Lawyers' Weekly

Bold Developments in the "Interface" Between International Law and Domestic Law

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There used to be a huge gap between public international law and domestic (often called "municipal law" by academic scholars). That same chasm existed among lawyers that plied their trade in these two disciplines.

A seminal development in the last decade or so has been the extent to which public international law has become part of the domestic law fabric and how the two disciplines are now inseparable. Consider the following:

- First, the impact of WTO panel decisions, including decisions of the Appellate Body, on actions of national trade agencies and domestic tribunals;

- Second, the increasing recognition in WTO panels of environmental, conservation and health concerns and the need for the strict rules of international trade to give way to these human factors;

The Advent of the WTO:

The amalgamation of public international law and domestic law has been accelerated rapidly in the last 10 years, directly and inescapably due to the Uruguay Round trade negotiations, completed in 1994.

The Uruguay Round produced the WTO Agreement, the most important international legal instrument to emerge since the United Nations and the Bretton Woods Institutions (the World Bank and the IMF) in the years after World War Two.

The WTO as an institution indeed has taken over as the most important multilateral body in the world today, a centralizing force in a world of constant change, helping to ensuring that the rule of law, not politics, governs commercial relations among States.

Impact of WTO Decisions on National Laws:

The so-called "retaliation" process in WTO system helps to ensure compliance with panel and Appellate Body rulings. Together with this kind of self-enforcement, adding greater juridical effect to WTO adjudications, there has been a sea change in the process of settling these State-to-State disputes.

Under the old quasi-diplomatic process in the General Agreement on Tariffs and Trade ("GATT"), disputes were largely over border laws and regulations. Almost all of the 100 or so GATT cases concerned national legislation on one form or another.

In the formative years of the WTO Agreement, as well, panels were largely seized with disputes over national legislative measures. Typical cases were the *Autopact Case* and the *Scallops Case*, each of which concerned tariff treatment of imports.

The extended the reach of the WTO became evident, however, in the important *Periodicals Case*, where the U.S. challenged a long-standing Canadian measure protecting home-grown magazines, and won.

That case engendered criticism in Canada because it involved cultural policy, previously seen as outside the scope of international trade rules. It illustrated, for good or bad, the broad reach of international law under the new WTO regime.

WTO Reviews of Administrative Decision-Making:

An even more critical change here is that WTO disputes now concern decisions of national regulatory agencies, reaching far beyond national laws and measures. This has profound implications in the international law domain.

It means, in effect, that the WTO panels and Appellate Body -- not the courts in the country concerned -- have become the final court of appeal in administrative agency decisions.

A good example is the recent decision on U.S. *Anti-Dumping Measures on Stainless Steel from South Korea*. The WTO panel found that the U.S. Commerce Department, a department of government, applied trade remedies contrary to the requirements of the Anti-Dumping Agreement. The case was not over the U.S. law itself but the decision of a national agency applying that law.

Other similar WTO disputes, such as a recent case of *Thailand -- Iron and Steel from Poland,* have likewise taken on national administrative decisions that were alleged to contravene the WTO Agreement.

This evolution of WTO adjudication, from examination of national laws and regulations, to assessing and reviewing decision-making by national tribunals and agencies, is clearly a watershed development. It has led to a blending of the process of pubic international law and domestic law to the extent that the two are now inextricably intertwined.

WTO Decisions on Environmental Measures:

A word needs to be said about the WTO and the environment. Much criticism has been leveled at the organization by interest groups and NGOs, claiming the WTO follows a business agenda and is unwilling or incapable of dealing with important non-trade interests.

Recent WTO decisions gainsay these criticisms. In the 2001 *Asbestos Case,* for example, the WTO Appellate Body affirmed the rights of members (in this case France) to take whatever measures they deem necessary to protect human heath. The *Asbestos Case* will have a major influence on future environmental and health issues in the WTO.

A Single Universe:

The major theme here is that international law, traditionally governing State-to-State relations only, is directly impacting on private rights. A good example of the melding of public international law and domestic law is in the realm of human rights, where Canadian courts have continued to adopt public international law standards in a host of Charter cases.

In the WTO. the cases reviewed above counter the traditional notion of the separation of the international and domestic legal regimes. For the practitioner, there is an increasing need to be able to advise clients on the direct implications of these developments.

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