

The WTO Dispute Settlement Understanding from a Developing Country Perspective: The Example of Thailand

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The WTO and its dispute settlement mechanism are hardly more than half a decade's old. But decisions from that process are coming quickly, creating a body of WTO law. Yet scant analysis has been published about how the growing body of WTO law is impacting developing countries. This article seeks to begin that process, by looking at WTO law from the perspective of developing country members generally, and from the perspective of Thailand specifically. The article asserts that the "legalization" of international trade concerns is a particular benefit to developing countries. The article further asserts that Thailand is in a privileged place vis a vis the WTO because it is a "well-developed" developing country, but that Thailand needs to assert that privilege by creating a legal task force to better exploit the WTO agreements.

1. Introduction

The WTO and its dispute settlement mechanism are hardly more than half a decade's old. But decisions from that process are coming quickly, creating a body of WTO law, both procedural and substantive. And with this growing body of law is a growing scholarship about this emerging area. Yet the scholarship remains largely focused on the subject area generally, or from a developed country perspective. Scant analysis has been published about how the growing body of WTO law and its practice are impacting developing countries, much less particular developing countries like Thailand.

This article seeks to begin that process, by looking at the WTO's-

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dispute settlement procedures, and the developing WTO law, from the perspective of developing country members generally, and from the perspective of Thailand specifically. Sections 2 and 3 look at the history of the WTO and its dispute settlement process respectively. Section 4 provides a history of Thailand's participation in the WTO dispute settlement procedure. In Section 5, I provide a starting point for analysis of the WTO's-dispute settlement process from a developing country perspective, and then provide some analysis of Thailand's use of the procedure. I argue that the "legalization" of international trade concerns is a particular benefit to developing countries, and that further reform is warranted, provided that it occurs gradually to ensure international support. I further argue that Thailand is in a privileged place *vis à vis* the WTO because it is a developing country that is relatively well-developed, but that Thailand needs to take advantage of that privilege by creating a legal task force to more strategically exploit the WTO agreements to its advantage.

2. History of the WTO

Our history reasonably must begin in America in the summer of 1930, when U.S. President Herbert Hoover signed the notorious Smoot-Hawley Tariff Act into law.¹ The law increased tariffs on foreign imports, leading to retaliatory tariff increases throughout the world.² The duties in turn slowed international trade, ultimately contributing to a global depression in the 1930s.³ The depression created the conditions that gave power to Japanese nationalist sentiment, and that allowed the Nazis their 1932 electoral victory.⁴

¹ Chen, Jim (2001) *Pax Mercatoria: globalization as a second chance at "peace for our time."* *Fordham Int'l L.J.*, vol.24, pp.1,10.

² Ryan, L. Winter (2000) *Reconciling the GATT and WTO with Multilateral Environmental Agreements: can we have our cake and eat it too?* *Colo. J. Int'l Envtl. I. & Pol'y*, vol.11, pp.223, 226-7.

³ *Id.* at p. 227.

⁴ Chen, *supra* note 1 at p. 11.

As that war was drawing to a close, the allies met at Bretton Woods, New Hampshire, to “lay the economic foundation for postwar peace.”⁵ The nations reached a consensus that a framework to facilitate international economic cooperation was needed.⁶ Three institutions were conceived, the International Monetary Fund (IMF); the International Bank for Reconstruction and Development (World Bank or IBRD); and the ill-fated International Trade Organization (ITO).⁷ While the IMF and the World Bank were to cover the financial side of the international economic equation, the ITO would administer and cover disputes arising over obligations encompassing commercial policy, such as trade and trade barriers, labor and employment, economic development and reconstruction, restrictive business practices, and intergovernmental commodity agreements.⁸

The 1948 Havana Charter proposed the creation of the ITO, an international organization for member states to work cooperatively in pursuit of the Charter’s principles and objectives.⁹ The Charter was signed by fifty three nations, seemingly an auspicious beginning.¹⁰ However, a reluctant U.S. Congress refused to ratify the Havana Charter, dooming its international support.¹¹

Nevertheless, in the meantime, on October 30, 1947, twenty-three nations signed the General Agreement on Tariffs and Trade (GATT), a multilateral agreement with the purpose of lowering tariff barriers between

⁵ *Id.* at p. 11.

⁶ Seilheimer, Lisa K. and Dixon, Craig A.A. (2000) Environmental Survey of WTO Dispute Panel Resolution Panel Decisions since 1995: “trade at all costs?” *Wm. & Mary Envtl. L. & Pol’y Rev.*, vol.24, pp.89, 90.

⁷ Dillon, Thomas J., Jr. (1995) The World Trade Organization: a new legal order for world trade? *Mich. J. Int’l L.*, vol.16, pp.349, 352.

⁸ *Id.* at p. 352.

⁹ Feddersen, Christoph T. (1998) Focusing on substantive law in international economic relations: the public morals of GATT’s article XX(a) and “Conventional” rules of interpretation. *Minn. J. Global Trade*, vol.7, pp.75, 80.

¹⁰ Seilheimer, *supra* note 6 at p. 91.

¹¹ Feddersen, *supra* note 9 at p. 80-1.

the contracting parties by creating schedules with specified customs treatment.¹² The GATT was intended only as a small but important effort to begin lowering tariffs until the economic agreements of the Havana Charter came into force.¹³ Although the GATT was designed as a provisional, stop-gap approach to international trade liberalization, because the Havana Charter was never ratified, the GATT became the “primary mechanism for coordinating global trade policy for the next half-century, even though it lacked a real institutional and structural framework.”¹⁴ Despite its provisional design, the GATT would eventually become the basis for the World Trade Organization (WTO), powerful proof of the strength of its initial features.¹⁵

In the ensuing half century since the adoption of the original GATT, member states have held seven rounds of negotiations, in which they have reduced tariffs and began addressing the emerging problem of non-tariff barriers. The most recent Uruguay Round resulted in the creation of the World Trade Organization, effective January 1, 1995.¹⁶ The Uruguay Round broadened the GATT to encompass trade in a variety of services, trade-related aspects of intellectual property, and trade-related investment measures.¹⁷ Among the agreements binding on all members of the World Trade Organization is the Understanding on Rules and Procedures Governing the Settlement of Disputes.¹⁸

The WTO is “the only international organization dealing with the global rules of trade between nations.”¹⁹ As of November 2000, the Geneva

¹² Seilheimer, *supra* note 6 at p. 79-80.

¹³ Dillon, *supra* note 7 at p. 353.

¹⁴ Feddersen, *supra* note 9 at p. 81.

¹⁵ Chen, *supra* note 1 at pp. 12, 13.

¹⁶ Feddersen, *supra* note 9 at p. 81.

¹⁷ *Id.* at p. 477.

¹⁸ *Id.* at p. 477.

