

CAN THE DISPUTE SETTLEMENT PROVISIONS OF REGIONAL TRADE AGREEMENT BE APPLIED BY WTO PANELS AND APPELLATE BODY? : THE MEXICO SOFT DRINKS CASE

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ABSTRACT

The Mexico Soft Drinks case arose out of a trade dispute between the United States and Mexico relating to the market for sweeteners in North America.¹ This paper will not only provide the background of WTO dispute settlement mechanism and background of the case but also show pop-up legal issues including the impacts of the decision. This case also provides a dramatization of the weakness of the WTO dispute settlement on (i) Jurisdiction of the WTO Panel and (ii) its authority to apply other dispute settlement provision of regional trade agreement to the WTO dispute.

This paper has found that (i) WTO Panel can exercise its jurisdiction under WTO Covered Agreement only and (ii) they cannot apply other RTA's to the WTO dispute. Furthermore the impacts of this decision raised up a problem of overlapping between RTA and WTO agreement.

Keywords: Mexico Soft Drink, WTO Dispute Settlement, WTO Panel's Jurisdiction

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¹ WTO, *Report of the Panel on Mexico – Tax Measures on Soft Drinks and Other Beverages* (7 October 2005), p. 18, < http://www.wto.org/english/tratop_e/dispu_e/308r-0_e.doc > at 22 August 2013.

บทคัดย่อ

คดี Mexico Soft Drink ได้ก่อให้เกิดข้อพิพาททางการค้าขึ้นระหว่างประเทศสหรัฐอเมริกาและประเทศเม็กซิโก ในประเด็นการนำเข้าสินค้าประเภทสารทำความหวานในตลาดทวีปอเมริกาเหนือ บทความนี้ นอกจากจะนำเสนอถึงความจำเป็นมาของระบบการระงับข้อพิพาทขององค์การการค้าโลกและความเป็นมาของคดีแล้ว ยังกล่าวถึง ประเด็นทางกฎหมายที่เกิดขึ้น รวมถึงผลกระทบของคำตัดสินด้วย คดีนี้ได้แสดงให้เห็นถึงข้อบกพร่องของการระงับข้อพิพาทขององค์การการค้าโลก ในประเด็น (1) เขตอำนาจของคณะพิจารณาขององค์การการค้าโลก และ (2) อำนาจในการบังคับใช้ บทบัญญัติของสนธิสัญญาการค้าในระดับภูมิภาคอื่น ในเรื่องการระงับข้อพิพาท กับข้อพิพาทขององค์การการค้าโลก

บทความนี้ ศึกษาพบว่า (1) คณะพิจารณาขององค์การการค้าโลกมีเขตอำนาจพิจารณาแต่เฉพาะในกรณีสัญญาอันเกี่ยวข้องกับองค์การการค้าโลกเท่านั้น และ (2) คณะพิจารณาขององค์การการค้าโลกไม่มีอำนาจบังคับใช้บทบัญญัติของสนธิสัญญาการค้าในระดับภูมิภาคอื่นกับข้อพิพาทขององค์การการค้าโลก นอกจากนี้ ผลกระทบของคำตัดสินในคดีนี้ก่อให้เกิดปัญหาความซ้ำซ้อนของการบังคับใช้ บทบัญญัติระหว่างสนธิสัญญาการค้าในระดับภูมิภาคกับบทบัญญัติขององค์การการค้าโลก

BACKGROUND OF WTO

The World Trade Organization, as we all knows as *WTO*, is an international organization, which regulates the rules for the global trading system and resolves any disputes exist between its member states. The main mission of the *WTO* is to increase international trade by promoting lower trade barriers and providing a platform for the negotiation of trade to their business. This includes the Ministerial Conference, which is the decision-making body of the *WTO*. The Ministerial Conference is also handled by three main groups which are (1) the General Council, (2) the Dispute Settlement Body ("*DSB*"), and (3) the Trade Policy Review Body ("*TPRB*"). Moreover, there are other councils (such as Council for Trade in Goods,² Council for Trade in Service,³ and Council for Trade-Related

² The Council for Trade in Goods is responsible for the workings of the General Agreement on Tariffs and Trade ("*GATT*").

