

INTERNATIONAL ECONOMIC LAW WORKING GROUP**MINUTES OF MEETING OF APRIL 11, 2012****7:00PM-9:00PM****AT****THE RESIDENCE OF PROFESSOR TAI-HENG CHENG****MEMBERS PRESENT:**

BARRY APPLETON, ESQ.
PROF. KRISTEN BOON
PROF. TAI-HENG CHENG
MS. ANA FRISCHTAK
MS. VALERIA GUIMARAES DE LIMA E SILVA
PROF. ROBERT HOWSE
PROF. CLAIRE KELLY
PROF. W. MICHAEL REISMAN
DR. MELANIE SAMSON
PROF. RICHARD STEWART

GUESTS PRESENT:

PROF. MICHAEL EWING-CHOW, NATIONAL UNIVERSITY OF SINGAPORE LAW SCHOOL
PROF. MEREDITH LEWIS, VICTORIA UNIVERSITY OF WELLINGTON
MR. WOUTER SCHMIT JONGBLOED, COLUMBIA UNIVERSITY
EDWARD BARNETT, NYLS FELLOW
MICHELLE IPPOLITO, NYLS FELLOW
NICHOLAS TURNER, NYLS FELLOW

MINUTES:**WELCOME**

Prof. Cheng welcomed the members to the final meeting of the inaugural series of International Economic Law Working Group meetings.

PRESENTATION BY MICHAEL EWING-CHOW ON HIS PAPER, *FOOD SECURITY: FROM SELF SUFFICIENCY TO PRODUCTION DIVERSIFICATION AND REGIONAL COOPERATION – A CASE STUDY IN RICE SECURITY*

Prof. Ewing-Chow began the discussion by noting that his paper about food security grew out of his work with the ASEAN Plus Three Emergency Rice Reserve (APTERR). He described recent concerns about food shortages and price increases, particularly rice, in Asia. He postulated that important causes of these trends include speculation and short-term volatility caused by export restrictions.

Prof. Ewing-Chow remarked that Singapore itself is an example of a nation that has benefited from trade liberalization and thereby food security.

He suggested that the notion of food self-sufficiency may be a flawed one, and that trade networks could offer a more promising method of addressing food insecurity.

He challenged the argument that food concerns ought to trump WTO rules. In his experience, very few WTO rules actually inhibit the development of rice reserves. In fact, the rules provide useful leverage for overcoming resistance from vested interests and may be perceived to impose virtuous discipline.

He noted that while Western influence in Asia has had the effect of decreasing the amount of rice consumed as a percentage of total caloric intake; although it remains a staple of the Asian diet and its absolute caloric contribution remains relatively constant. Ninety percent of rice is grown and consumed in the region. Thus, the saying that "rice is life" remains true.

Sudden increases in rice prices in 2008 caused by were followed by unilateral export restrictions led to food riots in Asia. Cyclone Nargis in Myanmar also illustrated the fragility of rice distribution and supply. That led to the realization that regional food security was perilous. This created the impetus for the ASEAN Plus Three Rice Reserve.

Initially there was a focus on developing self-sufficient food supplies locally in the region. However, countries including Korea and Japan argued that rice should come from outside the region. Prof. Ewing-Chow suggested that ultimately the biggest concern with self-sufficiency is in its sustainability. Different regulatory and economic incentives lead to the entrenchment of certain production methods and varieties of rice. "Putting all of the eggs in one basket" could lead to problems, especially as climate change affects the viability and predictability of food production. The better strategy would be to pursue a global trade model.

Prof. Ewing-Chow acknowledged that one of the arguments against the global trade model is its negative effect on employment in some places. However, he argued that "change management" in the form of direct public alleviation may be a more effective strategy.

Prof. Ewing-Chow also pointed to certain WTO rules that were implicated by export restrictions, including Article XI, which requires a "regulatory explanation" for restrictions to be valid. He said such difficulties suggested that the challenge ahead would be to create regional arrangements based on enlightened self-interest, not a global or grand solution.

Prof. Ewing-Chow noted that his paper discusses various WTO rules relevant to rice production, and rice trading and pricing. He said that past experiences demonstrated that pricing is an issue that needed dealt with. Fixed pricing is not only economically unsound but against WTO rules. However, a method that could work would be forward contract with a average price mechanism. He argued that this, if done sparingly, interventions would not breach trade rules. Moreover, a mechanism based on the averaging of prices would be good for the region because it would help smooth prices and correct information asymmetries.

He concluded that governments create unfortunate incentives resulting in over or reduced production by tinkering with market forces. Under such circumstances, prices do not reflect real

value and regulations cause as many problems as they solve. He stressed that the focus should be on a regional or global trade system that would support independent countries and consumers.

