

## Power, Rules and Principles – which orientation for WTO/GATT Law?

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## Curiosity and Prudence

- ▶ Rules are often ambiguous and open to interpretation.
- ▶ The interpreter must often try to look for the unwritten legal principles to contextualize the rule.
- ▶ Principles are flexible but provide the direction to the rules.
- ▶ Any established rule in a legal system should be an expression of a finely tuned balance between underlying principles and objectives.

- ▶ What are such principles within the legal framework of the WTO?
- ▶ In the preamble of WTO agreement the parties declared their determination to preserve suitable condition for multilateral trade.
- ▶ WTO agreement confirms the existence of basic principles in the WTO context.

- ▶ What are these principles?
- ▶ Economics principles: non-discrimination, transparency and open markets?
- ▶ Legal principles: due process, good faith and natural justice?
- ▶ Appellate Body seems to have acknowledged the second alternative.
- ▶ However, there is no one fundamental principle but a number of them.

- ▶ Tracing the principles is tricky in this case as there are countries from different legal cultural backgrounds.

## WTO/GATT: power, rule or principle oriented?

- ▶ As we have already seen in the last paper that in its early days GATT was characterized by a pragmatism-driven politico-diplomatic style of negotiated solutions.
- ▶ With time, a more rule oriented approached emerged.
- ▶ But it is rule oriented and not rule governed – consents of the parties are still important.

- ▶ From Uruguay round and with the framing of DSU the emphasis is now on a legal framework.
- ▶ But the role of negotiations and consent cannot be written off in WTO.
- ▶ Article 22.2 of the DSU provides for negotiations with a view to developing mutually acceptable compensation if the Member concerned fails to comply.

- ▶ But these are provisions. The main function DSU operation is still the provisioning of legal interpretation.
- ▶ The Appellate body, though not comparable to a domestic legal institution, is designed to generate fundamental principles and objectives underlying the system through its decision making process.
- ▶ One reason behind such transformation is to preserve the security and predictability of the system.

## Principles expressed in WTO agreement: Trade liberalization

- ▶ This means any interpretation pointing in the direction of trade liberalization preferred other conflicting principles might have to be taken into account

## Principles: Non discrimination

- ▶ There should not be any unjustifiable discrimination among WTO members.
- ▶ MFN and national treatment clause ensures actions against discrimination.

## Sovereignty and national defense

- ▶ The provision of escape clause can be seen as a way to protect national sovereignty when domestic interests clash with WTO rules.
- ▶ Articles XX and XXI of GATT 1994 refer to a number of situations in which members may deviate from the obligations under the General Agreement.
- ▶ Using such clause unilateral action was allowed in Shrimp Turtle case.

## Sustainable Development

- ▶ The objective of the protection of the environment has been mentioned in a number of WTO agreements.
- ▶ Such issues were raised in the Beef Hormone case between EC and the US when with the awake of Mad Cow disease EC banned North American beef that used hormones for raising cattle.
- ▶ WTO however, lent support to North America and allowed them to impose tariff against EU commodities.

## The Principle of cooperation

- ▶ WTO upholds the principle of multilateral solution rather than unilateral action.
- ▶ In the Shrimp-Turtle case the U.S. was criticized for taking unilateral action.

# Transparency

- ▶ Open markets must offer transparent rules.

## Rule of Law

- ▶ The DSU is the essential expression of this principle.

## Proportionality

- ▶ When conflicts arise between different principles (say, environment and trade), the conflicting principle (environment) should be applied to generate minimum trade restriction.
- ▶ For example under Article 5.4 of the SPS (Sanitary and Phytosanitary Measures) agreement, WTO Members are obliged to take into account the objective of minimizing negative trade effects' when determining the appropriate level of protection.

## Principles outside the WTO

- ▶ **Principles in statutes of WTO related international organizations –**  
IMF, WHO, FAO etc.
- ▶ **Principles laid down in other treaties under public international law –**  
in Shrimp Turtle case the principles laid in UNCLOS (United Nations Convention on the Law of the Sea), the convention on Biological Diversity, and the Conservation of Migratory Species of Wild Animals were used.
- ▶ **Principles in customary international law and general principles –**  
Article 38 of ICJ Statute

## Principles common to the internal legal regimes of WTO members

- ▶ Principles common to the internal legal codes of the member countries are difficult to verify.
- ▶ For European Union, the legal codes common to the member countries become the term of reference. But EU is way more homogeneous than WTO.
- ▶ If there is a principle common to all major legal systems then that should become a principle under public international law.

- ▶
- ▶ One striking example can be found in the Appellate Body report on the *US-Shirts and Blouses case*
- ▶ In this case the panel concludes that that the complainant (in this case India) has the burden of proof that USA is violating Agreements on Textiles and Clothing.
- ▶ However, the DSU usually refers to the European legal writings in defend their position. This may not be truly representative of different legal cultures within WTO.

## Rank and Relevance of Principles in the WTO system

- ▶ Important question: If there is a conflict between a rule and a principle, which one holds the higher position?
- ▶ Even more important issue is of conflicting principles: what if principles of trade liberalization and sustainability conflict with each other?
- ▶ Before addressing this issue let us see how is this addressed national constitution and EC law

## National constitution and EC

- ▶ In national constitutional law there is a clear hierarchy in favor of fundamental constitutional principles.
- ▶ The conflicting rules have to be interpreted in the light of such principles or just put aside.
- ▶ Some of the basic principles of GATT 1947 have served as a model for drafting the treaty for constitution of European Communities.
- ▶ Moreover, The European Court of Justice tries to ensure that common fundamental principles are taken into account and balanced against each other.
- ▶ The principle of proportionality is important to balance conflicting rules and principles.

## Balancing act under WTO

- ▶ The rules and principles expressed in the WTO agreement shall prevail over those in the GATT 1994 and all multilateral agreements.
- ▶ Specifically, the general rule of *lex posterior* or the customary rule of *lex specialis* have to be considered in cases of conflict.
- ▶ *Lex specialis* is a doctrine states that where two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).
- ▶ *Lex posterior derogat priori* is a rule of interpretation which states that where a latter law conflicts with an earlier law, it is the latter law that will prevail.

- ▶ In the EC-Hormones case the Appellate body stressed that a principle (the precautionary principle under the SPS agreement) does not, by itself and without a clear textual directive to that effect relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the agreements.
- ▶ Written rules/principles will have higher ranking than unwritten rules/principles.
- ▶ The issue of proportionality become important in the US-Shrimp case.