³ The Council for Trade in Services is responsible for the workings of the General Agreement on Trade in Services ("*GATS*").

Aspects of Intellectual Property Rights⁴) and other specific committees (Such as Committees on Trade and Environment, Committees on Trade and Development, Committees on Regional Trade Agreements, and etc.)

In brief, apart from hosting negotiations on global trade rules, the WTO is to act as an international arbitrator of disputes between WTO members thru the DSB.⁵

PART I: INTRODUCTION OF THE WTO DISPUTE SETTLEMENT PROVISIONS

When the member states are unable to resolve their trade dispute by negotiation, the intervention of the WTO dispute settlement provision will take place in order to settle the issue at hand and produce an acceptable solution for each member state. Dispute settlement is the central pillar of the global trading system and this makes the rules set out by the WTO be effectively enforceable.⁶ There are five topics that we should elaborate upon before entering into case study (Mexico Soft Drinks) which are as follows: (i) definition and character of the dispute settlement provision, (ii) objective of the dispute settlement provision, (iii) the DSB, (iv) the WTO dispute settlement mechanism, and (v) the enforcement of the decision.

(I) Definition and character of the dispute settlement method

In general, when the parties cannot settle their dispute, they might need third person to be their arbitrator in order to find out the reasonable settlement through methods of the dispute settlement as follows;

⁴ The Council for Trade-Related Aspects of Intellectual Property Rights is responsible for the workings of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).

⁵ WTO, *History of WTO*, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm> at 22 August 2013.

⁶ World Trade Organization Information and Media Relations Division, *Understanding the WTO*, p.55, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> at 20 August 2013.

Negotiation – A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter without the intervention of third parties.⁷

This method is the first mentioned principal between the States, not just because it is always the first way to be tried and is often successful, but because the States may believe its advantages to be so great as to rule out the use of other methods. Moreover, the negotiation between the States is usually represented through diplomatic channels by the diplomatic representatives (such as ambassadors or equivalent).⁸ The negotiation are sometimes ineffective if the parties refuse to have any dealings with each other because their positions are far apart and there are no common interests to bridge the gap. However, for the WTO disputes between each state, this method is very helpful for the WTO Members in order to settle disputes.

Mediation – A method of nonbinding dispute resolution involving a third party who tries to help the disputing parties reach a mutually agreeable solution.⁹

This method shall be applied when the parties are unable to resolve its dispute by negotiation. The intervention of a third party (*so-called Mediator*) is a possible means of breaking the deadlock of dispute and producing an acceptable solution for the parties. Basically, the mediator may just encourage the disputing parties to resume negotiations, or may do nothing more than provide them with a channel of communication. In this manner, the mediation cannot be reached without the parties' consents.¹⁰

Conciliation – A method for the settlement of international disputes of any nature according to which a commission set up by the parties, either on a permanent basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a

⁷ Bryan A. Garner, *Black Law Dictionary*, 1996 West Publishing Co, Second Pocket Edition, p.472.

⁸ J.G. Merrills, *International Dispute Settlement*, Sweet & Maxwell, First edition (1983), pp.2-7.

⁹ Bryan A. Garner, *Black Law Dictionary*, 1996 West Publishing Co, Second Pocket Edition, p.444.

