The WTO Appellate Body: Personal Perspectives[1]

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During my posting at the Permanent Mission of Thailand to the World Trade Organization (WTO)[4] in Geneva from 2011-2015,dealing with dispute settlement mechanism, I had two opportunities to attend Appellate Body hearings as a member of the Thai delegation (in the capacity of third participant) which I gladly took.

My first attendance was for the Philippines - Taxes on Distilled Spirit case (DS 396 and DS 403). The dispute was related to the Philippines' excise tax regime which had been in place since 1997. As a consequence, the Philippines imposed taxation on imported distilled spirits at a substantially higher rate than domestic products. The EU and United States were the complainants in the case. The Philippines lost the case at the panel stage but appealed on issues of law. The Division that handled the appeal was headed by Jennifer Hillman (United States). There was a high degree of spontaneity in the hearing. At times, there were light-hearted moments i.e. when a member of the Philippines' legal team was trying hard to make a point that the Philippines' spirit (sugar-based) tasted differently from the imported wheat-based spirits. According to him, the local spirit tasted sharp to the tongue and therefore consumers could easily tell the difference and that they were not "like products." The case was a rather straightforward question of national-treatment in which WTO law and jurisprudence have been very clear. No discrimination is allowed under WTO law. The Appellate Body upheld the panel's ruling. On 20 January 2012, the Dispute Settlement Body (DSB) adopted the report of the Appellate Body without hesitation[5]. At the next DSB meeting on 22 February 2012, the head of the Philippines delegation, sitting just a few feet away from me, stated categorically the intention to comply with the ruling but asked for a reasonable period of time to comply. The U.S. and EU welcomed the Philippines' compliance intention and pledged to work with the Philippines to find an acceptable timeframe.

The second case that I attended at the appellate stage was US-Tuna (Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: DS 381). This was an interesting case. The U.S. lost the case at the panel's stage. Interestingly the panel did not reach consensus on all the issues[6]at dispute even though they ruled in favor of Mexico. The U.S., taking cue from the minority, appealed on issues of law requesting the Appellate Body to reverse the panel's finding. The appeal process was interesting from the outset. U.S. Ambassador Michael Punke[7] wrote to the Presiding Member of the Appellate Body requesting

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3 I wrote this article in my personal capacity. The views expressed here are personal and do not reflect the Thai government's positions.

4 The Foreign Ministry usually sends a C8 official to take charge of WTO dispute settlement. My experience suggests that a high-caliber C6-C7 may be able to handle the responsibility as efficiently.

5 The Dispute Settlement Body operates on a negative consensus basis meaning that if it does not wish to adopt Appellate Body report, it has to do so with consensus.

6 The majority find that the measures at issue establish *de jure* mandatory labeling requirement and do not see the need to consider further if they are also *de facto* mandatory.

7 The U.S. Ambassador to WTO is also a Deputy United States Trade Representative (DUSTR)

the scheduling of the oral hearing in the week of February 19, 2012 because fixing a date after that would prejudice U.S. participation in the hearing due to the fact that one of the U.S. lead attorneys would be unable to travel to Geneva for medical reasons relating to her pregnancy. In the end, however, the Appellate Body fixed the date of the hearing on 15-16 March 2012, meaning that the U.S. had to find a substitute lawyer to handle the case.

The Division which handled the case was headed by Madam Yuejiao Zhang from China. Other members were Mr. Thomas Graham (U.S.) and Mr. Ujal Singh Bhatia (India). This case was more complex. It was a trade vs. environment issue. Although WTO law, particularly the preamble of the Marrakesh Agreement Establishing WTO (1995), states clearly that members maintain power to pursue their policy objectives to protect the environment for sustainable development, trying to strike a fine balance between free trade and protecting the environment has never been easy.

The Tuna case's main argument was about whether the U.S. dolphin safe labeling provisions[8] that govern the labeling of dolphin-safe tuna constitute "technical regulations" or merely "standards" under WTO law. The U.S. argued that the legal provisions in question were not technical regulations because their compliance is not mandatory. The U.S. provisions are meant to ensure that its market is not used to encourage the use of fishing techniques that harm dolphins. The U.S. argued further that even without dolphin-safe labeling, Mexico's tuna could still be sold in the United States. Mexico countered that the U.S. measures have been unnecessary and are completely arbitrary. To support its legal argument that such U.S. provisions are technical regulations which are inconsistent with WTO law, Mexico cited earlier WTO jurisprudence: EC-Sardines; and EC-Asbestos. In the end, the U.S. lost the case again at the appellate stage.

