GNLU INTERNATIONAL MOOT COURT COMPETITION 2013

THE CASE
ZWOVKA - ZWOVKA ENVIRONMENT AND SECURITY OF CHILDREN ACT

Complainant - Enroda
WT/DS/***

Bench Memorandum

INTRODUCTION

The World Trade Organization (WTO) has always had more than its fair share of critics. Indeed, recently, a couple of US foundations even deemed it appropriate to file a case against the WTO in a US district court. Two of the principal criticisms directed against the WTO are its perceived "trade at all costs" approach and alleged judicial activism pursued by some WTO panels and the Appellate Body.

Interestingly, sometimes at least, the panel may find itself in a classic catch 22 situation. In order to refrain from judicial activism it may have well have to ignore non trade concerns and issue a finding which may only be perceived as one which promotes trade at all costs. Such situation typically arises when the language of the WTO Agreements provide little room to maneuver.

The purpose of this moot problem is to initiate a scholarly discourse on one such issue: the impact, the lack of a general exception or security exception clause in the WTO TBT agreement may have on disputes adjudicated under its substantive rules. As the Appellate Body decision in *United States-Clove Cigarettes* proves, this is much more than a theoretical concern.

Some factors to keep in mind:

First, with the exception of two paragraphs, which are intended to be red herrings, each and every paragraph of the problem is intended to be a crucial part of the puzzle. Therefore, the best teams shall make optimum use of the facts presented in the moot problem. For example, the religious demography of Zwovka shall be relevant in determining the extent of threat, domestically produced action figures of Legann and his brothers represent. There may be a good case to argue that the threat of lead poisoning associated with such action figures is minimal compared to imported toys since unlike imported toys, such action figures affect only 70% of the population. Similarly, the limited rights of punishment granted to the religious police shall be relevant in determining the level of regulation Zwovka imposes on its own industry. Judges are requested to suitably reward participants who identify the key facts in the problem and make use of them in constructing their arguments.

Second, participants should be able to identify the central theme of this problem i.e. the impact, the lack of an exception clause shall have on disputes adjudicated under the WTO TBT rules. Therefore, participants for Enroda should be able to identify the tangible payoff in claiming that the WTO TBT should control over the GATT. If the WTO TBT controls, it is possible to argue that no form of human health or security concern would possibly save the measure. It is always possible to argue, however that the national treatment/MFN exceptions under Article 2.1 of the WTO TBT should be read in such a restricted manner that recourse to an exception clause becomes unnecessary.

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PRINCIPAL BASIS OF THE CLAIM

Enroda has challenged Sections 2 and 3 of the Zwovka Environment and Security of Children Act (Act). Section 2 prohibits import of all toys defined in Section 1 which have a lead content of more than 100 parts per million (ppm). Section 3 is more in the nature of a blanket ban. It covers all toys, as defined in Section 1, which are imported from Enroda. The effective period of the ban is 12 months, subject to a possible extension. The legal basis for these two challenges is different and participants are expected to present their claims accordingly.

SEQUENCE OF CLAIMS

The challenge is confined to claims under the WTO Technical Barriers to Trade Agreement (WTO TBT) and the General Agreement on Tariff & Trade (GATT). While a detailed analysis of the claims is provided below, this short guide may be borne in mind for ready reference.

As a *first* step, the participants should be able to identify as to whether the WTO TBT or the GATT should control a particular claim. In this case, such determination shall depend on whether the measure in question is a "technical regulation" or not. If it is a technical regulation, the WTO TBT shall control to the exclusion of the GATT. Alternatively, it is the rules of the GATT which shall be applicable. With respect to Section 2, the participant on behalf of Enroda should pursue his claim under the WTO TBT. Under Section 3, the participant for Enroda should pursue his claim under the GATT.

Second, with respect to its claim under Section 2, Enroda should make its claims under Article 2.1 and Article 2.2 of the WTO TBT. Furthermore, Enroda should be able to conclude that if the regulation violates Article 2.1 and 2.1, in the absence of an exception clause in the WTO TBT, the regulation has to be considered WTO inconsistent. Zwovka should be able to argue that the regulation does not attract Articles 2.1 and 2.2. In the alternative, Zwovka may argue that the exception clause under GATT would also apply to the WTO TBT. Or, it may also argue that the preamble of the WTO TBT acts as an exception clause. On merit, both of these arguments are

difficult propositions to sustain. Therefore, judges should give a degree of latitude to the participants representing Zwovka on this issue.