¹⁰ J.G. Merrills, *International Dispute Settlement*, Sweet & Maxwell, First edition (1983), pp.20-21.

settlement susceptible of being accepted by them, or of affording the parties, with a view to its settlement in which they may have requested.¹¹

In brief, the conciliation means a settlement of a dispute in an agreeable manner. If the negotiation and mediation method cannot resolve the parties' dispute, the parties may agree to set up a bilateral commission in order to make clear the questions in dispute and to suggest the terms of a possible settlement.¹²

Arbitration – A method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding.¹³

The arbitration provides the parties with the additional opportunity to obtain a decision (“Award”) from the arbitrator of their own choice. This method can also be used to produce a solution to a selected problem and on any agreed basis. Moreover, the Award shall be binding the parties, but not necessarily final. This is done so in order for the parties to be able to take further proceeding to interpret, revise, rectify, and to appeal the Award.

In general, the means available for the settlement of international disputes are divided into two groups as (1) negotiation, mediation and conciliation, and (2) arbitration and judicial settlement.¹⁴ In brief, the group no.1 is termed as a diplomatic means because the parties retain control of the dispute and **may or may not** accept a proposed settlement as they see fit. On the other hand, the group no.2 shall be used when the parties want a binding decision on the basis of international law.¹⁵

For the WTO dispute settlement, a dispute may arise between each WTO members because one country adopts a trade policy or takes some action that one or more fellow-WTO members consider to be breaking the WTO agreements (such as GATT, GATS, and TRIPS), or fail

¹¹ Ibid.,p.52

¹² Ibid.,p.60

¹³ Bryan A. Garner, *Black Law Dictionary*, 1996 West Publishing Co, Second Pocket Edition, p.41.

¹⁴ Judicial settlement involves the reference of a dispute to the World Court or some other tribunal. (such as European Court of Human Rights)

¹⁵ J.G. Merrills, *International Dispute Settlement*, Sweet & Maxwell, First edition (1983), pp.70-71.

to follow through on their obligations.¹⁶ The WTO shall take control of disputes in the WTO through the DSB on the basis that the priority is to settle disputes, not to pass judgment.

(II) Objective of the dispute settlement provision

“*Equitable, fast, effective, mutually acceptable*” This is a main objective of the WTO dispute settlement provision. In this way, under the old GATT, the WTO dispute settlement could not complete their principles as of yet because it had no fixed timetables, the rulings were easier to block, and many cases dragged on for a long time inconclusively. Additionally, after the Uruguay Round agreement, the WTO introduced better discipline for the length of time with flexible deadlines set in various stages of the procedure. The agreement also highlights that prompt settlement is very important if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year or 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent, it is accelerated as much as possible.¹⁷

Concerning the blocking of ruling, the Uruguay Round agreement made it impossible for the country losing their case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by *consensus*, meaning that just a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling. Hence, any country, which wants to block a ruling, has to persuade all other WTO members to share its view.¹⁸

¹⁶ World Trade Organization Information and Media Relations Division, *Understanding the WTO*, p.55, <http://www.wto.org/english/thewto_e/whatise/tife/disp1e.htm> at 20 August 2013.

¹⁷ United Nations Conference on Trade and Development, *Dispute Settlement 3.1 Overview*, p.42, <http://www.unctad.org/en/docs/edmmisc232add11_en.pdf > at 20 August 2013.

¹⁸ World Trade Organization Information and Media Relations Division, *Understanding the WTO*, p.56, <<http://www.wto.org/english/thewtoe/whatise/tife/disp1e.htm>> at 20 August 2013.

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.¹⁹

(III) The Dispute Settlement Body (“DSB”)

The Dispute Settlement Body (“DSB”) is the General Council. In brief, the DSB is the WTO General Council acting in a specialized role under a separate chair. The DSB administers the Understanding on Rules and Procedures Governing Settlement of Disputes (“DSU”), which regulates dispute settlement under all WTO agreements. Moreover, the DSB has the sole authority to establish “Panels” to consider the case, and to decide the outcome of a trade dispute on the recommendation of a Dispute Panels and on a report from the Appellate Body of WTO, which may have amended the Panels recommendation.²⁰ In this manner, the DSB can make their decision on the disputes based on the recommendations of the Panels and Appellate Body.

