EU Trade Protectionism Must Yield to non-EU Market Access Demands

By Lawrence Kogan, Esq.*

In a speech presented at a recent (5/19/06) European Society of International Law forum about the relationship between WTO and non-WTO law, WTO Director General (and former EU Trade Commissioner) Pascal Lamy made the following persuasive argument:

> "WTO Members' trade restrictions imposed to implement non-trade considerations, will be able to prevail over WTO market access obligations *so long as* they are *not* protectionist …*Absent protectionism*, a WTO restriction based on non-WTO norms, will trump WTO norms on market access" (emphasis added).
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> [*See* "La place et le role (du droit) de l'OMC dans l'ordre juridique internationale", Speech before the European Society of International Law (5/19/06), at: (http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm)].

Mr. Lamy should be applauded for his public acknowledgement that the WTO treaties (e.g., the GATT (1994) Article XX chapeau and exceptions, and the Sanitary and Phytosanitary (SPS) Agreement and Technical Barriers to Trade (TBT) Agreements) and accompanying jurisprudence place important substantive limitations on the ability of WTO Member governments to utilize non-trade measures (environment, health and safety (EHS) regulations and standards) to 'protect' home-country industry competitiveness.

However, would Mr. Lamy be equally as forthcoming in providing answers to the following questions?

1) Do these rules not effectively provide WTO Members with a rebuttable statutory presumption of WTO conformity – i.e., measures "applied or adopted for national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment…[*are not, at least, initially*, presumed to] create an unnecessary obstacle to international trade"?
2) Is it not true that non-EU WTO Member governments initially bear the burden of establishing, at law and/or in fact, that a given (EU) EHS or consumer-related market access regulation/directive (e.g., premised on the precautionary principle) has created an unnecessary obstacle(s) to international trade?
3) In order to satisfy this burden of proof and shift it back to the EU Commission, is it not true that non-EU WTO Member governments need only establish that such measures were promulgated, adopted or implemented in a manner that is either *intended to protect*, **or** *has the effect of* protecting home-country industries?
4) Would this not require simply a showing that the measure in question was *other than* the least trade-restrictive alternative available to achieve the EU Commission's stated policy objective(s)?

5) Is it not true that sufficient empirical and anecdotal evidence has now been adduced by international trade and regulatory scholars which demonstrates, beyond a reasonable doubt, that many EU EHS and consumer-related precaution-based regulations and standards amount to nothing more than disguised protectionist barriers to trade that represent *other than* the least trade-restrictive alternatives available to achieve the stated public policy goal(s)?
6) Does this evidence not show how lagging, underdeveloped or otherwise inefficient (noncompetitive) EU companies and industries seeking a 'level global playing field' have lobbied the EU Commission to provide EHS and consumer protection against the vicissitudes of globalization?
7) Have not the international media reported many times during recent years about the growth of these and other trade protectionist measures within the European region itself?
8) If non-EU WTO Member governments utilize this evidence to successfully establish, in law and/or in fact, that the EU Commission, and perhaps, even its Member States, have imposed such measures as disguised protectionist trade barriers, *is it not required that those measures yield, as a matter of WTO law*, to the market access demands of Argentina, Australia, Brazil, Canada, Chile, China, Chinese Taipei, Colombia, Ecuador, El Salvador, Honduras, India, Japan, Malaysia, Mexico, New Zealand, Paraguay, Peru, Singapore, Thailand, U.S. Uruguay, etc.?

As the chief public administrator of the international trading system and a custodian of international justice and the rule of law, it is arguably incumbent upon the WTO Director General to directly and candidly address these and other fine technical points for the benefit of the international lay community.

The author is the CEO of the Institute for Trade, Standards and Sustainable Development (ITSSD), Inc., a non-partisan non-profit organization dedicated to the promotion of a **positive paradigm of sustainable development consistent with private property, free market and World Trade Organization principles. ITSSD studies are accessible at: (http://www.itssd.org/library.htm).*