Trade and Environment in the Scope of the World Trade Organization - Conflicts and Articulation of the Laws

Zhang Rongfang

With the development of the international trade, some questions related to the relations between environment and trade had appeared and become more and more concerned by the international community. However, most of the provisions of the GATT on trade and environment are dogmatic and not so operational, lacking interpretations on the terms and concepts or a concrete delimitation of the relation between trade and environment, which contributes a potential danger for the conflicts between trade and environment. The reason is that in the agreements of the WTO, a less clear expression is adopted to a possible extent, so as to find a consensus between the members with different systems and levels of economic development and to be interpreted in accordance with the own will of Member States.

However, the permission to Member States to establish freely its proper politics to reach the environmental goals which are to be carried out makes the developed countries adopt environmental norms relatively more rigorous, while the developing countries, owing to the restrictions imposed by their own economic and technological level, as well as the lack of environmental conscience and the necessities of their own benefits, adopt more flexible norms and environmental politics, generating therefore conflicts when the products of developing countries try to enter the market of the developed countries. It is also a situation happening in developed countries, owing to the lack of uniformity between their environmental norms and measures.

In order to solve these problems, in the scope of the WTO it is necessary to produce specific laws on trade and environment, with the aim to consolidate the function and the effect of the international law on environment. The Member States of the WTO must put aside their own interests so as to, basing on the objective to protect and improve the environment, create a new conscience on the ecology and the environment concepts and culture, adopt a specific agreement on trade and environment that may reflect the objective requirements of environment protection. In the agreements on trade and environment, preferences and exceptions should be granted to the developing countries. This is the only way that the developing countries can eliminate, through the trade opportunities, the poverty, raise the incomes level and achieve the objective to reduce, in large-scale, the world-wide population living in poverty. The WTO must intensify to the level of the States the articulation of the sources on trade and environment, by adopting uniform environmental norms and politics

so that, when there is a conflict between the national law of a Member State and the international environmental norms and politics, the latter ones should prevail.

Besides, it is still necessary to explore the privileged functions of the Committee on Trade and Environment of the WTO. In order to make executable the environmental norms, the Committee on Trade and Environment has to study and analyze the effective norms in the different Member States, so as to find a form to harmonize the environmental norms of the developed countries with the ones of the developing countries, but without, on one hand, leading to the degradation of the level of internal environmental protection of the developed country and on the other hand, constituting an obstacle for the developing countries to reach their markets. In order to reduce the differences in the norms of environmental protection between the developed countries and the developing countries and to raise the capacity of execution of the international environment norms by the developing countries, the Committee on Trade and Environment must still attribute technical or financial supports to the developing countries, so as to promote of ecological protection and treatment enterprises.

Considerations Regarding the Enactment of a Law to Restrict the Abuse of Intellectual Property Rights After China's WTO Accession

Qiao Sheng

China has been engaging in increasing the protection of the intellectual property rights. After the WTO accession, must of the attentions centralized mainly on how to increase the level of protection of the intellectual property rights with respect to the TRIPS Agreement, without foreseeing the abuse of intellectual property practiced by the foreign enterprises, nor did China pay sufficient attention to the antitrust discussion in the area of intellectual property rights, resulting in the Chinese enterprises being prejudiced in a competition level.

In the author's opinion, China needs to adopt internal laws, namely to enact an antitrust law in order to guarantee the Chinese enterprises' power of competition and to challenge the foreign enterprises' abuse of intellectual property rights.

The reason for the enactment of a law to restrict the abuse of intellectual property rights is that the multinational enterprises have been applying in China, since its reform and opening to the outside world, their policies of intellectual property. For example, they used their patents and

new technologies to invade the Chinese market with their products, practising very high prices; with technology patents, they also imposed different kinds of restrictions to the Chinese enterprises and forced them to allocate considerable sums to buy the patent rights from foreign enterprises, reducing accordingly their power of competition in the market.

The author admits that the intellectual property rights form an important system for the protection and promotion of new technologies and for economic development. Nevertheless, some multinational enterprises make use of the high extent of protection of intellectual property rights to attack rivals from other countries. Therefore, a distinction between the protection and abuse of the intellectual property rights should be made. The aim of the intellectual property rights protection is the innovation, transference and diffusion of technologies and the development of the international community and public interests, as well as the balance of rights and obligations between the intellectual property rights' holders and users. Otherwise it is considered to be intellectual property rights abuse. In order to restrict effectively the abuse of intellectual property rights, the author considers that, first of all, an internal law should be enacted with legal support derived, mainly from the WTO and TRIPS agreements, so that the problem of international legality of this internal law is solved .

Finally, the author makes a few suggestions regarding the enactment of laws concerning abuse of intellectual property rights. He hopes that, before the promulgation of the antitrust law, the State Council may define in one regulation the restriction of abuse of intellectual property rights, and a specific organ to define the controlling procedures over the abuse of intellectual property rights.

The System of Preservation Measures in the Foreign Related Arbitration of China

Chi Un Ho

Arbitration is an effective form of solution of conflicts in civil and commercial matters. The different countries in the world evaluate more and more the role that arbitration takes in the solution of social conflicts.