For the decision making of the DSB, it uses a special decision procedure known as “reverse consensus” or “consensus against”.²¹ This process requires that the recommendations of the Panels (as amended by the Appellate Body) should be adopted **unless** there is a consensus of the members against adoption. In reality, this outcome is improbable because the winning party should normally have to join in on this reverse consensus.

Whether the complaint had been shown to be right or wrong, the DSB may direct the losing party to take action to bring its laws, regulations or policies into conformity with the WTO Agreements. The DSB will give the losing party a reasonable period of time in which to restore the conformity of its laws. If the losing party ignores or fails to restore the conformity of its laws within the reasonable period of time, the DSB may authorise a successful complainant to take retaliatory measures or trade sanctions to induce action on

¹⁹ Ibid.,

²⁰ Ibid.,

²¹ Ibid.,

the part of the losing party. Nevertheless, when a losing party brings its laws into conformity it may choose how to do so because there is no concept of “punishment”. Hence, the losing party may not necessarily make the changes that the winning party would like them to.²²

(IV) The WTO dispute settlement mechanism²³

When the dispute arises between the member states, the process of the WTO dispute settlement should be considered by the parties in the dispute and functions in three main steps as follows;

1). **Consultation** - (Takes approximately up to 60 days). Before taking any other actions, the countries in dispute are encouraged to talk to each other in order to settle their disputes by themselves. If that fails, then they can ask the WTO director-general to mediate or try to help in some other manner (such as the establishment of Panels).

2). **Panel** - (Takes approximately up to 45 days for the appointment of a panel, and more than 6 months for final panel reports to parties). If the dispute could not be resolved by consultation, the complaining country can ask the WTO director-general to appoint the panel. The panel consist of three (possibly five) experts (*so-called “Panelists”*) from different countries. Panelists for each case can be chosen from a permanent list of well-qualified candidates, or from elsewhere. Basically, they are independent and serve in their individual capacities to discover and interpret the fact and the law. They also cannot receive any instruction from any government. In reality, although the panels meet in secret and are not required to alert national parliaments that their laws have been challenged by another country, the countries in dispute usually try to lobby Panelists to achieve the greatest benefits.

However, the country “*in the dock*” can block the creation of the panel once, but when the DSB meets for a second time, the appointment can no longer be blocked unless there is a consensus against appointing the panel.

After Panelists consider all evidences, then they will send the panel’s report into the DSB in order to make rulings or recommendations and, in this capacity, the DSB can only

²² Ibid.,

²³ United Nations Conference on Trade and Development, *Dispute Settlement 3.2 Panels*, <http://www.unctad.org/en/docs/edmmisc232add12_en.pdf > at 20 August 2013.

reject the report by consensus. Hence, the panel's findings have to be based on the DSU as follows,²⁴

- **Before the first hearing** - each party in the dispute must present its case in writing to the panel.
- **First hearing** - the complaining country, the responding country, and another country, which have announced that they have an interest in the dispute, make their case at the panel's first hearing.
- **Rebuttals** - the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- **Experts** - if one party raises scientific or other technical matters, the panel may consult specific experts or appoint an expert review group to prepare an advisory report.
- **First draft** - the panel submits the descriptive sections of its report to the two sides, giving them at least two weeks to comment. This report does not include findings and conclusions.
- **Interim report** - the panel then submits an interim report, including its findings and conclusions to the parties, giving them at least one week to ask for a review.
- **Review** - the period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the parties.
- **Final report** - a final report is submitted to the parties and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform to the WTO rules. The panel may suggest how this could be done.

²⁴ World Trade Organization Information and Media Relations Division, *Understanding the WTO*, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm > at 20 August 2013.

- **The report becomes a ruling** - the report becomes the DSB's ruling or recommendation within 60 days unless there is a consensus against it. Both parties can also appeal the report if they don't agree with its report.

