



<http://www.diva-portal.org>

## Postprint

This is the accepted version of a paper published in *Italian Yearbook of International Law*. This paper has been peer-reviewed but does not include the final publisher proof-corrections or journal pagination.

Citation for the original published paper (version of record):

Iacovides, M. (2015)

Amicable Settlements, Mutually Agreed Solutions and Withdrawals in 2014: Is compensation Displacing Compliance?: WTO Case Law in 2014, Giorgio Sacerdoti (ed.).

*Italian Yearbook of International Law*, XXIV

Access to the published version may require subscription.

N.B. When citing this work, cite the original published paper.

Permanent link to this version:

<http://urn.kb.se/resolve?urn=urn:nbn:se:uu:diva-251489>

# WTO CASE LAW IN 2014

edited by GIORGIO SACERDOTI\*

with MARIOS C. IACOVIDES, GUENDALINA CATTI DE GASPERI, FRANCESCO MONTANARO,  
DORA CASTANEDA, WEI ZHUANG and TILAHUN E. KASSAHUN

## 1. INTRODUCTION: THE INCREASE IN THE NUMBER, LENGTH, AND COMPLEXITY OF DISPUTES AND ITS IMPACT ON THE WORKING OF THE DISPUTE SETTLEMENT SYSTEM

### *1.1.A Short Overview of 2014*

#### *Consultations and panel composition*

2014 saw a decrease in the number of requests for consultations, thirteen in comparison to twenty the year before.<sup>1</sup> At the same time, there was a greater number of panels established by the Dispute Settlement Body (“DSB”): there were in total fourteen panels established in 2014 (of which twelve were composed<sup>2</sup>, while two are pending composition<sup>3</sup>) compared to twelve in 2013.

---

\* Professor of international law, Bocconi University (Milan). This review was carried out within the framework of the PhD program in International Law and Economics of the PhD School of Bocconi University in Milan and with the collaboration of the two Marie Curie Early Stage Research Fellows at Bocconi University, within the DISSETTLE research network. Professor Giorgio Sacerdoti coordinated the individual reviews of WTO case law. These were authored by Dora Castaneda, Guendalina Catti de Gasperi, Marios C. Iacovides, Tilahun E. Kassahun, Francesco Montanaro, and Wei Zhuang. The editor would like to thank Niall Moran, Ph.D. candidate in International Law and Economics, Bocconi University (Milan), for his kind assistance in the language editing of the review. A shorter version of this review is due to appear in the Italian Yearbook of International Law, XXIV-2014, in late 2015.

<sup>1</sup> DS488, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*; DS487, *United States – Conditional Tax Incentives for Large Civil Aircraft*; DS486, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*; DS485, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*; DS484, *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products*; DS483, *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*; DS482, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*; DS481, *Indonesia – Recourse to Article 22.2 of the DSU in the US – Clove Cigarettes Dispute*; DS480, *EU – Anti-Dumping Measures on Biodiesel from Indonesia*; DS479, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*; DS478, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*; DS477, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*; DS476, *EU and its member States – Certain Measures Relating to the Energy Sector*; DS475, *Russian Federation – Measures on the Importation of Live Pigs, Pork and other Pig Products from the European Union*.

<sup>2</sup> DS475, *Russian Federation – Measures on the Importation of Live Pigs, Pork and other Pig Products from the European Union*; DS473, *EU – Anti-Dumping Measures on Biodiesel from Argentina*; DS471, *US – Certain Methodologies and their Application to Anti-Dumping Investigations involving China*; DS468, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*; S467, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging (Indonesia)*; DS464, *US – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*; DS461, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*; DS458, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging (Cuba)*; DS456, *India – Certain Measures Relating to Solar Cells and Solar Modules*; DS441, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and Packaging (Dominican Republic)*; DS435, *Australia – Certain Measures concerning Trademarks, Geographical Indications and other Plain Packaging Requirements applicable to Tobacco Products and*

## *Panel and Appellate Body reports*

Nine panel reports were circulated in 2014, covering thirteen disputes.<sup>4</sup> Five panel reports were adopted, four together with their corresponding Appellate Body Reports.<sup>5</sup> Continuing with the trend of previous years, all panel reports that were circulated in 2014 were appealed, but one.<sup>6</sup> When it comes to the output of the Appellate Body, five Appellate Body reports were circulated in 2014. Four of those were adopted by the end of the year, covering seven disputes.<sup>7</sup> This is a significant increase compared to 2013 during which only one report covering two disputes was adopted, a remarkable result given that for most of the year, the Appellate Body was operating with six rather than seven Members.<sup>8</sup> The four Appellate Body

---

*Packaging (Honduras); and DS434, Australia – Certain Measures concerning Trademarks and other Plain Packaging Requirements applicable to Tobacco Products and Packaging (Ukraine).*

<sup>3</sup> DS472, *Brazil – Certain Measures Concerning Taxation and Charges*; and DS474, *EU – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia*.

<sup>4</sup> Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, circulated to WTO Members 17 November 2014 [appeal in progress]; Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, circulated to WTO Members 14 October 2014 [appeal in progress]; Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R / WT/DS432/R / WT/DS433/R / and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R; Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R; Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R; Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R / WT/DS444/R / WT/DS445/R / and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R; Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014; Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, circulated to WTO Members 27 November 2014 [adoption/appeal pending]; and Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R.