¹⁹ WTO website at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

based WTO had 140 members.²⁰ Over three-fourths of those members are developing or least-developed nations.²¹ Those nations receive certain additional benefits such as technical assistance and training, and more time to implement agreements.²²

3. History of the WTO Dispute Settlement Mechanism

The history of the development of the dispute settlement mechanism within the GATT framework is an evolution from a fraternal, gentleman's-agreement, political approach for resolving disputes, to a more formal, rules-based legal system.²³

Because the GATT was not an organization, merely an agreement that provided a fairly general statement of consensus on principles of international trade, and which lacked any significant enforcement mechanism, the parties "were forced to develop a loose, consensus-based, member-enforced dispute settlement system."²⁴ In the first few years of the GATT era, parties began developing a procedure for adjudication based upon the terse language of Article XXIII of the GATT. The "panel procedure" allowed for disputes over GATT implementation to be submitted to panels

²⁰ WTO website at http://www.wto.org/english/thewto_e/thewto_e.htm.

²¹ Mota, Sue Ann (1999) *The World Trade Organization: an analysis of disputes*. *N.C.J. Int'l Law & Com. Reg.*, vol.25, pp.75. "There are no WTO definitions of 'developed' or 'developing' countries. Developing countries in the WTO are designated on the basis of self-selection although this is not necessarily automatically accepted in all WTO bodies." WTO Website at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

²² Mota, *supra* note 21 at p. 75-6.

²³ Lowenfeld, Andreas F. (1994) Remedies along with rights: institutional reform in the new GATT. *A.J.I.L.*, vol. 88, pp.477, 479.

²⁴ Maki, Peter C. (2000) Interpreting GATT using the Vienna convention on the law of treaties: a method to increase the legitimacy of the dispute settlement system. *Minn. J. Global Trade*, vol.9, pp.343-344; Kenworthy, James L. (2000) US trade policy and the World Trade Organization: the unraveling of the Seattle conference and the future of the WTO. *Geo. Public Pol'y Rev.*, vol.5, pp.103-104.

of GATT delegates from neutral countries, who were charged with issuing rulings on the merits of the complaint.²⁵ These rulings acquired legal status only if they were adopted by the GATT Council, which was composed of all GATT Contracting Parties.²⁶

For the first thirty years or so, until the late 1970s, GATT dispute procedures had a diplomatic character, with poorly defined procedures and rulings written in vague language that left much unsaid, leaving it to the parties to negotiate between the lines.²⁷ “The reason these impressionistic half-decisions were successful was that the early GATT of the 1950s was essentially a small ‘club’ of like-minded trade policy officials who had been working together since the 1946-1948 ITO negotiations.”²⁸

The system was not without significant problems. The respondent party had the power to delay and block conclusion of the dispute by preventing the establishment of a panel, objecting to the panel’s make up, and blocking consensus of an adverse panel report.²⁹ By the 1960s, the GATT dispute settlement mechanism fell into disfavor, chiefly as the result of the rapid influx of new members, mostly from developing countries, and the developed country members interest in avoiding the increasing list of complaints.³⁰

With the increase in concern over the proliferation of non-tariff barriers, and the attendant proliferation of rules concerning them, the use of the GATT dispute resolution process began a resurgence. In the 1979 Tokyo Round, the old “panel procedure” was enshrined in written rules.³¹

²⁵ Hudec, Robert E. (1999) *The new WTO dispute settlement procedure: an overview of the first three years.* *Minn. J. Global Trade*, vol.8, pp.1, 5.

²⁶ Lichtenbaum, Peter (1998) *Procedural issues in WTO dispute resolution.* *Michigan Journal of International Law*, 19 (4), pp.1195, 1199.

²⁷ Hudec, *supra* note 25 at p. 4.

²⁸ *Id.* at p. 5-6.

²⁹ Lichtenbaum, *supra* note 26 at p. 1194.

³⁰ Hudec, *supra* note 25 at p. 6.

³¹ Hudec, *supra* note 25 at p. 6.

Although the actual substance of the dispute settlement procedure remained essentially the same, albeit codified, the gentleman's club of the past had already come to be replaced with a wildly diverse and contentious membership of over eighty nations. The panels could no longer paper over fractious political differences with vaguely worded opinions, and a professional staff was hired to help insure a higher quality of panel decisions.³²

But the procedure still required all decisions to be made by consensus, continuing to give respondents veto power.³³ And in the 1980s there was an increase in delays in the dispute process, and in non-compliance with panel rulings.³⁴ As a result, the United States continued to feel frustrated by the limitations on the process, and were joined by, most significantly, the European Community, in pursuing further reform in the Uruguay Round.³⁵ Throughout the early years of the Uruguay Round negotiations, GATT party nations resisted the call from the United States and the European Community to create a legally binding dispute settlement mechanism. While most nations were willing to provide modest reform to the extant process, they were unwilling to abandon the key feature of requiring consensus.³⁶

That position was eroded rapidly, however, when the United States passed domestic legislation providing that it could unilaterally impose trade sanctions against other GATT members whenever the United States determined the other member was engaged in conduct having an adverse impact on U.S. trade. The passage of this notorious system of "Super 301" sanctions propelled the rest of the GATT membership to reluctantly accept the United States' position to create a legally binding

³² *Id.* at p. 6-7.

³³ *Id.* at p. 9.

³⁴ Lichtenbaum, *supra* note 26 at p. 1200.

³⁵ *Id.*

³⁶ Hudec, *supra* note 25 at p. 12.

dispute resolution mechanism.³⁷

In concluding the Uruguay Round in 1994, the GATT contracting parties agreed to the new Understanding on Dispute Settlement (DSU). The DSU included numerous provisions to increase the power of the dispute settlement system. Most centrally, the consensus model was abandoned, and respondent nations would no longer have the power to veto the rulings of the dispute panels.³⁸ Other significant reforms include the creation of a standing appellate body, and the stipulation that panels must employ customary rules of interpretation of public international law.³⁹ The creation of an enforceable international legal regime is almost unprecedented; the WTO's dispute settlement mechanism "provides one of the most developed enforcement regimes in international law."⁴⁰

4. Thailand's Participation in the GATT Dispute Settlement Mechanism

4.1 Introduction

Thailand had no experience with the GATT dispute settlement process until 1990, when the United States brought complaint for Thailand's apparently protectionist policy of refusing import licenses to foreign cigarette manufacturers. After the creation of the WTO and its DSU, Thailand has increasingly begun to use the procedure to its advantage, as shown below.

4.2 Cigarette Case

On November 7, 1990, the GATT panel released its report, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*.⁴¹

³⁷ *Id.* at p. 13.

³⁸ Maki, *supra* note 24 at p. 346.

³⁹ Feddersen, *supra* note 9 at p. 83-4.

⁴⁰ Pauwelyn, Joost. (2000) Enforcement and countermeasures in the WTO: rules are rules--toward a more collective approach. *A.J.I.L.*, vol.94, pp.335, 339.

⁴¹ DS10/R - 37S/200 (1990) (hereinafter "*Thai Cigarettes*").