3). **Appeals** – (Takes approximately up to 60-90 days) the parties can appeal a panel's ruling. They cannot re-examine existing evidence or examine new issues. Appeals have to be only based on matters of law such as legal interpretation.

Each appeal is heard by three members (“Judges”) of a permanent seven-member Appellate Body set up by the DSB and broadly representing the choice of WTO membership. Members of the Appellate Body have four-year terms. They have to be independent individuals with recognized standing in the field of law and international trade, not affiliated with any government. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The DSB has to accept or reject the appeals report within 30 days, and rejection of this is only possible by consensus.²⁵ Generally, the total time taken, in case without appeal, is approximate 1 year and 1 year plus 3 months in case there is an appeal.

(V) The enforcement of the decision

Unlike most other international organizations, the WTO has significant power to enforce its decisions through the authorization of trade sanctions against members which fail to comply with its decision.

At this level, the priority is for the losing defendant to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that “*prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members*”. This means the losing party must follow the recommendations in the panel report or the appellate body. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's

²⁵ See the Structure of the panel process at

<http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm> at 28 August 2013.

adoption. If complying with the recommendation immediately proves impractical, the member will be given a “reasonable period of time” to do so. If the losing party fails to act within this period, it has to enter into negotiations with the complaining country in order to determine mutually-acceptable compensation. For example, tariff reductions in areas of particular interest to the complaining party.²⁶

If after 20 days, no satisfactory compensation is agreed upon, the complaining party may ask the DSB for permission to impose limited trade sanctions against the losing party. The DSB must grant this authorization within 30 days of the expiry of the “reasonable period of time” unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. On the other hand, if this is not effective or practical and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective. In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

So in a practical sense, there are usually three choices for the losing country which are (1) the losing country have to change their law or regulation to conform to the DSB requirements, (2) pay ongoing compensation to the complaining country, or (3) face trade sanctions.

In conclusion, the WTO dispute settlement mechanism is usually (i) state-to-state, (ii) require consultations before members litigate, (iii) offers optional entrance to negotiation, mediation, and conciliation, (iv) provides formal arbitration if consultations are unsuccessful and, (v) uses trade sanctions as enforcement mechanism.

²⁶ World Trade Organization Information and Media Relations Division, *Understanding the WTO*, p.58, <<http://www.wto.org/english/thewtoe/whatise/tife/disp1e.htm> > at 20 August 2013.

PART II: CASE STUDY (MEXICO SOFT DRINKS)

(I) Background²⁷

Under NAFTA (“North American Free Trade Agreement”), Mexico received a sugar quota for export to the US. Practically, Mexico could not apply those quota rights. In addition, Mexico had tried to enforce those quota rights via NAFTA Chapter 20 panel. However, it was not successful because the US continued to block the appointment of panel members which Mexico established to examine US restrictions on Mexican sugar. Finally, because of this blockage, Mexico decided to respond unilaterally with the tax measures against the US.

On January 1, 2002, Mexico imposed the 20 percent tax on soft drinks and other beverages. The beverage tax was only applied to soft drinks using sweeteners (such as HFCS²⁸ or beet sugar) other than sugar cane. This meant that the soft drinks sweetened exclusively with sugar cane were tax-exempt. The new beverage tax measure had an immediate effect on HFCS because HFCS accounted for 99 percent of Mexico's sweetener imports. In brief, Mexico imposed a tax designed to discriminate against imports, especially US imports. Finally, the US asked the WTO to establish the panel with a complaint which claimed that the Mexico's beverage tax was inconsistent with Mexico's national treatment obligations under Articles III of GATT 1994. The US also alleged that these tax measures treated imported soft drinks less favorably than their "like" domestic counterparts. (In Mexico, sugar cane is almost exclusively a domestic product.) Finally, the WTO Panel had found that these tax measures discriminated against imports.