Prof. Cheng praised Prof. Ewing-Chow's masterful presentation and invited comments and questions from the group. Prof. Howse said he agreed with many of the arguments and inquired into the issue of state responsibility under the WTO rules when the actor is an organization such as the Secretariat. Prof. Ewing-Chow said that the Secretariat itself may not raise the issue of state responsibility; however, contracts that are formed between states might. It is a concern worth highlighting because states may use trade arrangements and rules as a way to avoid certain trade obligations. Prof. Howse asked how that analysis would apply to counterparties. Prof. Ewing-Chow said the issue is still being considered and the rules are still in draft form. In the current version, the Secretariat only acts as a "matchmaker" between willing parties. The concern is what happens when they start talking to one another without providing information about the transaction and the pricing mechanism. It is important to have transparency.

Prof. Meredith Lewis asked about regional attitudes towards diversifying food supplies. Prof. Ewing-Chow said it was an interesting topic, as evidenced by historical events.

Ms. Guimaraes de Lima e Silva asked for clarification on the incentives available to increase production. Prof. Ewing-Chow said that market fluctuations in 2008 demonstrated the importance of keeping enough "virtual rice" in the market to facilitate trade. Returning to the example of Singapore, Prof. Ewing-Chow remarked on the benefits of trade. In neo-classical economics, each country does what it does best and trades for the goods that it needs.

Mr. Schmit Jongbloed inquired about how this model would operate, for example, in sub-Saharan Africa, where there are fewer options for engaging in change management on the ground. He also asked about countries such as Japan that are reluctant to encourage change because of cultural resistance. And what happens with the forward-pricing mechanism, he asked, if a country rejects a contract in times of shortages, such as between Egypt and Ukraine? Prof. Ewing-Chow replied that he suspected that Japan's model will self-correct in time as a result of demographic shifts. He suggested that the sub-Saharan African example presents new issues worthy of another paper. As to the forward-pricing issue, the need to respond to supply changes is always an issue for governments. However, as his paper points out, the use of multiple willing counterparties would allow one to step in for another in response to immediate situations.

Prof. Reisman asked what sanctions were available under the current Asian system. Prof. Ewing-Chow said there were no sanctions, but there is a dispute resolution mechanism.

Prof. Cheng thanked Prof. Ewing-Chow for his presentation and for sharing his "insider's view" on rice trading in Asia.

PRESENTATION BY PROF. TAI-HENG CHENG ON A RECENT UNCITRAL ARBITRATION DECISION

After a short recess, Prof. Cheng circulated, with the parties' consent, a redacted version of a recent UNCITRAL award that he thought would be interesting for the group. Prof. Cheng served as an expert in the arbitration. Although the tribunal accepted his legal analysis, it ultimately rejected the claimant's case on the facts.

What was remarkable was that the tribunal then awarded full costs to the respondent, citing "bad faith," an issue that was never briefed. The tribunal's reasoning was that the claimant was a sophisticated lawyer and should have known that the claim was without merit. The dissent would also have awarded full costs, but would not have found bad faith.

Prof. Cheng asked for the group's reaction. The case seemed to present an example of a situation where national courts could play a role in regulating arbitration, perhaps in considering the claimant's due process rights.

A lively conversation followed on the issue of bad faith and the role of tribunal's in assessing the parties' conduct and credibility. There was agreement that the tribunal's reaction was unusual and that it raised interesting questions.

CIRCULATION OF LETTERS FORWARD BY JUDGE POGUE ON EXCHANGE RATES AND CHINA

Prof. Cheng circulated copies of letters, forwarded by Judge Pogue, that were exchanged recently between the U.S. Congress, the U.S. Treasury Secretary, and the U.S. Trade Representative, regarding China and the role of exchange rate practices in trade policy. Judge Pogue provided the letters as an update for the members on the issue.

Prof. Ewing-Chow remarked that China's labor standards worked to its advantage on this issue. Prof. Cheng commented that the situation is self-correcting as labor costs are rising. Prof. Ewing-Chow agreed, but suggested that more discussion was needed. Prof. Reisman noted that the issue comes up frequently in negotiations.

PRESENTATION BY PROF. ROBERT HOWSE ON THE WTO CLOVE CIGARETTES APPELLATE BODY DECISION

Prof. Howse began by offering some background on the Clove Cigarettes decision. The United States decided to ban the sale of clove cigarettes because of public health concerns; specifically because clove cigarettes are popular among a certain subset of young people. However, the cigarettes are largely a product of Indonesia, with the exception of a small U.S.-based producer.