Third, with respect to its claim under Section 3, Enroda will have to present its claim under GATT. Section 3 is indefensible under Article XI or Article III. Therefore, Zwovka will have to build its case under Article XXI.

CLAIMS

1. CLAIMS AGAINST SECTION 2 OF ESCA

1.1 Is Section 2 a technical regulation?

Judges should expect participants to be familiar with the following:

(1) The difference between a general measure and a technical regulation under the WTO TBT. In particular, the participants should be familiar with the Appellate Body decision in *EC-Asbestos* and the three prong test laid down in the case to distinguish a technical regulation from a general measure. Participants may also refer to the Appellate Body report in *EC-Sardines* for the three fold test. The participants should also be familiar with the excerpts from the cases highlighted below.

(2) The participants should be able to appreciate the legal implications when a measure is classifiable as a technical regulation rather than a general regulation. If the measure is a technical regulation, the WTO TBT shall control to the exclusion of the GATT.

1.1.1 Meaning of "technical regulation"

The issue under this claim is whether Section 2, ESCA qualifies as a technical regulation or not. Section 2 states that "The Act prohibits the import of all *toys*, as *defined in Section 1* with a lead content of *more than 100 ppm*"

The term "technical regulation" is defined in Annex 1(1) as a "*document which lays down product characteristics* or their related processes and production methods, including the applicable administrative provisions, *with which compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method".

The Appellate Body in *EC-Asbestos* laid down a three prong test for identifying a technical regulation. See Appellate Body, *EC Asbestos*, para 61. Under this test, a measure would qualify as a technical regulation when the following three conditions were met:

- The measure applied to an identifiable product or group of products for enforcement of regulation to be possible.
- The document set out one or more characteristics of the product.
- Compliance with the product characteristic was mandatory.

An illustration may offer more clarity. For example, if a regulation states that *"import of all pens are banned"*, there is a case to argue that the regulation does not lay down product characteristics and consequentially there is no question of compliance with any product characteristic. On the other hand, if the regulation states that "import of fountain pen with *nib of 1.5 mm* alone are permitted", the measure has *first,* laid down a product characteristic (nib of 1.5 mm) and *second*, specified that compliance with such a characteristic is mandatory. No import is possible unless the fountain pen meets certain specific product characteristics. This is the essence of a technical regulation and what sets it apart from other measures.

The distinction between a general measure and a technical regulation is clearly brought out in *EC-Asbestos*. The Appellate Body held, for instance in the context of the Decree prohibiting import of asbestos fibres that certain paragraphs of the Decree imposed a prohibition on asbestos fibres, as such. In particular, it held as follows:

This prohibition on these fibres does not, in itself, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted only of a prohibition on asbestos fibres, it might not constitute a "technical regulation".

Furthermore, in *EC Asbestos*, the Appellate Body stated that a *"technical regulation" has the effect of prescribing or imposing one or more "characteristics" – "features", "qualities", "attributes" or other "distinguishing mark.* See *AB, EC Asbestos*, para 68. The Appellate Body further stated that *""product characteristics" may, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively,*

that products must possess certain "characteristics", or the document may require, negatively, that products must not possess certain "characteristics"'. See *Id* at 69. Therefore, if the regulation from the illustration above read *"fountain pens imported into X must not have a nib of more than 1.5 mm",* that regulation would also qualify as a technical regulation. In this case, the document requires, negatively, that the pens must not possess certain characteristics.

1.1.2 Arguments for Enroda

Enroda may argue that the measure is a technical regulation because it identifies a product characteristic in negative terms of a group of identifiable products i.e. toys as defined in Section 1 (tricycles, scooters, pedal cars and similar wheeled toys) with lead content of more than 100 ppm. Compliance with the product characteristic is mandatory since the entire class of toys as defined in Section 1 with lead content of more than 100 ppm cannot be imported and sold in the Zwovkan market.

1.1.3 Arguments for Zwovka

Participants for Zwovka should not be penalized for conceding that the measure is a technical regulation. This argument is designed to favour Enroda. Zwovka has to base its defense under Article 2.1 and Article 2.2.