After unsuccessful initial consultations between Thailand and the United States, a GATT panel was formed concerning the United States' challenge of Thailand's restrictions on imports of and internal taxes on cigarettes.⁴² More specifically, under Section 27 of Thailand's Tobacco Act, 1966, the importation and exportation of tobacco, including, *inter alia*, cigarettes, was prohibited except by licence of the Director-General of the Excise Department.⁴³ From 1966 until bringing this challenge, such licences had only been granted to the Thai Tobacco Monopoly, which had imported cigarettes on only three occasions, in 1968-70, 1976 and 1980.⁴⁴ The law also contained a schedule of excise taxes on cigarettes which provided a higher ceiling rate for imported cigarettes.⁴⁵

The United States requested the panel to find, *inter alia*, that Thailand's restrictions on cigarette imports could not be justified under Article XX(b) of the GATT because the restrictions were not necessary to protect human health.⁴⁶ The United States requested that "Thailand eliminate its quantitative restrictions on imports of cigarettes and that it bring its tax laws and practices into conformity with its obligations under the General Agreement."⁴⁷

Thailand countered that its import restrictions on tobacco were justified under GATT Article XX(b) because smoking control measures adopted by the government require banning the import of cigarettes to be effective, and cigarettes made in the United States contain additives that might make them more harmful than Thai cigarettes.⁴⁸

Regarding the issue of additives in U.S. cigarettes, Thailand

⁴² *Id.* at para. 1.

⁴³ *Id.* at para. 6.

⁴⁴ *Id.* at para. 6.

⁴⁵ *Id.* at para. 8.

⁴⁶ *Id.* at para. 12.

⁴⁷ *Id.* at para. 13.

⁴⁸ *Id.* at para. 14.

posited that U.S. cigarette manufacturers were using unknown chemicals to compensate for lowered tar and nicotine, and other known additives which, according to the United States' own Surgeon-General's 1984 report, may have adverse health effects. Thailand also complained that U.S. cigarettes contained nicotine that had been extracted and re-sprayed back onto the leaf, making the cigarettes potentially more addictive.⁴⁹

The U.S. responded that its cigarettes had no special health concerns, indeed had been recognized by the Thai government as more safe because of the lower tar and nicotine content. It also pointed out that all additives had been disclosed since 1985, that no governments with ingredient reporting requirements had taken issue with any of the ingredients, that Thailand had no regulations or restrictions on cigarette ingredients or flavorings used in cigarettes, and that, indeed, the Thai Tobacco Monopoly used additives in its cigarettes.⁵⁰ Thailand indicated that it had in fact recently required the Thai Tobacco Monopoly to list all additives, and that the additives listed in the United States were only a consolidated list without identifying brand, limiting the usefulness of the information.⁵¹

Pursuant to agreement of the parties, the World Health Organization (WHO) submitted a brief to the panel. The WHO provided a scientific discussion of the deleterious effects of smoking, focusing on the burgeoning problem of smoking in the third world. The WHO stated, *inter alia*, that the sophisticated manufacturing techniques of American cigarettes made them more dangerous than Thai cigarettes because the new cigarettes were easier to smoke, and public health efforts could not compete against the marketing juggernaut of the American tobacco companies.⁵² On the issue of additives, the WHO admitted that while there

⁴⁹ *Id.* at para. 28.

⁵⁰ *Id.* at para. 31.

⁵¹ *Id.* at para. 32.

⁵² *Id.* at para. 52.

was great concern about the dangers of cigarette additives, there was no scientific evidence that cigarettes with additives are more dangerous than those without them.⁵³

Despite Thailand and the WHO's concerns about the adverse health consequences attendant to opening Thailand's cigarette market to international competition, the panel struck down Thailand's import restrictions. The panel found that in not granting licenses for the importation of cigarettes for the prior ten years, Thailand was acting inconsistent with its obligation requiring that a member not institute or maintain any prohibition or restrictions through, *inter alia*, import licenses, or the importation of any product from any other member.⁵⁴

The Panel then turned to Thailand's argument that the restrictions were permitted under Article XX(b), as restrictions "necessary to protect human ... life or health." The Panel agreed that smoking constituted a serious risk to human health and that therefore measures designed to reduce cigarette consumption fell under Article XX(b). The Panel stressed, however, that such measures were limited to those that were "necessary" to achieving that purpose.⁵⁵ The Panel construed this limitation to mean that "the import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."⁵⁶

Turning to those objectives, the Panel found that "the principal health objectives advanced by Thailand to justify its import restrictions were to protect the public from harmful ingredients in imported cigarettes,

⁵³ *Id.* at para. 53.

⁵⁴ *Id.* at para. 67.

⁵⁵ *Id.* at para. 70.

⁵⁶ *Id.* at para. 75.

and to reduce the consumption of cigarettes in Thailand.”⁵⁷ The Panel then applied its test to see whether Thailand’s objective to assure a high quality of cigarette could be met with measures consistent with, or less inconsistent with the GATT. The Panel held that “[a] non-discriminatory regulation implemented on a national treatment basis ... requiring complete disclosure of ingredients, coupled with a ban on unhealthy substances, would be an alternative consistent with the General Agreement.”⁵⁸

The Panel then turned to Thailand’s objective of reducing the quantity of cigarettes smoked there. The Panel found that the demand for cigarettes could be reduced consistent with GATT obligations by controlling cigarette advertizing or by restricting the supply of cigarettes using a government monopoly such as the Thai Tobacco Monopoly to regulate the overall supply of cigarettes, their prices and overall availability, provided that it accorded imported cigarettes the same treatment as domestic cigarettes.⁵⁹ The Panel concluded, “[t]he Panel **recommends** that the CONTRACTING PARTIES request Thailand to bring its application of Section 27 of the Tobacco Act into conformity with its obligations under the General Agreement.”⁶⁰ In response, Thailand lifted the ban on foreign brands in 1990.⁶¹

4.3 Shrimp Case

In October of 1998, the Appellate Body released its report, *United States-Import of Certain Shimp and Shrimp Products*.⁶² The appeal arose from a dispute that Thailand, Malaysia, India, and Pakistan, had against the United States regarding a prohibition by the U.S. on the importation of

⁵⁷ *Id.* at para. 76.

⁵⁸ *Id.* at para. 77.

⁵⁹ *Id.* at para. 78-79.

⁶⁰ *Id.* at para. 79.

⁶¹ *Big tobacco’s global reach: Thailand resists U.S. brand assault*. [Online] Washington Post. Available from: <http://www.ash.or.th/news/tobacconews2WashingtonPostSpecial.htm> [Accessed 18th November 1996].