<sup>5</sup> Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014; Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R; Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R; Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R / WT/DS432/R / WT/DS433/R / and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R; and Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R / WT/DS401/R / and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R.

<sup>6</sup> Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, is the only Panel Report that was adopted in 2014 without having been appealed. Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam*, WT/DS429/R, 17 November 2014, was appealed on 6 January 2015.

<sup>7</sup> Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014; Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014; Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014; Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014.

<sup>8</sup> On this, see the discussion *infra*, in Section 1.2.

Reports and the one Panel Report that was not appealed in 2014 are presented in more detail *infra* in Sections 3 – 7.<sup>9</sup>

The year also witnessed a growing trend in World Trade Organization (“WTO”) dispute settlement in the form of the extension of the timeline envisaged by Article 16.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) for filing a notice of appeal. First, in November 2014, India and the United States requested the DSB to adopt a draft decision extending the 60-day time period stipulated in Article 16.4 of the DSU to the end of January 2015 in the *India – Agricultural Products* dispute. The reason cited for requesting an extension was the workload of the Appellate Body.<sup>10</sup> Thus, it seems that the parties considered that the Appellate Body would not have been able to meet the time limit set by the DSU for issuing its report<sup>11</sup>, making them reluctant themselves to be confined by the tight timeframes set therein. At its meeting in November, the DSB agreed that it would adopt the panel report no later than 26 January 2015, unless the DSB decided by consensus not to do so or India or the US notified the DSB of its decision to appeal pursuant to Article 16.4 of the DSU. The panel report was eventually appealed by India on the 26 January 2015.<sup>12</sup> Second, in December 2014, Peru and Guatemala requested the DSB to adopt a draft decision reflecting a procedural agreement between them extending the 60-day time period stipulated in Article 16.4 of the DSU. Like India and the US, the parties cited the need to “take into account the current workload of the AB” as the reason for postponing the appeal, with Peru, the respondent in this dispute, making the timing of its appeal conditional on the workload of the Appellate Body.<sup>13</sup> At its meeting in December 2014, the DSB agreed that, it shall no later than 25 March 2015, adopt the panel report unless the DSB would decide by consensus not to do so or Guatemala or Peru would notify the DSB of its decision to appeal the panel report. At the time of writing, no appeal had yet been filed.

The above shows how the Appellate Body struggled in 2014 to issue its reports within the 90-day limit envisaged by the DSU. The delays revealed a significant disagreement among WTO Members as to the correct interpretation of Article 17.5 of the DSU. In particular, some WTO Members, notably the US, seem to understand Article 17.5 of the DSU as requiring the Appellate Body to consult and obtain the agreement of the parties participating in a dispute, if it cannot issue its report within the time limit. To that effect, they cite previous practice as establishing an accepted precedent.<sup>14</sup> Other Members, notably the European Union, consider that such previous practice carries no normative force, and find no legal basis in the DSU that would require the Appellate Body to consult and obtain the consent of WTO Members for a delay in the issuance of its report.<sup>15</sup> This matter remains unresolved, although it appears that the Appellate Body itself, as one would expect, prefers

---

<sup>9</sup> The present review does not cover Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015 that was issued in 2014, but was adopted in 2015.

<sup>10</sup> Joint Request by India and the United States for a Decision by the DSB, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/7 (7 November 2014).

<sup>11</sup> According to Art. 17.5 of the DSU, this is normally 60 days and in any case not over 90 days.

<sup>12</sup> Notification of an Appeal by India under Art. 16.4 and Art. 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and under Rule 20(1) of the Working Procedures for Appellate Review, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/8 (2 February 2015).

<sup>13</sup> Joint Request by Peru and Guatemala for a Decision by the DSB, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/6 (5 December 2014).

<sup>14</sup> Joint Communication from Argentina, Japan and the United States, *Argentina – Measures Affecting the Importation of Goods*, WT/DS444/16, WT/DS445/17 (9 December 2014).

<sup>15</sup> Communication from the European Union, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/18, WT/DS444/17, WT/DS445/18 (11 December 2014); Communication from India, *Argentina – Measures Affecting the Importation of Goods*, WT/DS444/18, WT/DS445/19 (11 December 2014);

the latter interpretation, since in *Argentina – Import Measures*, the case where this disagreement between WTO Members was most prominent, and in *US – Carbon Steel (India)*, it communicated the delay of the issuance of its reports, without having first obtained the consent of the parties to the dispute.<sup>16</sup>

### *Compliance disputes*

2014 was a busy year in terms of compliance disputes. Although there were no Article 21.5 reports adopted, at the end of the year there were no less than five compliance panels in operation. Three of those were compliance panels established in 2014,<sup>17</sup> whereas two were continuing their work from previous years.<sup>18</sup> The Panel Reports in *US – COOL (Article 21.5)*, the only Article 21.5 panel reports circulated during the year, were appealed.<sup>19</sup>

### *Concluded disputes*

In the course of 2014 there was also a noticeable increase in the number of disputes that were resolved, either through mutually agreed solutions<sup>20</sup>, or through settlement<sup>21</sup> and withdrawal.<sup>22</sup> These disputes are discussed *infra* in Section 2.