2. CLAIM UNDER SECTION 2.1 OF THE WTO TBT

Technical regulations have to comply with the discipline of Article 2.1. The relevant question is whether Zwovka through Section 2 of the ESCA has violated Article 2.1 or not. Article 2.1 states as follows:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

Therefore, three factors are relevant in order to establish a breach of Article 2.1. *First*, the measure must constitute a technical regulation. *Second*, the domestic product must be *like* the imported product. *Third*, the treatment accorded to imported products must be less favourable than that accorded to like domestic products and like products from other countries. See Appellate Body, *Tuna Dolphin II*, para 202.

For the purpose of this problem, therefore, two factors are relevant. *First*, what is the like product to toys as defined in Section 1? *Second*, does Section 2 subject imports of such toys to less favourable treatment than that accorded to the like products manufactured in Zwovka?

2.1 Scope of "Like Articles"

The term "like article" is not unique to the WTO TBT. The jurisprudence that has evolved under the GATT, Article III (National Treatment) standard is relevant, for our purpose. In *Japan-Alcohol*, the Appellate Body adopted a fourfold criteria *(A) similarity of the product (Physical Characteristics); (B) end-uses of the product in a given market (C) consumers' tastes and habits, which change from country to country and (D) product's properties, nature and quality* and *(E) tariff classification* in defining a like article. The panels and Appellate Body in Clove Cigarettes and Tuna Dolphin II applied this test under Article 2.1 as well.

In this case, the like article argument is designed to equally favor Enroda and Zwovka. Therefore, the claimants and the respondents are expected to vigorously defend their claims on this issue.

The likely "like product" in this case to toys defined in Section 1 are the dolls/actions figures of Legann and his brothers.

2.1.1 Arguments for Enroda

"Tricycles, scooters, pedal cars and similar wheeled toys" admittedly have different physical characteristics from dolls/action figures. Therefore, Enroda need not focus on this point. Differences in physical characteristics does not mean, however that the products cannot be *like*.

In *EC-Asbestos*, the Appellate Body held that in cases where the evidence relating to the properties establishes that the products at issue are physically quite different, the complainant shall have a higher burden to establish that despite pronounced physical differences there is a competitive relationship between the products such that all of the evidence, taken together, demonstrates that the products are *like*. See AB, *EC-Asbestos*, para 118. Consumer preferences and end use shall be two criteria which shall be particularly relevant in this circumstance. See *Id* at 117. Therefore, Enroda should focus on these two factors.

In case of *consumer preferences*, Enroda may argue that that the target group of customers for the action figures and Section 1 toys are almost identical i.e. both target children. Admittedly, as per the problem, the action figures are popular in the 4-8 years age group whereas Section 1 toys are popular in the 3-6 years age group. *First*, Enroda should argue that there is an overlap between the age group, further proving that that the target consumers are the same. *Second*, argue that the minor differences in age group are irrelevant as the target group needs to be understood at a broader level i.e. all children below 8 years. Children are as likely to purchase an action figure as they are to purchase tricycles, scooters and pedal cars.

In case of *end use*, Enroda may argue that both products have the same end use i.e. entertainment for children.

Moreover, the tariff classification at the four digit level for both these products is also the same. Therefore, Enroda may successfully argue that the products are like. Participants are expected to draw analogy with the Appellate Body report in *US-Clove Cigarettes* wherein it was stated that both domestically manufactured menthol cigarettes and imported cigarettes had the same end use as both satisfied an addiction to nicotine and created a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke. See Appellate Body, *US-Clove Cigarettes*, para 132.

Furthermore, in the context of consumer preferences and substitutability, the Appellate Body noted that *"the mere fact that clove cigarettes are smoked disproportionately by youth, while menthol cigarettes are smoked more evenly by young and adult smokers does not necessarily affect the degree of substitutability between clove and menthol cigarettes".* This finding may to some extent, but not completely, undercut a possible argument by Zwovka that Section 1 toys are disproportionately used by children whereas action dolls are used by children, children of high age group (over 8 years of age) an adults.

2.1.2 Argument for Zwovka

Zwovka should argue that action figures are not *like* articles to Section 1 toys. *First*, Zwovka should argue that the physical characteristics of Section 1 toys and action figures are very different. For such reason, as per the *EC-Asbestos* standard, Enroda has a higher burden to discharge to meet the *like article* test. *Second*, it should then argue that the requirement of customer preference and end use are not met.

