallel application of GATT and SPS disciplines

“Sanitary and phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).”

Art. 2.4 SPS Agreement

31



1. SPS Agreement

Concretization of Art. XX(b) GATT

“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 [member] of measures: (...)

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

Art. XX(b) GATT

32



1. SPS Agreement

- SPS measures? (para. 1 Annex A)
 - Measures aiming at the protection of human or animal life or health from food-borne risks (food safety measures)
 - Measures aiming at the protection of human, animal or plant life or health from risks from pests or diseases (disease control measures)
 - Measures aiming at the prevention or limitation of other damage from risks from pests (residual category)
- “within the territory of the Member” → excludes extraterritorial protection
- Bans, quarantine measures, certification, testing, labelling...

33



1. SPS Agreement

Basic Rights and Obligations

Sovereignty

Right to take SPS measures for the protection of human, animal or plant life or health

→ Art. 2.1



Limiting trade restrictions

- Necessity requirement (“only to the extent necessary”)
- Scientific basis requirement
- No arbitrary or unjustifiable discrimination

→ Arts. 2.2 and 2.3

34



1. SPS Agreement

Disciplines

- Harmonization around international standards (Art. 3)
 - Measures based on standards → “best efforts” provision
 - Measures conforming to standards → presumption of consistency
 - Measures exceeding standards → requires risk assessment
- Risk assessment and management (Art. 5)
 - Is there a risk? How likely is it?
 - Which level of protection? With which measure(s)?

35



1. SPS Agreement

Risk Assessment

“Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”

Article 5.1 SPS Agreement

- No prescribed methodology for risk assessment...
- ...but members must take account of available scientific evidence (Arts. 2.2 and 5.2)

36



1. SPS Agreement

Risk Assessment – Precautionary Measures

- SPS precautionary measures “where relevant scientific evidence is insufficient” (Art. 5.7)
 - Temporary measures (“provisionally”) → review
 - Based on the available pertinent information
 - Active seeking of the necessary scientific evidence for a more objective risk assessment
- Acceptance of precautionary principle in the SPS Agreement?

37



1. SPS Agreement

Risk Management

- Each member is free to determine the level of protection it deems appropriate in its territory based on...
 - ...scientific evidence
 - ...societal value judgments
- Minimizing negative trade effects (Art. 5.4) → “best efforts” provision
- No arbitrary and protectionist application across different risks (Art. 5.5)
- Choice of measure → not unnecessarily trade-restrictive (Art. 5.6)

38



2. Hormones Controversy

Case History

- EC import ban of beef treated with certain growth hormones
- Complainants: U.S. and Canada
 - Sufficient scientific consensus
 - Arbitrary and protectionist differentiation between...
 - ...artificial use of growth hormones for beef vs. naturally occurring growth hormones in other foods
 - ...artificial use of growth hormones for beef vs. pork
- Defendant: EC
 - Admissible precautionary measure (incomplete scientific evidence)

39



2. Hormones Controversy

Decision

- Panel report
 - Inconsistency with Arts. 3.1 and 3.3 SPS Agreement (harmonization) and Arts. 5.1 and 5.5 SPS Agreement (risk assessment)
 - “Evidentiary burden” lies with the member imposing the SPS measure
- AB ruling
 - Inconsistency solely with Arts. 3.3 and 5.1 SPS Agreement
 - “Evidentiary burden” lies with the complaining member
- Adoption of the AB report on February 13, 1998

40



2. Hormones Controversy

Implementation

- Deadline for implementation: May 13, 1999 → EC did not comply
 - Authorization by the DSB of retaliatory measures in the amount of USD 116.8 million and CAD 11.3 million on July 26, 1999
 - Memoranda of Understanding signed in May 2009 (U.S.) and March 2011 (CAN) → favorable tariff-rate quota for “high quality beef”
- Fundamental disagreement remains
- Ongoing negotiations on free trade agreements