### *Arbitrations*

During the year, there were neither any awards circulated dealing with the determination of reasonable periods of time for implementation of DSB recommendations under Article 21.3 of the DSU, nor any arbitrations on the level of nullification or impairment pursuant to Article 22.6 of the DSU.

---

<sup>16</sup> Communication from the Appellate Body, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/17, WT/DS444/15, WT/DS445/16 (24 November 2014); Communication from the Appellate Body, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/8 (8 October 2014).

<sup>17</sup> DS381, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*; DS397, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*; DS414, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*.

<sup>18</sup> DS353, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*; DS316, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*.

<sup>19</sup> Notification of an Appeal by the United States under Art. 16.4 and Art. 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and under Rule 20(1) of the Working Procedures for Appellate Review, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/29; WT/DS386/28, (2 December 2014); Notification of an Other Appeal by Canada under Art. 16.4 and Art. 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and under Rule 23(1) of the Working Procedures for Appellate Review, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/30, (16 December 2014); and Notification of an Other Appeal by Mexico under Art. 16.4 and Art. 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and under Rule 23(1) of the Working Procedures for Appellate Review, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS386/29, (16 December 2014).

<sup>20</sup> DS267, *United States – Subsidies on Upland Cotton*; DS406, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*.

<sup>21</sup> DS469, *European Union – Measures on Atlanto-Scandian Herring*.

<sup>22</sup> DS369, *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products*.

### *1.2. Selection of the Seventh Appellate Body Member*

The DSB appointed on 26 September 2014 Mr Shree Baboo Chekitan Servansing from Mauritius, to the Appellate Body for four years commencing on 1 October 2014. Mr Servansing replaced Mr David Unterhalter from South Africa, whose second term had expired on 11 December 2013.

In line with the rules and procedures contained in the DSU and in WT/DSB/1 governing the selection, the appointment was made on the basis of a Selection Committee's recommendation and following consultations with WTO Members.<sup>23</sup> The Selection Committee comprising the WTO Director-General (“DG”) and the Chairpersons of the General Council, the DSB, the Council for Trade in Goods, the Council for Trade in Services and the TRIPS Council interviewed seven candidates that had been nominated by WTO Members for this position.<sup>24</sup>

The 2013 selection process grounded to a halt when WTO Members could not reach a consensus on any of the original four candidates (three from Africa and one from Australia), leading to an unprecedented delay in the appointment process, so that the Appellate Body was compelled to operate with six Members for about ten months. The US objected to Kenya's candidate based on his writings in legal journals where he had submitted that the WTO's dispute settlement system is biased in favour of developed countries. The EU objected to the appointment of the Egyptian candidate, who was a director at the WTO Secretariat. African countries insisted that the Appellate Body Member should be an African, as Mr Unterhalter.

At its meeting on 23 May 2014, the DSB agreed to re-launch the selection process, and to invite nominations with a new deadline, in June 2014. Upon the recommendation of the new Selection Committee, the DSB appointed Mr Servansing as Appellate Body Member for a four-year term. Mr Servansing had been the Ambassador and Permanent Representative of Mauritius to the United Nations Office and other international organizations in Geneva, including the WTO, from 2004 to 2012, and has extensive experience in trade matters.

The above stalemate that blocked the appointment for several months was unprecedented. It was basically due, as far as is informally known, to the U.S. objecting to the candidate who had been tentatively selected by the selection committee, James Thuo Gathii of Kenya, a professor in a US law school. This shows on the one hand the attention that Members devote to the qualifications and orientations of the candidates (who must be approved by consensus of the membership); on the other hand the responsibility of the Members to be faithful to the qualifications and requirements laid down in art.17.3 including the geographical balance.

As a result, at the end of 2014 the Appellate Body was comprised of two professors, Peter van den Bossche of the EU (who at the end of the year was elected chairman of the Appellate Body for 2015) and Seu Wha Chan from South Korea; two former (trade) diplomats, Ujal Singh Bhatia from India and Shree Baboo Chekitan Servansing from Mauritius; two lawyers, Thomas R. Graham from the US and Ricardo Ramírez-Hernández from Mexico, and a former trade official, Yuejiao Zhang from China.

---

<sup>23</sup> Art. 17 of the DSU; Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the DSB on 10 February 1995, WT/DSB/1, 19 June 1995.

<sup>24</sup> Art. 17.3 of the DSU provides the Appellate Body “shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally” while maintaining a membership that is “broadly representative” of the WTO membership.

### 1.3. The Director-General's speech at the DSB

As a response to the different challenges the Dispute Settlement System faced during the course of the year, the DG, Roberto Azevêdo made an unprecedented statement regarding dispute settlement activities to the DSB, in its Meeting in September 2014.<sup>25</sup> The DG noted that the number of active proceedings being serviced by the Legal Affairs Division, Rules Division and the Appellate Body Secretariat has roughly doubled since 2012. He pointed out that the complexity of the disputes had increased over the years, bringing with it also lengthier submissions and reports, more time-consuming procedures, and putting a strain on translation. At the same time, the system was subject to constraints that did not allow it to increase its capacity, such as budgetary constraints, the DSU-imposed cap on the number of Members serving at the Appellate Body, the difficulty of finding available panellists, and the lack of enough experienced lawyers at the Secretariat, especially senior ones, meaning that some cases had had to be put on hold.<sup>26</sup>

The DG presented the means by which he had already tried to address the situation. These included staff mobility within the Secretariat, reallocation of resources to the dispute settlement divisions, and the hiring of junior lawyers on temporary contracts. As these were not expected to be enough, the DG also announced that he had allocated 15 additional posts to the three divisions.

