CHAPTER 12

Comment on the "WTO Response"

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Thank you for the opportunity to comment on the excellent papers by Joost Pauwelyn and Mitsuo Matsushita. This is my first opportunity to meet Mr. Pauwelyn whom I have considered (based on his significant scholarship) to be among the most thoughtful of the new generation of WTO law analysts. I want to highlight some areas of agreement and disagreement between the two papers, and offer a few comments of my own.

1. GATT vs. SPS

Professor Matsushita characterizes the SPS provisions as more specific and detailed than those of the GATT, and suggests that it should be sufficient to examine the hypothetical under SPS rules. Mr. Pauwelyn contends that the SPS Agreement "gives complete pre-eminence to health over trade," and that this SPS approach may be quite novel in the WTO legal system. He contrasts SPS with GATT Article XX which he says states a "not more trade-restrictive than necessary test" that could lead a Panel to balance trade versus health under GATT (but not under SPS).

Neither author evaluates the hypothetical under GATT rules, so let me try to do so. A ban on the *sale* of ducks treated with growth hormones ought not to be a violation of GATT Article III:2, and hence should be GATT-consistent. Nevertheless, one can imagine a Panel finding a national treatment violation on the grounds that all ducks are "like" products regardless of their health effects on consumers. Were that to happen, then the defendant country should be able to justify the measure as necessary to protect human health under Article XX(b). In considering Article XX(b), I assume that the Panel would apply a least-GATT-inconsistent test and not a least-trade-restrictive test. Although these tests are commonly confused, they are not synonymous and can lead to different results. The idea of a least trade-restrictive test goes back at least as early as the Abolition Convention of 1927. But despite its influence in the case law of the European Community, this test has never been adopted and applied by a GATT or WTO Panel as of the end of 2000. So I do not necessarily agree with Joost Pauwelyn that the GATT presupposes more balancing between health and commerce than does SPS.

Even if the measure passes GATT review, it could be challenged under SPS, as both authors note. This procedural posture suggests that it would be adequate to analyze a disputed health measure under SPS, while omitting a similar review under the GATT. Unless there is an international standard involved, it is hard to conceive of a situation where a measure would be consistent with SPS but inconsistent with the GATT.

Let me also note that I am not in complete agreement with Joost Pauwelyn's interesting observation that the SPS Agreement "gives complete pre-eminence to health over trade." For unlike the GATT, the SPS Agreement does have a least-trade-restrictive principle in SPS Article 5.6. Of course, the text of this provision appears to be deferential to the choices of a government on its "level of sanitary or phytosanitary protection." How that provision will be applied in tough cases remains to be seen. In my view, the implementation of SPS Article 5.5 by WTO Panels (particularly Salmon) has not accorded complete pre-eminence to health over trade.[1] Rather, it has favored commerce and some notional idea of policy consistency over health concerns. (See further discussion below.)

Finally, in Professor Matsushita's paper, he says that as stated in the Preamble of the SPS Agreement, the SPS provisions are an elaboration of Article XX(b) of GATT. It is true that the SPS Preamble says this. Nevertheless, in my view, giving any effect to these inartfully written words by WTO Panels will simply lead to mischief. For example, these words might be read as narrowing the scope of Article XX(b).

2. Adequacy of Risk Assessment

Professor Matsushita seems to accept the risk assessment as sufficient, but Mr. Pauwelyn expresses the concern that the assessment may not be specific enough to the situation of growth hormones in ducks. We probably don't have enough information to know for sure.

3. SPS Science Requirement

On the moot case (see Appendix), Mr. Pauwelyn suggests that even a minority scientific opinion, such as the one by Dr. von Entefleisch, could satisfy the quantum of evidence required. But he also notes that this determination depends on a case-by-case examination. Professor Matsushita takes greater note of the distinction between the SPS requirements in Articles 2.2 and 5.1, and points out that science evidence may be sufficient for Article 5.1 but not for Article 2.2. He also makes the important observation that Article 2 can provide an independent cause of action. Furthermore, he underlines that "[i]t is the power of a Panel to choose among conflicting

pieces of evidence and decide the case as long as it stays in the scope of objective assessment."[2]

I do not doubt that Panels will do this type of choosing (if they haven't already), and the Appellate Body may have done so in the *Hormones* case in rejecting Dr. Lucier's concerns about the one-in-a-million risk for women of getting breast cancer. The SPS Agreement seems to suggest such a vetting process in the requirement of "adequate" scientific evidence (Article 2.2) and in making available scientific expertise to the Panel (Article 11.2). This dimension of the gatekeeper role of the WTO Panelists will be explored further in future cases.