Prof. Howse said the question was why Congress did not choose to also ban menthol cigarettes, which are far more popular than clove cigarettes. One explanation is that clove cigarettes are important, and menthol cigarettes are produced by powerful domestic corporations.

Indonesia brought a case before the WTO, arguing that the ban was a violation of U.S. trade obligations, and that it would only make sense if the U.S. banned both clove and menthol cigarettes. The Panel in its national treatment analysis decided to apply the standard from the Asbestos case and look to the regulatory objective to see if they were "like products." This was a

change from prior jurisprudence because in the past the panel looked to a competing product analysis.

The Panel found that they were liked products. It went to the second step and found that there was an obvious differential treatment between foreign and U.S. products. Therefore it was a violation of the U.S.'s Technical Barriers to Trade (TBT) obligations.

The Appellate Body said that the case should not turn on the regulatory objective, but on a competitive relationship analysis. (This can be contrasted to the Asbestos case, where consumer and regulatory preferences overlapped.) Then the Appellate Body made a "jurisprudential move." It agreed that the U.S.'s ban led to a disparate impact. But it went further and added a step, which required asking if the disparate impact was attributable to a legitimate regulatory distinction. If so, it would not be a violation.

It then applied this standard to the facts. Prof. Howse stated that the U.S. argued that it could not ban the more popular menthol cigarettes because people would suffer withdrawal symptoms, leading to a major public health crisis. The Appellate Body did not buy this argument because people could simply switch to non-menthol cigarettes for their nicotine cravings.

Prof. Howse said he agreed with the Appellate Body's approach because it provided an important regulatory safeguard, but he said the facts relied on were questionable. The Appellate Body relied on the factual record provided by the Panel, which did not fully consider the U.S.'s argument about the effects of a menthol ban. The case could have gone another way had the evidentiary record been developed further.

Prof. Howse drew a connection to the EU hormone case involving the ban on the import of beef containing certain hormones. The argument was made that a similar ban should apply to broccoli because of the chemicals used. The Appellate Body said that was absurd because there was no need to ban both to justify a ban on one and that a ban on broccoli would amount to a massive regulatory intervention in people's lives. The difference here is that the Appellate Body didn't seem convinced that banning menthol cigarettes would be a massive regulatory intervention.

Prof. Lewis commented that the Appellate Body seemed dismissive of the U.S.'s position that there was a difference between banning a popular and a non-popular product. It would be easier to ban a product that appeals to some teenagers rather than a product used by millions of people. Prof. Howse noted that clove cigarettes appeal mainly to a subculture of people who likely lack political power. That is another important dimension in the case.

Prof. Stewart referred to the U.S. case *Brown Williamson v. FDA*. The Clinton administration's FDA attempted to regulate cigarettes as a drug. The O'Connor majority found the approach absurd because if there was no safe use for a product, they would have to be banned under law, not regulated. Prof. Stewart asked whether there was a need for a chapeau analysis under the TBT agreement.

Prof. Howse said the Appellate Body said there should be the same balance as Articles III and XX. This is an important aspect of the case. Adjudicators should not assume that there is less domestic authority to regulate under the TBT agreement.

Dr. Samson expressed concern that the panels are not taking into account non-scientific evidence, such as effects of smuggling and emerging black markets. Prof. Ewing-Chow noted that in Singapore there is a ban on electronic cigarettes, also for the reason that they make it easier to start smoking. He also observed that the case raises questions about the Appellate Body's inability to remand cases for fact-finding. If the Panel does not ask the right questions it can limit the Appellate Body. Dr. Samson said the Appellate Body could call on other experts. Prof. Ewing-Chow said they were under time constraints and that it can be difficult to find experts on short notice.

Mr. Appleton referred to a previous presentation by Prof. Howse in which he previewed upcoming WTO cases. He asked if Prof. Howse had any predictions for how this case might impact other upcoming cases. He also asked about the likely impact on investor-state disputes. Prof. Howse said the Appellate Body may have problems with its national treatment analysis in the Tuna/Dolphin case between the U.S. and Mexico and the KOOL case. Ultimately, the Appellate Body may choose to exercise judicial economy in the Dolphin/Tuna case by addressing the technical standards analysis without reaching the national treatment issue.

Prof. Howse concluded his presentation by remarking on the lively debate as to whether WTO law is relevant to investor-state disputes.

ADJOURNING REMARKS

Prof. Cheng and Howse thanked the members for their attendance during the Group's inaugural year. Meetings will recommence in the fall.

The minutes from the March 27 meeting were circulated and approved without amendment.