Finally, the DG also called upon WTO Members to assist by taking some steps that could alleviate the pressure on the system. The DG urged WTO Members to continue following past practice that had helped address the length and complexity of disputes, such as annexing parties' executive summaries to reports and placing limits on oral presentations before panels. Additionally, ways had been sought to streamline selection of panel experts and to standardize the content and format of routine communications and rulings in the Appellate Body.<sup>27</sup> The DG concluded by suggesting that WTO Members increase the number of Appellate Body Members to nine, thus increasing its capacity by approximately a third.

The debate that followed at the DSB on the DG suggestions showed, however, little agreement on any of them, although Members taking the floor generally acknowledged that the issues raised were relevant to the efficient functioning of the dispute settlement system.

GIORGIO SACERDOTI

---

<sup>25</sup> The speech is available at DSB, Minutes of Meeting of 26 September 2014, WT/DSB/M/350 (21 November 2014), pp. 2-4.

<sup>26</sup> See for instance, Communication from the Panel, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/7 (11 December 2014).

<sup>27</sup> Although this was not mentioned in the speech, the Legal Affairs Division, the Rules Division and the Appellate Body Secretariat are currently working on the establishment of the "Digital Registry". The digital registry will fulfil three functions: (i) it will serve as a secure electronic facility for the storage of all panel and Appellate Body records; (ii) it will include metadata on each dispute, allowing the registry to be used for the purposes of advanced research; and (iii) it will be a secure, reliable, and fast system of electronic registry for the filing of all submissions and for the handling of all communications related to disputes. For more detail, see the speech of Ms Valerie Hughes, Director of Legal Affairs Division, DSB, Minutes of Meeting of 26 March 2014 – Report on the Progress of the Digital DS Registry Initiative, WT/DSB/M/343 (13 June 2014), pp. 26-28.

## 2. AMICABLE SETTLEMENTS, MUTUALLY AGREED SOLUTIONS AND WITHDRAWALS IN 2014: IS COMPENSATION DISPLACING COMPLIANCE?

In the course of 2014 two mutually agreed solutions (“MAS”) were notified to the DSB, one notable dispute was terminated amicably before panel composition, and a dormant dispute was withdrawn. In what follows we briefly present these developments.

### 2.1. European Union – Measures on Atlantic-Scandian Herring

At the beginning of the year, the DSB had to deal with quite a peculiar dispute. In 2013, Denmark, in respect of the Faroe Islands (“Faroese”), had requested consultations with the European Union (“EU”) regarding an import ban on Atlanto-Scandian herring and Northeast Atlantic mackerel from the Faroes and a prohibition on the use of EU ports by Faroese and other vessels that fished or transported those fish or their derivatives.<sup>1</sup> The Faroes believed the EU measures to be inconsistent with Articles I:1, V:2, and XI:1 of the General Agreement on Tariffs and Trade (“GATT 1994”),<sup>2,3</sup> whereas the EU considered the measures necessary to preserve the depleted mass of that fishstock, since the Faroes had left the five coastal states’ common management of herring and mackerel<sup>4</sup> and unilaterally adopted a fishing quota considered unsustainable by the EU.<sup>5</sup> A panel was established following Denmark’s second request in February 2014. In parallel, the Faroes pursued arbitration through the Permanent Court of Arbitration under the United Nations Convention on the Law of the Sea.<sup>6</sup> Simultaneously, negotiations continued under the auspices of a working group examining a reallocation of the fishing quotas. By August, Denmark and the EU informed the DSB that the matter had been settled as an agreement on Faroese fishing quotas for 2014 had been reached, and access to the EU market was restored.<sup>7</sup>

The dispute was atypical in two respects. First, it involved a claim brought by a EU Member State against the EU, a novelty in WTO dispute settlement. Under EU law, Member States owe the EU a duty of sincere cooperation, which *inter alia* requires them to “facilitate the achievement of [its] tasks and refrain from any measure which could jeopardise the attainment of [its] objectives”.<sup>8</sup> Moreover, the conservation of marine biological resources is an EU exclusive competence, precluding any action on the part of the Member States.<sup>9</sup> As Denmark initiated the dispute in respect of the Faroes, it could have claimed that in that

---

<sup>1</sup> Art. 5 of Commission Implementing Regulation 793/2013 of 20 August 2013 establishing measures in respect of the Faeroe Islands to ensure the conservation of the Atlanto-Scandian herring stock, [2013] OJ L 223/1.

<sup>2</sup> General Agreement on Tariffs and Trade 1994, Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations (15 April 1994), 1867 *UNTS* 154.