In case of *customer preference*, Zwovka should argue that consumers perceive the action figure as a product different from Section 1 toys. *First*, for one set of customers i.e. adults and older children, the action figures are perceived as a collector's item or a showpiece. There is no market for Section 1 toys among this set of customers. In so far as children of the age group 4-8 years

are concerned (or their parents), the action figures are possible purchased less for their entertainment value and more to introduce young children to the Troikan faith and to religious or moral values.

In case of ***end use***, similar arguments are possible. Zwovka may argue that the end use of Section 1 toys and the action figures are different. Section 1 toys are principally used for entertainment whereas action figures are purchased to sensitize children to cultural, religious and moral values.

2.2 Less favourable treatment

Under the standard set by the Appellate Body in *US-Clove Cigarettes*, a panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products. See AB, *US-Clove Cigarettes*, para 180. Furthermore, the Appellate Body has held that the object and purpose of Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions. See *Id* at 174. In particular, there is no breach of the "less than favourable treatment" requirement if the detrimental effects on imports may be explained by factors or circumstances unrelated to the foreign origin of the product. See Appellate Body Report, *Dominic Republic-Cigarettes*, para 96.

Therefore, the relevant test that judges should apply in the present case is whether the conditions of competition between imported toys and domestically manufactured action figures are modified in any way. Furthermore, the judges should bear in mind that all detrimental impact on imports are not prohibited under Article 2.1 in so far as they arise exclusively from legitimate regulatory objectives.

This is a case of a possible de facto discrimination, if any. Therefore, judges should carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular,

whether that technical regulation *is* ***even-handed***, in order to determine whether it discriminates against the group of imported product.

2.2.1 Arguments on behalf of Enroda

Enroda will have to establish that imported Section 1 toys are subject to less favorable treatment than domestically manufactured action figures. This is because, the action figures contain on an aggregate 300 ppm of lead. On the other hand Section 1 toys cannot possess more than 100 ppm of lead. Therefore, the measure discriminates among like articles by modifying the conditions of competition against imports. The detrimental impact on imports is obvious because imports are foreclosed from the market while sale of action figures which impose a similar level of threat are permitted.

Furthermore, Enroda may argue that the detrimental effect on imports does not arise purely from legitimate regulatory distinctions. This is because sufficient regulation is not put in place to address the threat of lead poisoning from action figures. Besides the authorized production, Enroda may argue that a huge unregulated market for manufacture of such dolls exists with an estimated capacity of 1.75 million units. The total production of such dolls (200,000 units + 1.75 million units) poses a huge threat of lead poisoning to children, who are effected much more than adults. In addition, the limited rights of punishment of the religious police make the enforcement mechanism for regulating illegal production highly ineffective. Therefore, in substance, the imports are subject to much more stringent regulation and less favorable treatment.

2.2.2 Argument on behalf of Zwovka

Zwovka shall have to argue first that the level of threat posed by Section 1 imports is far higher than that imposed by the action figures. *First*, the quantum of imports of Section 1 toys is in the range of 4-5 million units (2010-2011). In contrast, regulated production of action figures is a miniscule 200,000. Zwovka should argue that unregulated production should not be taken into account for the purpose of this analysis, especially since Zwovka is taking steps to regulate this source of production through its religious police. In fact, Zwovka should argue that it has the

sovereign right to determine the methods (of punishment) of regulation and a panel cannot decide what kind of penal system it adopts under its municipal system.

3. CLAIM UNDER ARTICLE 2.2 OF THE WTO TBT

Technical regulations have to comply with the discipline of Article 2.2. The relevant question is whether Zwovka through Section 2 of the ESCA has violated Article 2.2 or not. Article 2.2 states as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a *view to or with the effect of creating unnecessary obstacles to international trade*. For this purpose, *technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create*. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information related processing technology or intended end-uses of products

It may be borne in mind that the text of Article 2.2 is similar to Article XX (b) and the chapeau of the GATT. Article XX (b) and the chapeau state as follows:

Subject to the requirement that such measures 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:

(b) necessary to protect human, animal or plant life or health;

Therefore, arguments made under both these provisions will be similar. One important difference is that Article 2.2 is worded as a positive obligation whereas Article XX (b) is in the nature of an exception. In addition, the burden of proof requirement is different under these two provisions.

That said, it is relevant to note that the "no more trade restrictive than necessary" language of Article 2.2 has the practical effect of aligning the provision with the Article XX (b) "necessary" jurisprudence. See Appellate Body, *Korea – Beef*, para 164.