According to Mexico, Mexico did not appeal the Panel's conclusions that the mentioned tax measures were inconsistent with Mexico's national treatment obligations under Article III of GATT 1994. At the same time, Mexico requested the WTO Panel to decline to exercise its jurisdiction, and recommended to the parties that they submit their complaint to an arbitral panel under the NAFTA. The NAFTA dispute settlement forum could better address the substantive claims in this case which were linked to a dispute

²⁷ WTO, *Report of the Panel on Mexico – Tax Measures on Soft Drinks and Other Beverages* (7 October 2005), p. 18, < http://www.wto.org/english/tratop_e/dispu_e/308r-0_e.doc > at 22 August 2013.

²⁸ HFCS comes from high fructose corn syrup.

regarding market access for Mexican sugar cane in the United States under the NAFTA. Mexico also argued that, as for its tax measures, they were designed to secure compliance by the US of NAFTA law, the alleged tax measures were justified under the GATT Article XX (d) exception. Declining Mexico's request not to exercise its jurisdiction in this case, the panel ruled against Mexico on both the substantive claims as well as the GATT article XX (d) justification. Mexico appealed the panel's decision on the jurisdiction issue and the GATT Article XX (d) exception only.

(II) Legal Issues

Based on this case, there are two main legal issues that linked up with the topic as follows;

1). Can the WTO Panel exercise its jurisdiction?

At a panel level, Mexico had asked the WTO Panel to decline and to exercise its jurisdiction in this dispute in support of the Arbitral Panel that was established under the NAFTA. In brief, Mexico tried to use the WTO Panel decision in order to put additional pressure on the US to appoint the panelists under the NAFTA. The WTO Panel rejected Mexico's request on the ground that, under the DSU, *it did not have the discretion to decide not to exercise its jurisdiction in a case that has been properly brought before it.*²⁹

Nevertheless, in the appeal process, Mexico did not argue that the WTO Panel had jurisdiction to hear the US complaint. Instead, Mexico argued that the WTO Panel had the power to abstain from ruling on them and should have exercised this power for this dispute. The Appellate Body agreed with Mexico that WTO Panel had the power, which included the right to determine whether they had jurisdiction, the scope of their jurisdiction, and the right to exercise jurisdiction by declining to rule on the claims.

However, the Appellate Body recalled its ruling that the discretion of Panel did not extend to modify the substantive provisions of the DSU. Furthermore, the Appellate Body agreed with the Panel's conclusion that a WTO Panel would seem not to be in a position to choose freely whether or not to exercise its jurisdiction. The Appellate Body also

²⁹ WTO, *Report of the Panel on Mexico – Tax Measures on Soft Drinks and Other Beverages* (7 October 2005), p. 22, < http://www.wto.org/english/tratop_e/dispu_e/308r-0_e.doc > at 22 August 2013.

considered Mexico's position that the US claimed under Article III of GATT were "inextricably linked to a broader dispute and only a NAFTA panel could resolve the dispute as a whole". However, the Appellate Body stated that "accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreement". So this meant that in this case there was no ground in the DSU for the panels and the Appellate Body to adjudicate non-WTO disputes.

2). Can the GATT exception (Article XX) be used to secure compliance with another Member's international obligations?

Article XX (d) of GATT stated that "Subject to the requirement that such measure 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 contracting party of measures: (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices."³⁰

This Article provides, in part, that nothing under the GATT shall prevent the adoption or enforcement by any contracting party of measures that is necessary to secure compliance with laws or regulations, which are not inconsistent with the provisions of this Agreement.

Mexico argued that their tax measure were justified under Article XX (d) of GATT as measures were necessary to secure compliance by the US with US national obligations under the NAFTA. Mexico also described its tax measures as temporary and proportionate measures intended to persuade the US in order to comply with its NAFTA commitments regarding market access conditions for Mexican sugar.

³⁰ WTO, *Report of the Panel on Mexico – Tax Measures on Soft Drinks and Other Beverages* (7 October 2005), p. 31, < http://www.wto.org/english/tratop_e/dispu_e/308r-0_e.doc > at 22 August 2013.