<sup>3</sup> Request for Consultations by Denmark in Respect of the Faroe Islands, *European Union – Measures on Atlanto-Scandian Herring*, WT/DS469/1 (7 November 2013), pp. 3-4.

<sup>4</sup> In addition to the EU and the Faroe Islands, the other states are Iceland, Norway, and Russia.

<sup>5</sup> DSB, Minutes of Meeting of 22 January 2014, WT/DSB/M341 (25 April 2014), p. 15.

<sup>6</sup> United Nations Convention on the Law of the Sea, 1833 *UNTS* 3, 10 December 1982, entry into force 16 November 1994.

<sup>7</sup> The restrictive measures were repealed by Commission Implementing Regulation (EU) 896/2014 of 18 August 2014 repealing Implementing Regulation (EU) No 793/2013 establishing measures in respect of the Faroe islands to ensure the conservation of the Atlanto-Scandian herring stock, [2014] OJ L 244/10.

<sup>8</sup> Art. 4(3) of the Treaty on European Union (“TEU”), [2012] OJ C 326/1 (26 October 2012).

<sup>9</sup> Art. 3(1)(d) of the Treaty on the Functioning of the European Union (“TFEU”), [2012] OJ C 326/1 (26 October 2012). For the requirement to refrain from external action when the EU has competence, see DELGADO CASTELEIRO and LARIK, “The Duty to Remain Silent: Limitless Loyalty in EU External Relations”, 36 *European Law Review*, 2011, p. 524 ff.

capacity it was not acting as an EU Member State. Support could, perhaps, have been furnished by Declaration 25 to the Maastricht Treaty on the representation of the interests of the overseas countries and territories. The Declaration, though not appended to the TEU and TFEU following the adoption of the Lisbon Treaty, has been invoked by Denmark in support of whaling activities of Greenland and the Faroes at the International Whaling Commission, and appears to still carry political weight.<sup>10</sup> That, however, might not have been enough to explain why Denmark did not bring an action for the annulment of the contested Regulation pursuant to Article 263 TFEU before engaging in international dispute settlement, or why it did not follow the procedural requirements found in Declaration 25, such as notification to the Council and the Commission. Without doubt, had the dispute proceeded, it would have raised some very interesting points on the EU–Member States relationship within the WTO. It might also have incited litigation at the EU Courts, for instance an infringement action from the Commission against Denmark pursuant to Article 258 TFEU.

The second peculiarity of the dispute is that it involved a customs territory whose WTO status is unclear. The Faroes is a self-governing overseas administrative division, part of Denmark.<sup>11</sup> The Faroes are not part of the EU;<sup>12</sup> the two parties' trade relations are regulated by a bilateral trade agreement.<sup>13</sup> Thus, the panel might have been called to examine the applicability of WTO law to the Faroes as part of Denmark's WTO membership, had its jurisdiction been disputed by the EU. Denmark's instrument of acceptance of the Marrakesh Agreement Establishing the WTO ("WTO Agreement"<sup>14</sup>) as "the Kingdom of Denmark" did not include any statement on territorial limitations.<sup>15</sup> The Vienna Convention on the Law of Treaties stipulates that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".<sup>16</sup> This suggests that the WTO Agreement binds Denmark's entire territory, including the Faroes.

However, Article XI:1 of the WTO Agreement makes original WTO membership also contingent on annexing valid goods and services schedules. The EU schedules only cover the EU customs territory and Denmark has no separate schedules for the Faroes.<sup>17</sup> Thus, an argument could have been made that under the specific rule of Article XI:1, Denmark's WTO membership does not extend to the Faroes. A further complicating factor would have been that Denmark had a valid GATT 1947 schedule covering the Faroes until it joined the (then)

---

<sup>10</sup> MILLER, "Declaration 25 of the Treaty on European Union: Danish Territories and whaling", House of Commons Library Standard Note SN 5980 (24 May 2011).

<sup>11</sup> The 1948 Home Rule Act of the Faroe Islands, Act No. 137 (23 March 1948). Since 2005, the Faroese government has been empowered to represent itself and conclude treaties with States and international organisations in matters devolved to it, such as external trade relations: Act on the Assumption of Matters and Fields of Responsibility by the Faroese Authorities, Act No. 79 (12 May 2005); Act on the Conclusion of Agreements under International Law by the Government of the Faroes, Act No. 80 (14 May 2005).

<sup>12</sup> Art. 52 TEU establishes the applicability of EU Treaties to Denmark, but Art. 355(5)(a) TFEU stipulates that the territorial scope of the Treaties does not extend to the Faroes. The Faroes are not associated with the EU as an overseas country or territory: See Arts. 198-204 and Annex II TFEU.

<sup>13</sup> Agreement between the European Community, of the one part, and the Government of Denmark and the Home Government of the Faroe Islands, of the other part, [1997] OJ L 53/2.

<sup>14</sup> Marrakesh Agreement Establishing the WTO ("WTO Agreement"), *supra* note 2.

<sup>15</sup> See WTO Secretariat, Status of WTO Legal Instruments, 2012 edn., available at: <[http://www.wto.org/english/res\\_e/booksp\\_e/wto\\_status\\_legal\\_inst12\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/wto_status_legal_inst12_e.pdf)>, p. 16.