As the *US-Clove Cigarette* and *Tuna-Dolphin II* jurisprudence confirms, a panel is likely to borrow the jurisprudence under Article XX (b) to interpret the provisions of Article 2.2. For the

purpose of this bench memo, the arguments under Article 2.2 and Article XX (b) [which will also apply in the present case, as discussed below] are discussed collectively. The differences, as applicable is also highlighted below.

Article 2.2 [and Article XX(b)] requires that technical regulations (a) pursue a legitimate policy objective and (b) not be more trade-restrictive than is necessary to fulfil a legitimate objective keeping in mind the risk non fulfilment would create (the underlined text is unique to Article 2.2). See for example, Panel Report, *US-Clove Cigarettes, para 7.333*. Under Article XX(b), and unlike Article 2.2, the respondent also has to demonstrate that it complies with the requirements of the chapeau of Article XX.

3.1 Argument on behalf of Enroda

Enroda will be required to establish *first* that Section 2 does not pursue a legitimate policy objective and *second*, it is not more trade restrictive than necessary to fulfil this legitimate objective. Enroda does not have a good claim under the first part.

The objective of Section 2 is to protect human health. Article 2.2 specifically states that protection of human health is a legitimate objective. Therefore, it is better for Enroda to argue that the technical regulation is not ***necessary*** to pursue the legitimate objective of protecting the human health, in particular that of children. It is relevant to note that children, especially those under the age of six are particularly susceptible to lead poisoning. Under the WTO GATT, a measure is necessary if no other reasonably available alternative is available to meet the legitimate objectives. See AB, *EC Asbestos,* para 164.

The Appellate Body in *Brazil – Retreaded Tire* in the context of Article XX (b) adopted a two step test to determine the trade restrictiveness of a measure under scrutiny. The *first* step required an examination of whether the measure at issue made a material contribution to the achievement of the legitimate objective. See Appellate Body Report, *Brazil-Retreated Tires*, para 156. The *second* step required an analysis of whether a less trade restrictive measure could have made the same contribution. *Id*.

In *Clove cigarettes*, the panel adopting this twofold test sought to *first* examine whether the ban on clove cigarettes exceeded the level of protection that the U.S sought to achieve. See *Panel Report, US-Clove Cigarette, para 7.377*. *Second*, it analyzed whether the regulation made a material contribution to the health objectives of the regulation. See Panel Report, *US-Clove Cigarettes*, paras 7.385 and 7.399.

In this case, *first*, participants may rely on scientific reports to suggest that the 100 ppm requirement is a bit of on overreach. For instance, in the United States, as recently as 2009, through the Consumer Product Safety Improvement Act, the permitted lead content on surface paint used in children's toys was reduced from 600 ppm to 90 ppm. *Second*, Enroda may argue that the measure does not make significant contribution to the health objectives since a major source of lead poisoning for children is kept outside the scope of regulation.

In addition, participants should be suitably awarded for providing innovative, workable and less trade restrictive alternatives which Zwovka could have pursued instead of imposing such stringent requirements. For example, the participants may argue that Zwovka could have restricted the ban to the scrapeable surface coating of the toys, as this is what poses the most proximate harm to children.

3.2 Arguments for Zwovka

Zwovka should argue that the threat from lead poisoning is a real danger to children, relying also on scientific reports, as a basis for its claim. Zwovka should argue that Section 2 pursues a legitimate objective of protecting human health. It also effective, Enroda may argue, to meet its end goal, which is to regulate a major source of lead poisoning. Zwovka would have a case to argue that a comparison between limited volume sale of action figures and high level of imports is inherently unfair. This is more so because the limited volume of action figures is sold to a broader spectrum of people including adults who are not as affected as children. Second, in light of the religious demography of Zwovka, limited people are affected from lead content in action figures.

3.3 No exception standard under the WTO TBT

Once Enroda is successful in establishing a claim under Article 2.1 and/or Article 2.2, the question that arises is whether the regulation may be saved through a general or security exception as is found under the GATT. The WTO TBT does not contain an exception clause. The question was left unanswered in *Clove Cigarettes*. For example, the panel held in relevant part as follows:

As regards the violation of Article 2.1 of the TBT Agreement, the United States has made clear that it is not invoking Article XX of the GATT 1994 as a defense for claims raised by Indonesia under the TBT Agreement. Under the circumstance, we understand the United States to be of the view that the Panel does not need to make a finding on the availability of Article XX to justify a violation of a provision of the TBT Agreement.