⁶² WT/DS58/AB/R 12 (1998) (hereinafter “*Shrimp Case*”).

certain shrimp and shrimp products.⁶³ The prohibition was imposed pursuant to that nation's Endangered Species Act of 1973. Regulations that became effective in 1990 pursuant to that Act required that all U.S. shrimp trawl vessels use approved turtle excluder devices ("TEDs") in areas where shrimp harvesting was resulting in the killing of sea turtles.⁶⁴ In 1989, the Endangered Species Act was amended, adding "Section 609." That Section contained two significant provisions. Section 609(a) instructed the United States' Secretary of State to, *inter alia*, initiate negotiations with an eye to develop treaties for the protection and conservation of sea turtles.⁶⁵ Secondly, the Section provided that no later than the first of May, 1991, the United States was to ban shrimp harvested with commercial fishing technology that adversely affects sea turtles, except for harvesting nations that have been certified.⁶⁶ Regulations elaborated that certification would be granted to countries who either essentially don't harvest shrimp in areas inhabited by sea turtles, or countries that adopt a regulatory program regarding sea turtle conservation "that is comparable to the United States program *and* where the average rate of incidental taking of sea turtles by their vessels is comparable to that of the United States vessels."⁶⁷

The Appellate Body analyzed whether Section 609 fell within the scope of the exceptions created by Article XX of the GATT, in order to

⁶³ *Id.* at para. 1.

⁶⁴ *Id.* at para. 3.

⁶⁵ *Id.* at para. 4.

⁶⁶ *Id.*

⁶⁷ *Id.* at para. 4-5. In October of 1996, Thailand joined with India, Malaysia, and Pakistan to request consultations with the United States pursuant to the DSU. In January 1997, Thailand and Malaysia requested the establishment of a Dispute Settlement Body panel to examine their complaint, Pakistan made the same request in January of 1997, and the two panels were consolidated into a single panel. A third panel requested by India in April of that year was also consolidated. The Panel published its report in May 1998. The Panel found that the United States' import ban as applied was not consistent with Article XI:1 of the GATT 1994, and was not justified under the exceptions of Article XX. In July of 1998, the United States filed its notice to appeal the Panel report. *Id.* at paras. 1, 2, 8, 9.

resolve the dispute between the parties.⁶⁸ The Appellate Body turned to the task of determining whether Section 609 fell within the exception granted under Article XX(g), which covers measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁶⁹ The Appellate Body considered the arguments of appellees that sea turtles were not “exhaustible” because living things are a renewable resource, and rejected them, finding that living resources could be renewable resources.⁷⁰ The Appellate Body readily found that the sea turtles are an “exhaustible” resource because they are an endangered species.⁷¹

The Appellate Body next turned its attention to the question of whether Section 609 “relates to” the conservation of exhaustible natural resources. The Appellate Body essentially set a test that the measure’s means must bear a reasonable relationship to its ends. Here, the Appellate Body found that “Section 609, *cum* implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species.”⁷²

Having found that Section 609 met the requirements of Article XX(g), the Appellate Body turned to the question of whether the measure followed the dictates of the Article XX chapeau.⁷³ The Appellate Body turned to the actual language of the chapeau, noting its requirements.⁷⁴ The Appellate Body then noted that the purpose of the chapeau is to

⁶⁸ *Id.* at para. 130-1.

⁶⁹ *Id.* at para. 132-3.

⁷⁰ *Id.* at para. 135.

⁷¹ *Id.* at para. 140.

⁷² *Id.* at para. 149.

⁷³ The Chapeau to Article XX provides as follows: “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.”

⁷⁴ *Id.* at para. 158.

prevent the abuse of the exceptions to Article XX.⁷⁵ The Appellate Body put it another way in stating that the chapeau is “but one expression of the principle of good faith.”⁷⁶ Thus understood, “[t]he task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.”⁷⁷

The Appellate Body turned to an analysis of the chapeau to the Section 609 measure, first to determine if the measure has been applied in a manner constituting “unjustifiable discrimination between countries where the same conditions prevail.”⁷⁸ The Appellate Body found the measure conspicuously flawed by its coerciveness: “Section 609, in its application, is, in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.”⁷⁹ In refining its analysis, the Appellate Body stated, “it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.”⁸⁰

⁷⁵ *Id.* at para. 159.

⁷⁶ *Id.* at para. 166.

⁷⁷ *Id.* at para. 168.

⁷⁸ *Id.* at para. 169.

⁷⁹ *Shrimp Case*, *supra* note 62, at para. 169.

⁸⁰ *Id.* at para. 172.

The Appellate Body also faulted the United States for failing to engage the appellees and other shrimp-exporting Members in “serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.”⁸¹ The Appellate Body noted this failure was of particular concern here, where the U.S. law itself had directed that such treaty making efforts take place, where protection of a highly migratory species demands concerted and cooperative efforts, and where the United States did successfully engage in such a treaty making process with some Members.⁸² The Appellate Body then summed up, finding these differences in application of Section 609 constitute “unjustifiable discrimination” under the chapeau of Article XX.⁸³

The Appellate Body then turned to a consideration of whether Section 609 had been applied in a manner constituting “arbitrary discrimination between countries where the same conditions prevail.”⁸⁴ The Appellate Body found that the “rigidity and inflexibility” in the application of the U.S. measure also constituted “arbitrary discrimination” within the meaning of the chapeau.⁸⁵ The Appellate Body also noted that the certification process had no due process type safeguards, such as the right of an applicant to be heard, nor were reasoned, written opinions of application decisions required, nor were there any opportunities for review of a denial of an application.⁸⁶ These due process failings rendered the measure, as applied, arbitrary within the meaning of Article XX’s chapeau. The Appellate Body concluded by recommending that the United States

⁸¹ *Id.* at para. 174.

⁸² *Id.* at para. 175-80.

⁸³ *Id.* at para. 184.

⁸⁴ *Id.* at para. 185.

⁸⁵ *Id.*

⁸⁶ *Id.* at para. 188.

bring its law into conformity with the GATT.⁸⁷

4.4 Anti-dumping Case

In September 2000, a Dispute Settlement Panel released its Report, *Thailand-Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*.⁸⁸ The Report resulted from a dispute brought by Poland against Thailand. Pursuant to GATT Article VI's anti-dumping duties, and the Agreement on the Implementation of Article VI of the GATT 1994 (also known as "the Anti Dumping Agreement" or "the AD Agreement"), Thailand had determined that Poland was "dumping" certain steel products, harming Thailand's domestic industry in these products, and imposed anti-dumping duties on the products entering Thailand. Thailand subsequently refused two requests by Poland for disclosure of findings.⁸⁹ Poland denied that its industry was engaged in impermissible dumping, and in April of 1998, sought consultations with Thailand pursuant to the DSU.⁹⁰ When the parties were unable to informally resolve their dispute, in October of 1999, Poland requested that a Panel to be formed to hear its complaint.⁹¹

Poland contended that Thailand's actions violated the WTO's Anti-Dumping Agreement. The Panel found that Thailand's imposition of

⁸⁷ *Id.* at para. 196. "At the DSB meeting on 27 January 2000, the US stated that it had implemented the DSB's rulings and recommendations. On 12 October 2000, Malaysia requested that the matter be referred to the original panel pursuant to Article 21.5 of the DSU, considering that by not lifting the import prohibition and not taking the necessary measures to allow the importation of certain shrimp and shrimp products in an unrestrictive manner, the United States had failed to comply with the recommendations and rulings of the DSB. At its meeting of 23 October 2000, the DSB referred the matter to the original panel pursuant to Article 21.5 DSU." *Overview of the State-of-play of WTO Disputes*, section I(16). 2001. [Online] Available from: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [Accessed 21st February 2001].