It is hard to view the WTO or SPS as being a promoter of public health and safety. Thus, I believe that it is deceptive for the WTO to claim on its web page that "safety concerns are built into the WTO agreements" and that the purpose of WTO provisions on product standards "is to defend governments' rights to ensure the safety of their citizens."[3] Defend from whom? The WTO?

I am also troubled by Professor Matsushita's suggestion that a Panel should consider factors such as the "reputation of the research institute" and whether the institute is "closely affiliated" with the government imposing the SPS measure. I see no reason to impugn a food safety institute that is part of a government.

4. Regulatory Consistency

Mr. Pauwelyn notes, I believe correctly, that the SPS requirement for regulatory consistency (Article 5.5) requires "in depth interference" and is the provision with the "real bite" in the SPS Agreement. He and Professor Matsushita reach the same conclusion on Question 10 that a ban on duck meat but not beef could violate SPS.

I would guess that they are right about how a Panel would rule. And that's probably the way the Panel ought to rule given the text of Article 5.5. But I doubt that WTO rules should have been written with such a sharp bite directed at health-related laws.

It is true that Article 5.5 does not outlaw policy inconsistency alone. For a measure to violate Article 5.5, it must not only seek arbitrary or unjustifiable differences in levels of risk avoidance, but it must also be discriminatory or a disguised restriction on international trade. This sounds like a stringent test, but in practice Panels have found it easy to detect what they perceive to be discriminatory behavior.

The logic behind Article 5.5 is that because policy inconsistency is irrational, one can infer from it that governments are motivated by protectionism. The problem with this approach is that irrational government action is too common to serve as a reliable indicator of protectionism. In

pointing this out, I surely don't mean to defend irrational public policy. But before the WTO attacks disguised health policies, it should do more to eliminate undisguised protectionist trade policies such as tariffs and quotas. Furthermore, many national protectionist policies (such as antidumping) are internally inconsistent and lack any scientific basis, yet they are still permitted by the WTO.

5. Sovereignty and Deference

A few of the posed questions use the term "deference" (Questions 1, 13, 15, 16); one of the questions uses the term "sovereignty" (Question 8). These questions can be asked regarding the role of the judge. They can also be asked regarding the nature of the international commitment.

What is the role of the WTO judge? I don't think she ought to resist encroaching sovereignty. The governments have decided in writing the treaty to dilute their sovereignty to some extent. Similarly, because the WTO is a set of disciplines on governments, the judge should not defer to a defendant government as to whether the defendant has violated these disciplines. If there is space for deference in the judge's role, it would only be in delineating facts. What is the standard of review on the facts? The Appellate Body says it is "objective assessment of the facts." This seems to imply very little (if any) deference to an administrative determination by the defendant government on facts. (But the Antidumping Agreement, Article 17.6 does have an exception to this.)

Similarly, I would not favor the judge being deferential to a government's view of the nature of its obligation within the WTO treaty. That's one reason why the statement in the DSU (Article 3:2) that WTO recommendations and rulings "cannot add to or diminish the rights and obligations provided in the covered agreements" cannot be taken seriously. In every WTO case I've seen, the government litigants come in with very different views as to their respective "rights and obligations." And they can't both be right. So in many disputes, one government's *ex ante* expectations on its "obligations" are being changed, and new obligations are being added by WTO dispute settlement.

Of all the administrative determinations supervised by the SPS agreement, the ones relating to Equivalence may be the most deserving of deference. SPS Article 4.1 states that importing countries shall accept SPS measures of an exporting country's government if that government "objectively demonstrates" to the importing country's government that its measures achieve the importing State's chosen level of SPS protection. While the use of the term "objectively" suggests less than complete deference, a Panel ought to accord considerable deference to a regulatory agency's review of foreign regulatory practices.

NOTES

1. Steve Charnovitz, The Supervision of Health and Biosafety Regulation by World Trade Rules, *Tulane Environmental Law Journal* 13 (2000), 271, 283–85, 291.

2. See Matsushita in this volume, p. 202.

3. World Trade Organization, "10 Common Misunderstandings about the WTO".