The point in the appeal was as to whether the term “to secure compliance with laws or regulations” under Article XX (d) of GATT included WTO inconsistent measures that were applied by the WTO Member to secure compliance with another WTO member’s obligations under an international agreement. (In this case, it was referred to NAFTA).

The Appellate Body defined the term of “**laws or regulations**” under Article XX (d) of GATT to mean as “*rules that form part of the domestic legal system of a WTO Member including rules deriving from international agreements that had been incorporated into the domestic legal system of a WTO Member*”.³¹ This means the “law or regulations”, which a Member seeks to secure compliance for exclude obligations of another WTO Member under an international agreement. In addition, the Appellate Body defined the term “**to secure compliance**” as “to enforce compliance”. However, the Appellate Body noted that Article XX (d) did not require “the use of coercion”.³²

Hence, the Appellate Body agreed with the Panel that Article XX (d) of GATT was not available to justify the inconsistent of WTO measures that seek to secure compliance by another WTO Member with other Member’s international obligations.

(III) Impacts of the decision

Based on the decision, another interesting question arises from dispute settlement provisions under RTAs (“Regional Trade Agreement”) and the WTO which is “*can the dispute settlement provisions of bilateral agreements (such as NAFTA) be applied by panels and the WTO Appellate Body?*”

There are a few points to be considered when asking this aforementioned question:

1). **Jurisdiction of the WTO Panel** – The Appellate Body judged that the complaint must be claimed under WTO covered agreement only. (For further information at paragraphs 56³³ and 78³⁴ of WTO Appellate Body, Report on Mexico-Soft drinks, on 22 August 2013).

³¹ WTO, *Report of the Panel on Mexico – Tax Measures on Soft Drinks and Other Beverages (7 October 2005)*, p.163, < http://www.wto.org/english/tratop_e/dispu_e/308r-0_e.doc > at 22 August 2013.

³² Ibid.,

³³ Paragraph 56 “...we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations. We see no basis

2). **Interpretation of WTO provisions** – Prof. Joost Pauwelyn, from Duke Law School believed that even if the WTO has jurisdiction to decide claims under WTO covered agreement only, this limited jurisdiction of WTO panels does not mean that WTO panels cannot refer to non-WTO treaties (such as NAFTA). Hence, the reference can be made to outside treaties as long as they reflect the common understanding of all WTO members.

3). **Applicable law for the resolution of WTO claims** – This point and question remain unresolved because the WTO Appellate Body did not decide this issue and paragraphs 56 and 78 of WTO Appellate Body related to the jurisdiction of WTO panel, and not the question of applicable law.

Hence, the answer for this question is the dispute settlement provisions of bilateral agreements (such as NAFTA) which cannot be applied by panels and the WTO Appellate Body because NAFTA is a Non-WTO covered agreement.

In my point of view inspired by Frieder Roeseeler, an Executive Director of Advisory Centre on WTO Law, this case makes a few questions stand out to me. If the dispute settlement provisions of bilateral trade agreements can be applied by the WTO Panels and the WTO Appellate Body, the WTO can get involved to judge the dispute based on another Non-WTO agreements (such as NAFTA, APEC and etc.). On the other hands, the WTO

in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements”. Accepting Mexico’s interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements....”

³⁴ Paragraph 78 “...Mexico’s interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would become adjudicators of non-WTO disputes. As we noted earlier, this is not the function of panels and the Appellate Body as intended by the DSU...”

regulation (Such as DSU) is an international law, and then it should not be affected by another agreement (such as NAFTA).