⁸⁸ WT/DS122/R 28 (2000) (*hereinafter* "Steel Case").

⁸⁹ *Overview of the State-of-play of WTO Disputes*, *supra* note 127 at section IV(2).

⁹⁰ Steel Case, *supra* note 88 at para. 1.

⁹¹ *Id.* at para. 2.

the anti-dumping measure on Poland was contrary to the requirements of Article 3 of the Anti-Dumping Agreement in that inconsistently with the second sentence of Article 3.2 and Article 3.1, the Thai authorities did not consider, on the basis of an “objective examination” of “positive evidence” in the disclosed factual basis, the price effects of dumped imports; inconsistently with Articles 3.4 and 3.1, the Thai investigating authorities failed to consider certain factors listed in Article 3.4, and failed to provide an adequate explanation of how the determination of injury could be reached on the basis of an “unbiased or objective evaluation” or an “objective examination” of “positive evidence” in the disclosed factual basis; and inconsistently with Articles 3.5 and 3.1, the Thai authorities made a determination of a causal relationship between dumped imports and any possible injury on the basis of their findings concerning the price effects of dumped imports, which the Panel had already found to be inconsistent with the second sentence of Article 3.2 and Article 3.1, and their findings concerning injury, which the Panel had already found to be inconsistent with Article 3.4 and 3.1.⁹²

Probably the most significant fact leading to the Panel’s determination that Thailand had failed to comply with the AD Agreement was Thailand’s continued use of confidential information to form the basis of its determination that Poland was engaged in dumping. Regardless of any legitimate reasons Thailand felt it had for keeping some information confidential, the Panel held that “because the Polish firms (and/or their legal counsel) did not have access to the reasoning or analysis contained in this confidential document (and other such documents) in the course of the Thai AD investigation or at least from the time of the final determination, and because Poland did not have access to the reasoning in these documents prior to these WTO Panel proceedings, we do not consider that such the reasoning contained exclusively in these documents can be

⁹² *Overview of the State-of-Play of WTO Disputes*, *supra* note 87, at section IV(2).

considered to constitute 'positive evidence' or an indication of an 'objective examination' within the meaning of Article 3.1 AD that can be taken into account by us as an additional statement of the reasoning supporting the Thai affirmative determination.⁹³ The Panel focused on the importance of all interested parties to relevant information during an investigation so that the interested WTO member could exercise its judgment about whether it would be appropriate to resort to the use of the DSU procedures.⁹⁴

On October 23, 2000, Thailand appealed the Panel Report.⁹⁵ The Appellate Body has recently released its decision in this matter. As has been typical in the past, while the Appellate Body rejected some of the Panel's analysis, it upheld the Panel's decision to strike down the rule that restrains international trade, here Thailand's imposed anti-dumping duties against Poland.⁹⁶

In one sense the Report by the Appellate Body was a victory for Thailand. The Appellate Body struck down the central reasoning by the Panel that it could not rely on confidential information in determining, under AD Article 17, whether Thailand met its investigation obligations under AD Article 3.1.⁹⁷ The Appellate Body also held that under Article 17.5 and Article 17.6, a Panel must examine the facts before it, whether in confidential or non-confidential documents.⁹⁸

Nevertheless, the Appellate Body upheld the Panel's reasoning that under AD Article 3.4, Thailand was required to evaluate all of the factors listed in that provision.⁹⁹ The Appellate Body found that regarding Article

⁹³ *Steel Case*, *supra* note 88 at para. 185.

⁹⁴ *Id.* at para. 185.

⁹⁵ *Overview of the State-of-Play of WTO Disputes*, *supra* note 87, at section IV(2).

⁹⁶ *Thailand - Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-alloy Steel and H-beams from Poland*. [n.p.], 2001.

⁹⁷ *Id.* at paras. 98 - 121.

⁹⁸ *Id.* at para. 115 - 16.

⁹⁹ *Id.* at para. 130.

3.4, “the Panel, by means of a thorough textual and contextual analysis, clearly applied the customary rules of interpretation of public international law.”¹⁰⁰ Thus, because Thailand had not made an evaluation of all the Article 3.4 factors, the bottom line did not change from the Panel to the Appellate Body reports: “The Appellate Body *recommends* that the DSB request that Thailand bring its anti-dumping measure found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement*, into conformity with its obligations under that Agreement.”¹⁰¹ It remains to be seen how Thailand will react to this ruling against it.

4.5 Case against the United States for its Anti Dumping Act of 2000

Last December, Thailand joined Australia, Brazil, Chile, the EC, India, Indonesia, Japan, and Korea in requesting consultations under the DSU concerning the October 2000 amendment to the U.S. Tariff Act of 1930, titled “Continued Dumping and Subsidy Offset Act of 2000” (the “Act”).¹⁰² According to the requesting Members, the Act mandates the US customs authorities to distribute on an annual basis the duties assessed pursuant to a countervailing duty order, an anti-dumping order or a finding under the Antidumping Act of 1921 to the petitioners or interested parties who supported the petition, for their expenditure incurred with respect to “manufacturing facilities, equipment, acquisition of technology, acquisition of raw material or other inputs.” According to the requesting Members, these “offsets” constitute a specific action against dumping and subsidisation which is not contemplated in the GATT, the AD Agreement or the SCM Agreement.

¹⁰⁰ *Id.* at para. 128.

¹⁰¹ *Id.* at para. 143.

¹⁰² United States - Continued Dumping and Subsidy Offset Act of 2000 (WT/DS217/1). See, *Overview of the State-of-Play of WTO Disputes*, *supra* note 87, at section VII(82).

4.6 Case against Egypt for its ban on Thai Tuna with Soybean Oil

Last September, Thailand requested consultations with Egypt pursuant to the DSU concerning the prohibition imposed by Egypt on importation of canned tuna with soybean oil from Thailand in January 2000.¹⁰³ Thailand's position is that Egypt's actions constitute failure to carry out its obligations under the following provisions of the Marrakesh Agreement Establishing the World Trade Organization: Articles I, XI, and XIII of the GATT, and Articles 2, 3 and 5, and Annex B, Paragraph 2 and Paragraph 5, of the SPS Agreement. Importantly, Thailand's claim against Egypt is the first one at the WTO involving genetically modified organisms.¹⁰⁴

4.7 Case against Colombia Ban on Importation of Thai Polyester Filaments

In September of 1999, Thailand requested the creation of a DSU Panel over its dispute with Colombia concerning the prohibition imposed by Colombia on importation of plain polyester filaments from Thailand imposed in October of 1998.¹⁰⁵ Thailand alleged that Colombia's safeguard measure was inconsistent with Article 2 of the Agreement on Textiles and Clothing (ATC) regarding the application of a transitional safeguard mechanism and with Article 2 of the ATC regarding the introduction and application of restrictions by Members. At the DSB meeting in October 1999, Thailand announced that it was withdrawing its request for a panel because the Colombian safeguard measure had been terminated.