In addition, the Appellate Body in Clove Cigarettes observed that "TBT Agreement does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX". See AB. *US-Clove Cigarettes*, para 101.

3.3.1 Arguments for Enroda and Zwovka

Enroda's argument in this case is going to be quite straight forward. The WTO TBT does not contain an exception clause. Therefore, once a measure violates the WTO TBT it has to be necessarily struck down. Enroda should be able to successfully rebut the arguments made by Zwovka to the contrary.

Zwovka may argue that Article XX applies to the WTO TBT. One basis for making this claim is that all WTO agreements form part of a single package. Therefore, exceptions in one agreement may be transposed into another. In the alternative, Zwovka may argue that the preamble of the WTO TBT is nothing but an exception clause. Both the arguments are difficult propositions to sustain. Therefore, judges should provide the participants with a degree of latitude in this regard.

First, Zwovka may argue that the GATT, 1994 and the WTO TBT are both interpreted as "integral parts of the same treaty, the WTO Agreement". See Appellate Body Report in *Argentina- Footwear*, para 81 (the Appellate Body held that the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards were provisions of one treaty, the WTO Agreement). Under the principle of effectiveness, Zwovka may argue, all parts of the WTO Agreement including its annex agreements, the GATT and the WTO TBT have to be considered as a whole. The connecting link between the WTO TBT and the GATT may also be drawn from the preamble to the WTO TBT which espouses that the WTO TBT *desires "*to further the objectives of GATT 1994".

Enroda may rebut this argument through recourse to the Interpretative Note to annex 1A. The Interpretative Note states that in the event of a conflict between *"GATT 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.* The Appellate Body in *Guatemala-Cement* defined conflict as a situation where compliance with one agreement leads to a violation of the other. See Appellate Body Report, *Guatemala –Portland Cement, para* 65. Enroda should argue that the definition of conflict should be broad enough to exclude situations where different agreements address identical legal principles such as "less trade restrictive than necessary" in different ways.

Zwovka, on the other hand should argue that there is essentially no conflict between the provisions. In fact, the exception clause supplements the WTO TBT. For example, the preamble of the WTO TBT itself states that *no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.* The thrust of the preamble is the same as that of Article XX.

Again, Zwovka may argue that the preamble creates independent legal obligations. Enroda on its part may argue that while the preamble constitutes the "context" for the purpose of Article 31 of

the Vienna Convention on Law of Treaties it does not create independent legal obligations. The Appellate Body in *US-Shrimp*, for instance, stated that the preamble *reflects the intention of WTO negotiations and must add color, texture and shading to interpretation of an agreement*. See Appellate Body Report, *US-Shrimp Turtle I*, para 153.

Zwovka may argue, however that an interpretation which renders the preamble redundant may also not be permissible under the jurisprudence of the Appellate Body. See Appellate Body Report, *US-Gasoline* at 21. The effectiveness doctrine of treaty interpretation requires that if a treaty is open to two interpretations, one of which disables the treaty from having an appropriate effect, good faith demands that effective interpretation be adopted.

4. CLAIM UNDER ARTICLE XX(B) AND CHAPEAU

As mentioned, the provisions of Article 2.2 are almost identical in scope to Article XX (b). Therefore, the arguments highlighted above with respect to Article 2.2 shall also apply to an Article XX (b) defense. The only difference is that under Article XX (b) it is Zwovka and not Enroda which should be able to demonstrate the existence of a reasonably available and less trade restrictive alternative to the measures presently put in place. In addition, Zwovka shall have to demonstrate that it meets the requirements of the chapeau of Article XX which states as follows:

Subject to the requirement that such measures 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.

Even if a measure meets the requirements of Article XX (b), it may still be struck down if it violates the provisions of the chapeau. The chapeau prohibits *first*, arbitrary or unjustifiable discrimination between countries where similar conditions prevail and *second*, a disguised restriction on trade.

A measure is arbitrary if it is capricious, unpredictable and inconsistent See Panel Report, *US-Shrimp*, (Article 21.5, Malaysia) para 5.124. Discrimination that is foreseeable and not merely inadvertent or unavoidable is unjustifiable. See Appellate Body, *US –Gasoline* at 29. The discrimination must be between countries where the same conditions prevail.

A measure is a disguised restriction on trade when the "design, architecture and revealing structure" of the measure show that, in fact, the measure does not pursue the policy objective of the specific exception. See Panel Report, *US-Shrimp*, (Article 21.5, Malaysia) para 5.142.