<sup>16</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969, entry into force 27 January 1980, Art. 29.

<sup>17</sup> The current and historical situation of WTO Members' valid goods schedules is available at <[http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_table\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm)>. Services schedules are available at <[https://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm)>.

European Communities in 1973.<sup>18</sup> According to the unappealed Panel in *Japan – Film*, GATT 1947 schedules may create legitimate expectations under certain conditions.<sup>19</sup> Here, the remoteness of the schedules in time and the fact that they only cover goods would weigh against the creation of legitimate expectations.

The upshot is that the outcome of this dispute’s jurisdictional aspect is difficult to predict. Whatever the result might have been, it would have had significant broader implications, not least for other territories that – although of ambiguous status under WTO law – may want to test the WTO-compatibility of sanctions or other measures through WTO dispute settlement, by having a willing WTO Member initiate a dispute on their behalf.<sup>20</sup>

## 2.2. *United States – Subsidies on Upland Cotton (Brazil)*

2014 saw the conclusion of a decade-long dispute between the US and Brazil on subsidies to cotton. In 2009, following the completion of the compliance proceedings and the arbitration as to the level of retaliation<sup>21</sup>, Brazil was authorised to adopt countermeasures against the US, as a result of the latter’s non-compliance with the recommendations of the DSB.<sup>22</sup> Brazil postponed their adoption and concluded with the US a framework for a MAS to the dispute, setting out parameters for discussions on a permanent solution.<sup>23</sup> Regular consultations were held and, in October 2014, the parties notified the DSB that they had concluded a Memorandum of Understanding (“MoU”), and agreed that the dispute was terminated.<sup>24</sup> The main features of the MoU are a US undertaking to make a one-time payment of US\$ 300 million to the Brazilian Cotton Institute, and a commitment to impose higher fees and shorter repayment terms on its cotton export credit programme. In exchange, Brazil agreed not to suspend concessions or other obligations to the US and to abstain from taking further action under Article 21.5 of the Dispute Settlement Understanding (“DSU”<sup>25</sup>).<sup>26</sup> Brazil also agreed to a peace clause by virtue of which it will not bring further claims on US cotton subsidies until September 2018, although it can initiate disputes on other agricultural subsidies so long as it engages in an extra step of consultations with the US beforehand.

---

<sup>18</sup> See The Territorial Application of the General Agreement: A list of territories to which the Agreement is applied, Addendum, G/5 Add.1 (21 May 1952) and Application of the General Agreement: Faroe Islands, G/10 (21 May 1952).

<sup>19</sup> Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, paras. 10.61-10.81.

<sup>20</sup> The likelihood that such a dispute might materialise increased during 2014. Trade sanctions were put in place, triggered by the situation in Ukraine. At the same time, new, de facto autonomous regions with ambiguous WTO membership (as the WTO Member that they have unilaterally seceded from does not have de facto control over their trade, customs etc.) have been created. These regions see a third WTO Member, namely Russia, as a natural advocate.

<sup>21</sup> Decision by the Arbitrator, *United States – Subsidies on Upland Cotton (Article 22.6 – US I)*, 31 August 2009, DSR 2009:IX, p. 387; Decision by the Arbitrator, *United States – Subsidies on Upland Cotton (Article 22.6 – US II)*, WT/DS267/ARB/2 and Corr.1, 31 August 2009, DSR 2009:IX, p. 4083.

<sup>22</sup> DSB, Minutes of Meeting of 19 November 2009, WT/DSB/M/276 (29 January 2010).

<sup>23</sup> Joint Notification from Brazil and the United States, *United States – Subsidies on Upland Cotton*, WT/DS267/45 (31 August 2010).

<sup>24</sup> Notification of a Mutually Agreed Solution, *United States – Subsidies on Upland Cotton*, WT/DS267/46 (23 October 2014).

<sup>25</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement, *supra* note 2.

<sup>26</sup> This is compatible with WTO obligations: Appellate Body Report, *European Communities – Bananas III (Article 21.5 – Ecuador II)*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1, DSR 2008:XVIII, p. 7165, para. 217. See also Art. 45 of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, (2001) Supplement No. 10 (A/56/10), chp.IV.E.1.

Two points of general systemic importance can be made about the MoU. First, the dispute was settled not through compliance, but through compensation, which will only be received by Brazil. The US will be able to keep in place its cotton subsidies and, although their terms will be improved, other possibly affected Members will not benefit.<sup>27</sup> From an internal WTO viewpoint, a MAS ought to be considered a success, since it is the preferred solution to any dispute.<sup>28</sup> Yet, the US-Brazil MoU also highlights the inherent conflict in WTO law between adjudication (and by extension judicialization) and diplomacy. The seemingly endless possibilities of negotiating different solutions to the ones arrived at through dispute settlement show that, at least when it comes to remedies, the system leans more towards diplomacy. This is not necessarily negative, (the discussion about efficient breaches of WTO law comes to mind<sup>29</sup>) yet it shows how discussions of constitutionalisation and individual rights are premature.<sup>30</sup>