¹⁰³ Egypt - Import Prohibition On Canned Tuna With Soybean Oil, complaint by Thailand (WT/DS205/1); See, *Overview of the State-of-Play of WTO Disputes*, *supra* note 87, at section VII(70).

¹⁰⁴ Genet website at <http://www.gene.ch/genet/2000/Oct/msg00056.html>

¹⁰⁵ Colombia - Safeguard Measure on Imports of Plain Polyester Filaments from Thailand, complaint by Thailand (DS 181/1); See, *Overview of the State-of-Play of WTO Disputes*, *supra*, note 87, at section VIII(B)(30).

4.8 Case Against Hungary for Export Subsidies of Certain Agricultural Products

In March of 1996, Thailand joined Argentina, Australia, Canada, New Zealand, and the United States in requesting consultations with Hungary concerning the requesting parties' claims that Hungary violated Article 3.3 and Part V of the Agreement on Agriculture by providing export subsidies on agricultural products not specified in its Schedule, and by providing agricultural export subsidies in excess of its commitment levels.¹⁰⁶ In January 1997, Argentina, Australia, New Zealand and the United States requested the establishment of a panel, and Canada, Japan, Thailand and Uruguay reserved their third-party rights to the dispute. At the DSB meeting in July 1997, Australia, on behalf of all the complainants, notified the DSB that the parties to the dispute had resolved it.

4.9 Case against the EU Concerning Duties on Thai Rice

In October of 1995, Thailand requested consultations with the European Union concerning its giving preferential treatment to basmati rice from India and Pakistan.¹⁰⁷ Similar complaints against the EU were lodged by the United States and Canada. The United States followed up by requesting a Panel, and in April 1997, the US informed the WTO Secretariat that it was withdrawing its request for a panel in view of the fact that the EC had adopted regulations implementing an agreement reached on this matter.

¹⁰⁶ Hungary - Export Subsidies in Respect of Agricultural Products, complaint by (WT/DS35). See, *Overview of the State-of-Play of WTO Disputes*, *supra* note 87, at section VIII(B)(18).

¹⁰⁷ European Communities - Duties on Imports of Rice, complaint by Thailand (WT/DS17). See, *Overview of the State-of-Play of WTO Disputes*, *supra* note 87, at section VIII(B)(5)(c).

5. Analysis

5.1 Developing Country Perspective on DSU Reform

5.1.1 Introduction

Unfortunately, while the lengthy list of English language scholarly works analyzing the WTO dispute settlement mechanism grows longer by the day, when the list is culled to include those works analyzing the system from a developing country member perspective, it becomes frustratingly bare. While it may be that, for instance here in Thailand, good efforts have been made in Thai on WTO-dispute scholarship, those works remain inaccessible to the world body of scholars, students, legal practitioners, government policy makers and WTO bureaucrats, all of whom need an enriched developing-country perspective on the rapidly growing area of WTO dispute settlement law, both substantive and procedural.¹⁰⁸

5.1.2 More Politics or More Rules?

An analysis of the WTO dispute resolution procedure from a developing country perspective can properly begin with the thought provoking article by Professor Shin-yi Peng. Professor Peng argues that the evolution of the WTO dispute settlement procedure from a consensus building model to a legal one represents the triumph of western, in particular American, cultural values throughout East (including Southeast) Asia. He argues that the notion in the United States of a strong legal system as a unifying force in a federal political system, whose approach has been adopted by the WTO, contrasts sharply with East Asian countries, who have traditionally eschewed legal formalism for an approach aimed at "lowering

¹⁰⁸ Calling for such a perspective is not meant to assume that all developing country members will necessarily share the same assumptions. For instance, a relatively well-developed country like Thailand is bound to see itself in a very different posture to the WTO than, say, its underdeveloped neighbor Laos, or the rapidly developing but politically dissimilar China. Nevertheless, the outline of some concerns basic to developing countries can be sketched.

tensions, defusing conflicts, and promoting compromise,” and whose approach was dominant in the earlier GATT dispute settlement system. Professor Peng argues that, “In the name of economic globalization, Asian people’s legal consciousness, attitudes, and beliefs are experiencing ‘cultural homogenization.’”¹⁰⁹ He also argues that the legalism of the WTO dispute settlement procedure favors Western country members: “Given that the new WTO dispute resolution system is a more rule-oriented system, the West, comfortable with the legalistic approach of settling international trade disputes, enjoys an advantage in the new WTO dispute settlement system.”¹¹⁰

Missing from Professor Peng’s analysis are the sound reasons that the legalization of the WTO dispute settlement mechanism benefits East Asian, and indeed all developing country members of the WTO. Nostalgia for a simpler time in East Asia’s past where differences were papered over with vague language and “peer pressure” may merely have served to protect vested interests in East Asian countries at the expense of fairness and efficiency. Even if the practice was indeed well-suited to the agrarian East Asia of the past, where values were widely shared, it simply cannot work in a global environment, where raw power more readily substitutes for shared cultural notions of fairness in disputes. Quite simply, in the heterogeneous global trading culture, only well-defined, enforceable rules applicable equally to all participants can mitigate against abuses of a system for free and fair global trade. And those abuses would be perpetrated by the more powerful, i.e., developed countries, against the weaker, developing ones.

The basic rationale for developing countries to advocate a rules-based legal system for WTO dispute resolution is relatively straight-

¹⁰⁹ Shin-yi Peng (2000) The WTO legalistic approach and East Asia: from the legal culture perspective. *Asian-Pacific L. & Pol’y J.*, vol.1, Issue 2. Available from the World Wide Web: <http://www.hawaii.edu/aplpj/1/13.html>

¹¹⁰ *Id.*

forward:

Treating the GATT as a constitution or statutory document instead of a contract is significant because it turns the GATT/WTO from a negotiating forum into a rules-based adjudicative system. In a system where disputes are settled by reference to the relative power of the parties, any rules underlying the dispute are meaningless. The parties will only acknowledge the rules when they agree with them. However, when the dispute is settled by reference to the rules themselves, parties must then confront these rules and agree to be bound by them. This respect for rules automatically leads to more confident negotiating, especially by weaker parties. It was important for GATT/WTO to make the transition, otherwise the powerful members would have mandated what the agreement meant.¹¹¹

To this commentator, there is little question that well-defined rules most benefit the relatively powerless, provided that those relatively powerless have the resources to enforce those rules, that the procedures are seen to be and are in fact objective and competent, and that the system for enforcement provides remedies to breaches of the rules that make pursuing those breaches worthwhile. Thus, an idealized WTO dispute settlement process would provide detailed rules of conduct, the breach of which could be effectively challenged by any member, or the institution of the WTO itself, and as a result, the offending member would make full reparations to those harmed by the breach and desist from further breach. More to the point, such a system would effectively deter such breaches in the first place, creating a much fairer free trade environment.