4.1 Argument for Enroda

Enroda has a case to argue that the measure does not pursue the policy objective of the exception i.e. protect children from lead poisoning. *First*, the action figures which contain high lead content

of 300 ppm remain unregulated. *Second*, there is insufficient protection put in place in Industrial Zones. While factory units are shut to children, the threat of lead poisoning in residences and schools is very real.

4.2 Argument for Zwovka

Zwovka may argue that the threat from Section 1 toys far outweighs the threat from other sources. It may further argue that it is taking the necessary steps to regulate Industrial Zones and therefore it has adopted an even handed approach in regulating imports and in regulating its own industries.

5. CLAIM UNDER SECTION 3

Judges should expect participants to be familiar with the following:

(1) Section 3 is to be covered under the GATT and not the WTO TBT.

(2) Section 3 violates Article XI of the GATT. Participants may also argue that the measure violates national treatment principles in as much as the rules only apply to imports from Enroda and not to domestic producers. It is relevant to note that there is no MFN claim under Article I of the GATT.

Section 3 of ESCA states as follows:

The Act, based on intelligence reports received by the Executive, over which the Parliament recognizes the right of the Executive to exercise privilege, restricts the import of all toys defined in Section 1 for an interim period of 12 months from Enroda. This is an emergency action which will be withdrawn upon the subjective satisfaction of the Executive that intelligence reports of possible threat to the citizens of Zwovka from the OAZ are inaccurate. The interim period of 12 months may be extended if considered absolutely necessary.

Bearing in mind, the discussion above, on the scope of technical regulations, it is relevant to note that Section 3 does not identify product characteristics and therefore does not constitute a technical regulation. Therefore, it is the GATT which shall control the claims.

5.1 Claim under Article XI & Article III:4

The relevant provisions of Article XI are reproduced below, and state:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party

The present measure is quite clearly a prohibition on imports and therefore squarely covered under Article XI.

The national treatment rules of Article III: 4 which state that *"the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use"* are relevant. It is possible for Enroda to argue that the measures treat Section 1 imports less favorably than domestically manufactured like articles, as only Section 1 imports are subject to strict regulation and that too without sufficient cause.

5.2 Defense under Article XXI

The core issue under Section 3 pertains to the security exception. The issue is whether Article XXI is broad enough to cover the highly broad scope of Article 3. Article XXI is reproduced below for ready reference:

Article XXI

Security Exceptions

"Nothing in this Agreement shall be construed
(a) *to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or *other emergency* in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

It is relevant to note the Chairman of the Preparatory Committee who drafted the relevant part of the ITO Charter stated that *"the spirit in which Members of the Organization would interpret these provisions (security exception) is the only guarantee against abuses"*. Therefore, panels are likely to give a broad degree of deference to sovereign decisions under the security exceptions.

In this regard, it is necessary to note that paragraphs 11-13 are designed to make participants think in a particular way. None of these paragraphs have any evidentiary value whatsoever and the panel cannot determine its conclusions on any of the facts presented in the paragraphs.

The issue is, *first*, whether as a matter of legal principle, a country may claim absolute confidentiality on any subject/information it deems fit, without an independent examination. *Second*, the issue is whether a country may self-declare a state of emergency with the possible purpose of using the security exception to mount unjustifiable trade barriers.

5.3 Arguments for Enroda & Zwovka

Enroda has to argue that the provision of Article XXI (a) has to be interpreted in good faith. Therefore, blocking imports without offering any explanation whatsoever is contrary to the intent of Article XXI. Enroda may argue that at the very least Zwovka should, without disclosing details/or source of the information explain the reason why such action has been taken. Zwovka may rebut this argument on the ground that the discretion vested under Article XXI is absolute.

Under Article XXI:b (3), Zwovka may argue that a member retains the absolute discretion to declare a state of emergency in international relations. It need not offer any explanation whatsoever as to the basis for such declaration. Enroda may rebut this argument through arguing that a determination of emergency has to be made on the basis of some independent examination, such as by a panel. Otherwise, the provisions will lose their meaning as the exception would be used as a ploy to circumvent trade obligations. Furthermore, Enroda should insist that it is implicit that any declaration of emergency identifies the basis for such emergency. Since Zwovka has refused to disclose this information, a self declaration that a state of emergency exists is not sufficient.