Secondly, giving preference to the diplomatic settlement of disputes means negotiating power is paramount. The US-Brazil MoU materialized, no doubt, because Brazil's countermeasures were credible and would have hurt the US. This is not always the case, as Antigua's experience from *US – Gambling* shows all too clearly.<sup>31</sup>

### 2.3. *United States – Measures Affecting the Production and Sale of Clove Cigarettes (Indonesia)*

2014 also saw the resolution of the dispute between the US and Indonesia regarding the former's ban on clove-flavoured cigarettes, again by means of compensation rather than compliance. Without first having referred the matter to a compliance panel, in 2013 Indonesia requested DSB authorisation to suspend concessions pursuant to Article 22.2 DSU. Since the US objected to the level of suspension of concessions, the matter was referred to arbitration under Article 22.6 DSU. In 2014, the two parties requested the suspension of the circulation of the Arbitrator's award, and subsequently notified the DSB that they had reached a MAS.<sup>32</sup>

Unfortunately, the text of the MAS was not made public at the time of the notification. From media sources, it appears that in exchange for Indonesia not adopting countermeasures, the US has undertaken not to ban clove-flavoured cigarillos. This seems a logical approach, as part of the US strategy in the arbitration had been to claim that Indonesia was not suffering nullification or impairment due to the ban on the production and sale of clove-flavoured cigarettes. The reason, according to the US is that Indonesia has recuperated its losses by exporting clove-flavoured cigarillos instead, a type of product not encompassed by the ban. Other aspects of the MAS reported in the media point to the US postponing a WTO dispute against Indonesia over restrictions on exports of mineral and mining products, and giving consideration to granting duty-free treatment to Indonesian insulated ignition

---

<sup>27</sup> See EVENET and JARA, "Settling WTO Disputes without Solving the Problem: Abusing Compensation" (9 December 2014), available at <<http://www.voxeu.org>>.

<sup>28</sup> Art. 3.7 DSU. Note, however, that according to Art. 22.1 DSU, compensation is a voluntary and temporary measure that must be consistent with the WTO covered agreements, and implementation of a recommendation to bring a measure into conformity with the covered agreements is preferred.

<sup>29</sup> For an overview of this debate see COLLINS, "Efficient Breach, Reliance and Contract Remedies at the WTO", 43 *Journal of World Trade*, 2009, p. 225 ff., p. 227 and references there.

<sup>30</sup> For discussion on this matter, see HOWSE and NICOLAIDIS, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?", 16 *Governance*, 2000, p. 73 ff.

<sup>31</sup> Although it seems that the general climate of compromise has rubbed off on that dispute too: Inside U.S. Trade, "With U.S. in a Settling Mood, Antigua Steps Up Engagement on WTO Case" (17 October 2014).

<sup>32</sup> Notification of a Mutually Agreed Solution, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/17 (9 October 2014).

wiring sets under the Generalized System of Preferences. As part of the agreement, Indonesia appears to have promised to improve protection of intellectual property rights domestically.<sup>33</sup>

The settlement of *US – Clove Cigarettes* is a further example of offering compensation instead of bringing measures into compliance with the recommendations of the DSB, effectively buying the “right” to continue violating the WTO covered agreements. The discussion of this issue in relation to *US – Upland Cotton (Brazil)* is thus relevant here. Further, this settlement raises two additional important issues. The first of these is the issue of transparency and control. With the text of the MAS unknown, it is questionable how the right of all Members to ‘raise any point relating thereto’ pursuant to Article 3.6 DSU can be secured.<sup>34</sup> It is also impossible to check whether the MAS is consistent with WTO obligations as per Article 3.5 DSU.

The second issue pertains to sequencing, i.e. recourse to Article 22.2 DSU before an Article 21.5 panel has had the chance to rule on the compliance of measures adopted to bring the respondent’s rules into compliance with DSB recommendations.<sup>35</sup> Not having the benefit of the award of the Arbitrator in this case leaves us without indication of how the problem was dealt with, and thus without guidance should the issue arise in the future. There is also the matter of what will happen to the related – and from a systemic point of view, very interesting – consultations requested by the EU with Indonesia on precisely this matter. The EU considers Indonesia’s recourse to Article 22.2, as well as the exclusion of third parties from the proceedings, to be inconsistent with various provisions of the DSU.<sup>36</sup> Sequencing and third party participation are both items being discussed in DSU negotiations.<sup>37</sup> All this goes to show how not successfully completing these negotiations is starting to create friction that cannot be remedied by informal procedural fixes such as those in the so-called “DS efficiency process”.<sup>38</sup>

#### 2.4.EC – Seal Products II

At the end of 2014 Canada informed the DSB that it wished to terminate the panel composition process and formally withdraw its complaint in the *EC – Seal Products II* dispute.<sup>39</sup> The panel composition process had been effectively put on hold since 2011,

---

<sup>33</sup> GUIDA, “U.S. Settles WTO Clove Cigarette Case with Indonesia; Keeps Ban in Place”, 32:40 Inside U.S. Trade, 2014, p. 22 ff., pp. 22-24.