But like everything else, the WTO does not exist as a Platonic ideal, but in the soil of its own history and evolution. Because the GATT has a long history of “big-boy” power politics, that legacy is not dismantled

¹¹¹ Maki, *supra* note 24 at p. 359.

without reactionary repercussions to the system from nations accustomed to getting their way. And reform can also create domestic backlash, where protectionist interests who have a legitimate fear of freer trade, seek to undermine the movement for further trade liberalization. Reform creates instability, even as it attempts to work greater justice. For developing countries, who have the most to gain from further dismantling the legacy of power politics from the dispute settlement process, the question is how best to accomplish further reform, how to avoid the dim prospect of foreign retaliation from bully nations, and domestic retaliation from locally powerful protectionist interests.

This fundamental dispute between the political/private and legal/public approaches goes to the heart of the very nature of the new WTO agreements. Have the new WTO agreements merely created contractual obligations among the members, or did they actually create international law obligations that nations are forbidden from violating? One commentator appears to consider that the agreements allow the flexibility to ignore their dictates, to in effect “breach the contract” and accept retaliation as an alternative to compliance.¹¹² But another scholar has disputed this analysis, arguing effectively that the rulings from the WTO dispute panels require compliance as a matter of international law.¹¹³ In other words, while it is true that the WTO has no direct means of enforcing a decision that a member is breaching its obligation, the member nevertheless has an international legal obligation to comply.¹¹⁴

In the real world, it seems fair to say that great strides have been made in creating enforceable rules for global free trade. These are

¹¹² Bello, Judith Hippler (1996) *The WTO dispute settlement understanding: less is more. A.J.I.L.*, vol.90, pp.416-417. “The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.”

¹¹³ Jackson, John H. (1997) *The WTO dispute settlement understanding-misunderstandings on the nature of legal obligation. A.J.I.L.*, vol.91, pp.60.

¹¹⁴ *Id.* at p. 60- 63.

international legal obligations that, while lacking strong enforcement mechanisms, create great incentive for compliance. That some countries will from time to time fail to follow their obligations under the WTO for domestic reasons may be a relief valve as the world comes to terms with globalization. Undoubtedly, such “relief” will disproportionately burden developing countries. It is only the recognition that reform necessarily moves slowly that developing countries should continue to tolerate gaps in an effective dispute settlement process.

With the above caveats, we can turn to specific suggestions for reform. Apparently, in the few short years that the new WTO dispute settlement mechanism has been developing, it has been met with widespread approval.¹¹⁵ Nevertheless, “to conclude that there is a general satisfaction among all WTO Members that the dispute settlement is working well and is fair for all WTO Members would be a mistake.”¹¹⁶ Developing country members for the most part lack the financial resources or the legal and other expertise required to effectively protect their rights under WTO agreements. They have no way to effectively enforce a favorable panel report, “as retaliation is likely to hurt them more than a prospectively targeted developed country.”¹¹⁷

5.1.3 Legal Assistance

To the extent that the new WTO dispute resolution procedure is rules-based, it requires effective advocacy on the merits and defense of claims. The proliferation of procedural and substantive rules in the regime demand specialized legal expertise, expertise that is expensive and often lacking in developing countries. While the DSU provides for legal assistance to developing countries, this help “has been insufficient in

¹¹⁵ Van der Borgh, Kim (1999) The review of the WTO understanding on dispute settlement: some reflections on the current debate. *Am. U. Int'l L. Rev.*, vol.14, pp.1223, 1225.

¹¹⁶ *Id.* at p. 1226.

¹¹⁷ *Id.*

practice.”¹¹⁸ Not surprisingly, additional legal assistance has been the foremost request from developing countries.¹¹⁹

5.1.4 Remedy

While the WTO dispute settlement procedure has moved strongly in the direction of a rules based, judicial approach to determining violations of WTO obligations, the system remains frustratingly political and private when it comes to providing remedies.¹²⁰ Thus, even after a finding that a member has violated a WTO obligation, developing countries, lacking political and economic power, have no effective means of enforcing DSU rulings in their favor. Longstanding proposals suggest adding monetary damages and joint or collective retaliation as additional remedies.¹²¹ Other proposals include assessing a monetary fine, imposing a loss of WTO voting rights, and imposing a loss of other WTO member privileges such as technical assistance to coerce compliance.¹²²

In the short term, a more practical solution may be to amend the WTO's charter to make explicit that WTO covered-agreement obligations are indeed international law obligations that must be complied with, that there is no legal choice to comply or accept retaliation as an alternative. Although this approach lacks a remedy, and some members might continue to avoid such obligations, that they would be avoiding an express international obligation to comply would create strong incentive for them to do so.

¹¹⁸*Id.* at p. 1231.

¹¹⁹ *Id.*

¹²⁰ Pauwelyn, *supra* note 40 at p. 339-40.

¹²¹ Ven Derr Borgh, *supra* note 115 at p. 1231-32.

¹²² Charnovitz, Steve (2000) *Should the teeth be pulled? A preliminary assessment of WTO sanctions*. Available from: http://www.gets.org/gets/library/admin/uploadedfiles/Should_the_Teeth_Be_Pulled__A_Preliminary_Assessment.htm

5.1.5 Panel Composition

The arbitral history of the GATT dispute settlement mechanism remain in the composition of the panels, where panels membership is not a full time position, and where parties have the right under limited circumstances to reject panelists. The European Communities have proposed creating a standing Panel Body. The EU also proposes that parties would no longer have a choice in panelists.¹²³ Again, moving toward removing the vestigial remnants of arbitral practice from the WTO and the DSU can only serve to strengthen the position of developing countries. Developing countries have legitimate concerns about having their perspectives represented in the Panels, but such concerns can be addressed by ensuring a truly diverse standing Panel Body, and retaining quotas for panel members from developing countries.

5.2 Thailand's Use of the Dispute Settlement Mechanism

5.2.1 Introduction

In the decade since Thailand's first, albeit involuntary, participation in the GATT dispute settlement mechanism, when the United States forced Thailand to allow the importation of foreign cigarettes, both the level and sophistication of Thailand's participation have increased substantially. In the history of the pre-WTO GATT, the cigarette case was Thailand's only exposure to the dispute settlement mechanism. But in the last five years, with the creation of the WTO and its DSU, Thailand has not been shy in asserting its rights through the DSU process. Thailand is undoubtedly benefitting from a long history of international diplomacy and legal reform along Western models. Nonetheless, Thailand needs to further develop a specialized legal team that can focus on using the rules of the WTO to Thailand's fullest advantage. Such a proactive approach to

¹²³ Ven Derr Borghet, *supra* note 115 at p. 1240.

global trade is in line with the motto of Thailand's new government to be assertive in problem solving, rather than waiting to respond to emergencies. While Thailand has begun to use the DSU, it has yet to show it recognizes that manipulating the WTO through effective legal advocacy may well be one of the cost-effective tactics available to it in its development.