However, if the WTO Panels and the WTO Appellate Body do not agree to apply other dispute settlement provisions of bilateral trade agreements (such as NAFTA) in the same manner as they did in the Mexico Soft Drinks case, this brings to an overlapping problem between different dispute processes. (NAFTA v. WTO) Firstly, in this dispute, there is an overlap between NAFTA (Chapter 20 regarding general disputes) and the WTO dispute settlement process relied upon by the US. Secondly, the WTO process overlaps with three ongoing investor-state complaints under NAFTA (Chapter 11 regarding investment). The complaint in both cases is also claimed to be the violation of national treatment.

The proceeding problem has to do with the forum selection or forum shopping. For example, the US had done this in the *Canada – Periodicals* cases which the US decided to bring its case to the WTO instead of NAFTA because there is a cultural industries exception under NAFTA.³⁵ In the Mexico soft drinks case, the US firstly blocked the appointment of panelists under Chapter 20 of NAFTA. When Mexico did exactly what the US used to do in the old GATT days in response to blockage at NAFTA, the US immediately objected with a WTO complaint. Then, the WTO said that they were not in a position to choose freely whether or not to exercise its jurisdiction. Hence, this dispute still is an unresolved dispute, even the WTO got involved, because, based on a sugar quota for export to the US under NAFTA, Mexico could not enforce the US to participate both of NAFTA and WTO.

PART III: CONCLUSION AND RECOMMENDATION

In the end, the main issue, which everyone should be concerned with, is regarding the decision of the DSB on Mexico Soft Drinks case and the question of the overlap with multilateral dispute settlement. These questions also bring such doubts into the WTO members regarding the effectiveness of the WTO dispute settlement provisions. In

³⁵ Frieder Roessler, *Mexico – Tax Measures on Soft Drinks and Other Beverages* (DS308), p.7, <http://www.ali.org/doc/wto/wto2006_2007/2-%2010-8-08-SoftDrinksCase-CmtsRoessler.pdf> at 22 August 2013.

principle, the overlap should not always exist because different treaties have different substantive obligations and the dispute settlement provisions incorporated into those treaties which have to do with the enforcement of such obligations.

Based on the main objective of the WTO dispute settlement provision *in order to secure a positive solution to a dispute*,³⁶ this decision (Mexico Soft drinks) seems so far from a positive solution to a dispute. Moreover, this mentioned question might decrease the confidence of the WTO members for the expectation of the WTO dispute settlement provision. Hence, if the WTO dispute settlement provision cannot effectively resolved the dispute, then the WTO law is no longer of any consequence in the international level because the parties, especially the developing countries (such as Mexico or another), will not trust the WTO dispute settlement provision and finally use their own ways to retaliate in the same fashion as Mexico did against the U.S.

Finally, as a mentioned comment of Prof. Joost Pauwelyn, I think that the WTO should open its mind to other treaties (such as NAFTA) by accepting such clauses as Forum selection clauses under NAFTA Article 2005,³⁷ where the parties can choose where to go when there is a dispute regarding a matter arising under both NAFTA and the WTO. However, if the parties make a choice, then the other forum can no longer be used.

On the other hands, I think that developing countries (such as Mexico in this case), should be careful to lunch a dispute process that cannot be blocked by the other side when they negotiate bilateral trade agreement, and also carefully consider their actions and to anticipate the economic and political effects of launching these particular disputes as well as

³⁶ United Nations Conference on Trade and Development, *Dispute Settlement 3.2 Panels*, p.3, <http://www.unctad.org/en/docs/edmmisc232add12_en.pdf > at 20 August 2013.

³⁷ NAFTA (1994), Article 2005 GATT Dispute Settlement stated that “1. Subject to paragraph 2, 3 and 4, dispute regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated there under, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Part...” and “6. Once dispute settlement procedures have been initiated under Article 2007 pr dispute settlement proceedings have been initiated under GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4”

the expected legal outcome before taking litigation. In my personal point of view, Mexico's legal position in this case was too weak, and it made many arguments which were tenuous at the best. So we as a developing country need to say thank you to Mexico because this case offers us some lessons to beware of and consider more innovative and new strategies in WTO litigation.