On the whole, I think that WTO law suffers from textual ambiguity just like the language of Article 190[9] of the repealed Thai Constitution B.E. 2550 which deals with the treaty-making process in Thailand. For instance, both sets of law regularly use adjectives which might be hard to define i.e. Article 190 employs the word "*significant*" and "*immense*". To reach the threshold of "significant" or "immense" is rather subjective and debatable. Likewise, the WTO Agreement on Technical Barriers to Trade (TBT) uses adjectives in its provisions rather frequently such as "*more than necessary*".[10] What action is necessary or more than necessary is subject to constant debate. The issue in the Tuna case is whether the U.S. provisions are "more trade restrictive or necessary". Defining the test for necessity is not an easy task. This type of language has a lot of built-in subjectivity.

The aforementioned two cases were neither directly related to nor impacting on the trade concerns of Thailand. In these two cases, Thailand chose not to take sides in the nature

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8 The provisions include (1) Dolphin Protection Consumer Information Act (2) Related Code of Federal Regulations (3) The Ruling in Earth Island Institute v. Hogarth, 2007

9 Article 190 The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organisations.

A treaty which provides for a change in the Thai territories or extraterritorial areas over which Thailand has sovereign rights or has jurisdiction in accordance therewith or in accordance with international law or requires the enactment of an Act for the implementation thereof or has *immense impacts* on national economic or social security or generates *significant commitments* in trade, investment or budgets of the country, must be approved by the National Assembly. For this purpose, the National Assembly shall complete its consideration within sixty days as from the receipt of such matter.

10 Article 2.2 of TBT "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be *more trade-restrictive than necessary* to fulfil a legitimate objective….."

of the disputed claims but joined in the proceedings as the third participant to make sure that the system was functioning well and transparently. But I choose to highlight them for a very important purpose – to assess, evaluate and recommend a way for Thailand to project itself into the scene of adjudicating.

After seeing the Appellate Body in action twice, I have to say that I am impressed with their high standard of professionalism. No doubt they are efficiently backed up by the Secretariat. But the spontaneity during the hearing requires breadth and depth of WTO law and high diplomatic skills on the part of Appellate Body members. Because panels and the Appellate Body are quasi-judicial bodies, the nature of their oral hearing is not the same as a domestic court's hearing. The atmosphere is more relaxed. The presence of third participants also gives the impression that the hearing is like a normal WTO meeting in progress.

Now the question is – should Thailand nominate qualified persons to be selected as a member of Appellate Body. In my opinion Thailand should definitely do so[11]. After all, Thailand is one of the key players in the dispute settlement mechanism of the WTO. Thailand's strength lies in its image of being a country that takes a middle-ground approach to major issues of international trade. My stint in Geneva has taught me unequivocally that politics plays a major role in trade negotiations. The North-South approach to trade issues sometimes makes it difficult for WTO members to agree on any issue. In addition to dispute settlement, I also handled development issues. As a result, I attended the Committee on Trade and Development (CTD) meetings regularly. I found that the CTD is highly politicized. Even inscribing issues onto the agenda is problematic. The Chair usually has to hold a few informal consultations with members on agenda-setting reflecting a high degree of divisiveness among membership.

Another reason why Thailand and/or ASEAN should field a suitable candidate for the election of Appellate Body member is to make the composition more representative among the membership. After the election of Mr. Bhatia (India) into the Appellate Body in December 2011, the trend was very clear that major trading nations were trying to hold on to the seat. The Appellate Body now looks similar to the UN Security Council. Of the 7 current members, there are nationals of the following countries or groupings serving on the Appellate Body: U.S.A, India, China, South Korea, EU, Mexico and Mauritius. There is a real need to maintain the right balance between having nationals of developed and developing countries in the membership of the Appellate Body.

In order to be successful in the membership selection of the Appellate Body, I think Thailand should follow a dual-track approach. The sooner we start the better. The first action needed is to raise Thailand's profile in the WTO dispute settlement mechanism. Reflecting on Thailand's past role, I believe that we have been doing a good job, so we just need to keep the momentum going by joining in disputes as a third party, as and when necessary, and participate actively in the DSU Review.[12] The second track is to groom our international trade lawyers so that they will be able to compete for important appointments in major international organizations. My feeling is that Japan is far ahead of Thailand in this regard and South Korea is actively following suit. Korea has been sending high-caliber delegates from the capital to

11 In 2012, Thailand's Cabinet decided to nominate Dr. Thanes Sucharikul, former Ambassador, to contest for a vacant position left by Mr. Shotaro Oshima of Japan who resigned before the expiry of his term. In the end, the position went to Mr. Seung Wha Chang of South Korea.