And in its advocacy, whether in the dispute settlement process or in seeking legislative reform of the WTO, Thailand would do well to be cautious that its positions take a long range view of Thailand's place in the global trading system. For instance, although Thailand is a "developing country," it is a relatively developed one. With its increasing wealth and democratic participation, developed country concerns are increasingly vying with developing country ones. Thailand needs to see itself more clearly as becoming a developed country member.¹²⁴ And as an almost-developed country, with a strong lawyer class and system of law long in place, further legalizing the WTO dispute resolution process will not burden Thailand the way less developed countries can be burdened by a rules-oriented system.

Thailand also has the special status among most developing countries of having never been colonized. Thailand does not have the fear and suspicion of foreign powers that characterize so much of the foreign relations of former colonies. This openness translates into a leadership quality in the era of globalization. This is particularly true given Thailand's history of excellence in foreign diplomacy. Thailand can be free to form

¹²⁴ For instance, in the growing debate over imposing labor standards in the WTO, it might well be in Thailand's best interest to support such a measure. As domestic pressures within Thailand in the years ahead will undoubtedly increase Thailand's already relatively progressive labor standards, Thailand has nothing to lose by requiring other nations to provide the same. On the contrary, with the imminent membership of China to the WTO, and the competition to Thailand such membership will entail, supporting minimum labor rights would help provide Thailand a competitive advantage *vis a vis* China, who undoubtedly now has the advantage of exploited labor.

coalitions around issues that further Thailand's interests, seeking partners with developing and developed countries alike.¹²⁵

Thailand is in the unique position to benefit in the WTO from its developing country status, while having the culture, the history, and the resources to take advantage of the WTO's emerging legal culture. It remains only for Thailand to effectively marshal these resources, creating a permanent legal and policy task force that can exploit the WTO rules to the nation's best advantage.

5.2.2 Thailand as Respondent

Thailand has been fortunate that to date there have only been two claims made against it for GATT/WTO violations. Thailand's first direct exposure to the GATT dispute resolution system was an ignominious one. The United States' case against Thailand's *de facto* ban on cigarette imports obviously caught Thailand off guard. It is difficult to imagine a more difficult position to defend under the GATT than an outright distinction between domestic and foreign products, as was the practice in Thailand's cigarette policy. While Thailand tried hard to justify such a distinction after the claim was made, it is difficult to imagine any arguments being persuasive at that point, where the protectionism was so obvious. Yet Thai arguments were not without merit. Thailand's position that foreign cigarettes contained harmful additives could have worked. But a proactive approach was needed. Before being sued, Thailand should have changed its law, stopping the overtly protectionist approach, substituting a law banning the use of certain cigarette additives and requiring the disclosure of all additives. To the extent that these additives were not used in domestic

¹²⁵ Unfortunately, Thailand's longstanding freedom also stands to harm it as trading blocks based on shared histories between developed countries and their former colonies are formed. These trading blocks disadvantage the global trading system. The creation of the Free Trade Area of the Americas by 2005 will be a particular blow to Thailand, which lacks a developed country partner to create a similar agreement, and which relies so heavily on exports to the United States.

cigarettes, but were added to foreign ones, Thailand would have kept out dangerous foreign cigarettes with the added bonus of supporting its domestic industry in a manner appropriate to Thailand's international trade obligations. Instead, a flood of seductive American cigarettes has been allowed to invade Thailand, to the great detriment of its people's health. Thailand has now become one of the largest importers of American cigarettes.¹²⁶ And because the WTO increasingly requires that non-tariff barriers like health regulations that burden imports be proven with sound science, the window of opportunity provided by the Panel to ban "harmful additives" in cigarettes may be closing.¹²⁷

In Poland's claims against Thailand, Thailand has mounted a more assertive, sophisticated defense. Unfortunately, the sophistication of the defense did not amount to much practically, as the Appellate Panel has ultimately struck down Thailand's imposition of anti-dumping duties on Poland. The lesson reaffirms the crucial point made above, namely, that the best defense is having provided sufficient justification initially, rather than counting on lawyers to make clever arguments after a claim has been made.

In sum, Thailand cannot rely on experts in international trade law to come in and save it from a claim made against it. These legal experts must be brought in from the beginning of any decision that burdens trade, to ensure that all such decisions are made in a manner that procedurally and substantively will be less likely to run afoul of the WTO dispute

¹²⁶ In 1996 and 1997, Thailand was one of the top ten countries importing American cigarettes. Dhooge, Lucien J. (1998) *Smoke across the waters: tobacco production and exportation as international human rights violations*. *Fordham Int'l L.J.*, vol.22, pp.355.fn. 243.

¹²⁷ "Products developed to lessen the risk of disease by reducing exposure to toxic chemicals are scientifically feasible, but in the absence of rigorous research, no one knows if these products decrease the incidence of tobacco-related disease or actually increase it by encouraging smoking." Feb. 22, 2001 press release from the Institute of Medicine. The report, entitled *Clearing the smoke: the science base for tobacco harm reduction* is available on-line at the National Academy of Sciences website at <http://www.nap.edu/books/0309072824/html/>

settlement process, a process that has shown itself hostile to almost all impediments to international trade. As Thailand has excelled in international diplomacy, in the new era of international trade law, it must learn to excel in exploiting that law to the nation's advantage.

5.2.3 Thailand as Complainant

It is encouraging to see that Thailand is increasingly making complaint through the DSU to enforce its WTO rights. Soon after the creation of the WTO and the DSU, Thailand joined with other countries successfully, as in the shrimp case against the United States, and the claims against the EU and Hungary. More recently, Thailand has gained the confidence to file claims on its own as well, in its claims against Colombia and Egypt, already successful in having Colombia remove its offending regulation. And Thailand remains willing to join in collaborative efforts, as demonstrated by recently joining a claim against the United States' new anti-dumping law, brought by a broadly diverse group of nations.

The complex WTO agreements contain enormous detail. The rules are a fertile ground for Thailand to exploit to its benefit. A commitment of resources for international law experts to plow these fertile grounds would provide dividends to Thailand as it continues to grow as a major international trading partner.

6. Conclusion

As Members approach the probability of starting a new trade round as early as late this year,¹²⁸ Thailand and other developing countries have another opportunity to advance a rules-based DSU that facilitates their interests in protecting their rights to free and fair trade. With the caveat

¹²⁸ July deadline set for WTO Basic Agenda. *Bangkok Post*, Tuesday January 2, 2001, section A.

that slow reform will insure that all members are ready to move forward together, developing countries should use their real clout in the WTO to further “judicialize” the dispute resolution process. As the trend for that process in the last five years show, the vision of the original ITO is over half a century later finally being realized.

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