The preservation measures is the main means that the parties often apply in the process of foreign related arbitration so as to guarantee the execution of the decision and to preserve the important evidences of the case. In China, the preservation measures in arbitration include property preservation and evidence preservation. Nevertheless, internationally there is no legal definition for preservation remedies. Some scholars believe that

all the measures taken before the final arbitral decision can be considered as preservation measures.

Regarding the competence to grant preservation measures, there are three kinds of legislative and judicial practices in the world, namely: the exclusive competence of the arbitral tribunal; the exclusive competence of the court, and the concurrent powers of the court and the arbitral tribunal to grant preservation measures. Among these three kinds of practices, the division of the powers between the court and the arbitral tribunal is of the following ways: a) the party that applies for the preservation measure may choose to apply directly to the court or to the arbitral tribunal for the preservation decision. This is the adopted way in Germany, Hong Kong, Macao, etc.; b) the arbitrator only has the right to grant interim measures when there is specific agreement between the arbitration parties; c) the court only has the power to make decision when certain requirements specified by the law are met, otherwise this power can only be exercised by the arbitral tribunal.

Since the laws of the countries only stipulate the obligations and conditions of the court to help to execute the arbitral decision, without stipulating the execution of interim measures granted by the arbitral tribunal, disputes may arise, both in terms of theory and of practice. The new Arbitration Law of Germany stipulates expressly the competence of the Court to execute the preservation measures granted by the arbitral tribunal whose place of arbitration is not in Germany.

In China, the main legal grounds to deal with the foreign related arbitral preservation matters are the Civil Procedure Law of the People's Republic of China and the Arbitration Law that entered in force in 1995. According to the author, these two laws do not correspond to the evolution tendency of the international arbitration preservation system and need to be revised. He presents the following reasons:

1) Regarding the period for application of preservation measure, in China the property preservation before arbitration is provided only in the matter of maritime arbitration. There are no correspondent norms in other matters.

2) Since the competence over preservation measures belongs exclusively to the court, on one hand this deprives the parties the right to choose the preservation decision to be made by the arbitral tribunal, on the other hand they will also lose the help and convenience given internationally in this matter.

3) Regarding the object of the property preservation, the provision of the Civil Procedure Law of China regarding the object of the property preservation as "the properties related to the case in question" may easily provoke controversy. In the author's opinion, the provision in question should be changed to "constitutes object of preservation of property all the properties of the demanded party that can be object of execution".

From the Single Shareholder Private Company to the Disregard of Corporate Personality - the Regime of Disregard of Corporate Personality should be established in Macao

Cheang Kam Yiu

Under the provisions of the Commercial Code of Macao, the single shareholder private company is one kind of private company that can be established by any natural person. Although anybody can establish a single shareholder private company, it is often administrated by one shareholder. This sole shareholder, who is not subject to the other shareholders' control, may easily make use of his special status to abuse the independent personality of the company and as such the company would become an instrument of the shareholder as a means to avoid the applicability of laws. In order to build up the confidence of the people in the single shareholder private company, the author states that a regime of disregard of corporate personality should be established in Macao, which enables the creditors to demand from the shareholder acting in bad faith.

First of all, the author presents the regime of the single shareholder private company in Macao, considering that in Macao there is also a regime similar to that of the disregard of corporate personality. Nevertheless, as this regime is applicable only to the cases of bankruptcy of a single shareholder private company and is inapplicable while a company lasts, if the shareholder abuses the limited liability and the independent personality of the company, the rights of the creditors would not be guaranteed. Therefore, rigorously speaking, the regime of disregard of corporate personality does not exist in Macao.

Second, the author presents the foreign regime of disregard of corporate personality, which is also called "piercing the corporate veil" in the Anglo-American system. According to this regime, if the shareholders abuse the limited liability of the private company or the legal personality independent of the shareholders, the independent personality of the company will be disregarded; the personality of the company and the shareholders will be considered as one and the shareholders will assume a joint and several and unlimited liability against the external credits of the company. On the other hand, the author indicates that, besides the cases of the single shareholder private company, the confusion between the corporate personality and the shareholder's personality can also happen in the general private companies.

Although there are confusions of personality, the author believes that

the Court will only apply the regime of disregard of corporate personality when the legal interests of creditors or of the community are offended because of corporate personality abuse. Synthesizing various situations, the author concludes that there are four requirements for the application of the regime of disregard of corporate personality, namely: 1) requirement of the subject; 2) subjective requirement; 3) requirement of the act; 4) requirement of the result.

Finally, the author considers that the laws in force in Macao are provided with the conditions for the establishment of the regime of disregard of corporate personality. Based on the provisions of article 326 (abuse of right) of the Civil Code of Macao and article 383 (establishment of an administration aside the general meeting) of the Commercial Code, we may legislate against the acts of abuse of corporate personality so as to prevent possible torts. The author also considers that when legislating we may consult the foreign correspondent laws in order to establish a regime of disregard of corporate personality applicable to Macao.