12 Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU)

DSU review negotiations on a regular basis[13]. A few of them are drawn from the academic field with impressive track records.

With this level of competition, the best way to add value to a candidate's profile is to publish works of high quality on issues of international trade law. I think we have to encourage our Thai experts to publish their works in leading journals as often as possible. From my observation, among the present members of Appellate Body, one holds a Ph.D. (Peter Van den Bossche), a few hold Master degrees (Yuejiao Zhang, Ricardo Ramirez Hernandez, Shree Baboo Chekitan Servansing, and Ujal Singh Bhatia[14]), and one holds a J.D. (Thomas Graham). The educational background of Appellate Body members is varied.[15] The only pattern that I can draw a conclusion from is that most of them hold advanced degrees. But a degree by itself, even if it is a Ph.D., is only a marginal gain if it is not backed up by a large body of published work[16], a high-level of practice[17] or a distinguished government career[18]to reflect the recognized authority of a candidate in the field. The present composition of the WTO Appellate Body (April 2016) reflects such a statement.

Another point that I have observed is that some of the candidates for the selection of Appellate Body member have had previous experiences as a panelist. I think this is a good personal qualification. If any candidate is blessed with the opportunity to serve on a panel, they may have a head start in the selection process. But it could also work against the candidate, particularly if he is deemed to have taken a position considered harmful to the trading interests of powerful WTO members. If a candidate is vetoed or rejected by those members, his chance is doomed. In my opinion, having previous experience as a WTO adjudicator or panelist is beneficial, but not necessary. In fact, citizens of countries that feature often in the WTO dispute settlement process may not have opportunities to serve as panelists at all because of the potential conflict of interest.

I have a feeling that the Selection Committee[19], when selecting a person to serve on the Appellate Body, will look for someone who is constantly mindful of the role of WTO adjudicators – that their role is first and foremost to settle the dispute. They are not expected to engage in law-making or "judicial activism" but to interpret WTO law in a balanced way taking into account members' rights and obligations. This is because the WTO is a member-driven organization. Making law is exclusively within the prerogative power of WTO members. The dispute settlement mechanism cannot add to or subtract from members' rights and obligations. The jurisprudence is to help achieve the security and predictability of the

13 Korea has a keen interest in the issue of remand (the sending back of the case to panel for further fact-finding.)

14 Member of Appellate Body does not have to be a lawyer but must have demonstrated expertise in law, international trade and the subject matter of WTO law (Article 17.3 of DSU)

15 WTO (2016)

16 A candidate from Korea, Chang, listed 13 pieces of publication on issues of international economic law in his curriculum vitae. He also served on many WTO panels. See WTO, 2012 (JOB/DSB/CV12/4)

17 David Unterhalter, a former Appellate Body member, is a renowned barrister in South Africa and U.K. with long years of practice in a wide range of fields.

18 Some serving and previous members of Appellate Body are of ambassador rank.

19 The Selection Committee is composed of Chairs of DSB, General Council, Goods Council, Services Council, TRIPS and the Director-General of WTO. Although they cast their votes in their individual capacity, they will listen to members' comments on each candidate.

system only.[20]

In theory, there are only six chairpersons of major WTO committees including the Director-General who will cast their votes in the selection process. However, as the WTO is a member-driven organization, the Selection Committee will have to listen to the views of its members. Therefore, building a wide network of support is crucial to the success of any campaign for those who aspire to be members of the Appellate Body.

In conclusion, my participation in DSB meetings and Appellate Body hearings has reaffirmed my understanding that the WTO dispute settlement system "has been a remarkable success".[21] As one of the most used systems in the world I am sure this will continue for many years to come.

Reference

Marrakesh Agreement Establishing the World Trade Organization (1995)
Understanding on Rules and Procedures Governing the Settlement of Dispute (1995)
Vienna Convention on Consular Relations (1963)
Philippines- Taxes on Distilled Spirit (DS 396 and DS 403)
United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS 381)
WTO (2016)

20 See Article 3.2 of Understanding on Rules and Procedures Governing the Settlement of Disputes

21 See The Future of WTO: Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (WTO, January 2005) para. 221.