<sup>34</sup> ALSCHNER, “Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System”, 13 World Trade Review, 2014, p. 65 ff., pp. 92-93. See also RUIZ FABRI, “The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the *EC-Bananas* Dispute”, in BOISSON DE CHAZOURNES, KOHEN, and VIÑUALES (eds.), *Diplomatic and Judicial Means of Dispute Settlement*, Leiden: Martinus Nijhoff Publishers, 2013, p. 87 ff., pp. 116-18.

<sup>35</sup> For a brief explanation of sequencing, see MARCEAU and HAMAOU, ‘Implementation of Recommendations and Rulings in the WTO System’, in BOISSON DE CHAZOURNES, KOHEN, and VIÑUALES (eds.), *supra* note 34, p. 187 ff., pp. 195-96.

<sup>36</sup> Request for Consultations by the EU, *Indonesia – Recourse to Article 22.2 of the DSU in the US – Clove Cigarettes Dispute*, WT/DS481/1 (19 June 2014). Australia and Brazil have joined the consultations. For more background, see also Communication from the EU, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS/406/15 (14 February 2014).

<sup>37</sup> Report by the Chairman, Ambassador Roland Saborío Soto, to the Trade Negotiation Committee (Special DSB Session), TN/DS/24 (21 April 2011).

<sup>38</sup> See JARA, “Enhancing the Efficiency of the Panel Process at the WTO”, 9 Global Trade and Customs Journal 2014, p. 88 ff.

<sup>39</sup> Communication from Canada, *European Communities – Certain Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS369/3 (3 December 2014).

\* Marie Curie Early Stage Research Fellow at Bocconi University (Milan) and Doctoral Candidate in European Law (WTO Law and Competition Law) at Uppsala University; LLM in European Law, Stockholm

presumably because Canada (together with Norway) pursued instead the *EC – Seal Products I* dispute, reported below in Section 3. *EC – Seal Products II* concerned Belgian and Dutch measures rather than EU ones. As a result of the adoption of harmonizing measures on trade in seal products at the EU level, Belgium and the Netherlands repealed their measures, leading Canada to terminate this dormant dispute.

MARIOS C. IACOVIDES\*

### 3. APPELLATE BODY REPORTS, *EUROPEAN COMMUNITIES – MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS*<sup>1</sup>

#### 3.1. Introduction and Main Facts of the Dispute

The *EC – Seal Products* dispute arose out of complaints lodged by Canada and Norway against the legal regime for seal products established by the EU under Regulation (EC) no. 1007/2009 and Commission Regulation no. 737/2010 (collectively, “EU Seal Regime” or “measure”)<sup>2</sup> in order to address the EU consumers’ public moral concerns regarding seal welfare. The EU had already addressed partially some of its concerns in the early 1980s, through the imposition of a ban on the importation of seal pups’ skins and related products. As an answer to the increasing political and institutional actions in the EU and demonstrations in several EU Member States, the EU Seal Regime sets forth a general ban on the importation and marketing of all seal products and provides three narrow exceptions to such prohibition. The most significant exceptions are the so-called Inuit exception (“IC exception”) and the marine resource management exception (“MRM exception”). The IC exception was introduced in order to comply with the rights and principles established at the international level under the United Nations Declaration on the Rights of Indigenous Peoples and other international law instruments to protect indigenous lifestyles.<sup>3</sup> It allows market access only to products (i) made from seals killed in traditional hunts by the Inuit and/or other indigenous communities, (ii) partially used, consumed and/or processed by the above-mentioned communities in accordance with their traditions, thus (iii) contributing to their subsistence.<sup>4</sup> The MRM exception serves the purpose of preserving vulnerable marine species while avoiding the waste of by-products. It is triggered only where (i) the products are obtained from hunts carried out under a national resource management plan and are not in excess of a specified threshold, and (ii) the by-products of the hunts are marketed in the EU only in a non-systematic manner and on a no-profit basis.<sup>5</sup>

As the parties to the dispute failed to reach a MAS during the consultations process, a panel was established upon the request of Canada and Norway. The complainants raised a number of claims concerning the alleged inconsistency of the measure with, *inter alia*, a broad array of provisions of the Agreement on Technical Barriers to Trade (“TBT Agreement”) and the GATT 1994.

The Reports were circulated in November 2013 and appealed shortly thereafter. The Appellate Body issued its Reports in May 2014. While reversing the Panel’s findings under the TBT Agreement, it substantially upheld the major findings of violation under the GATT 1994 and found the measure to be inconsistent with the EU’s obligations therein. Therefore, it recommended the EU to bring the measure into conformity with such obligations. At the

---

<sup>1</sup> Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014.

<sup>2</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ L 286, 31 October 2009, pp. 36-39, (“Basic Regulation”) and Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ L 216, 17 August 2010, pp. 1-10 (“Implementing Regulation”).

<sup>3</sup> See, General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN. Doc. A/RES/61/295 of 13 September 2007, Arts. 3 and 20(1). See also references in the Basic Regulation, Recital 14. Interestingly, such rights and principles are strongly recognised under the Canadian Constitution: indeed, many exceptions for indigenous communities are provided by Canadian laws and upheld by the Supreme Court of Canada.

<sup>4</sup> See, Art. 3(1) of the Basic Regulation and Art. 3 of the Implementing Regulation.

<sup>5</sup> See, Art. 3(2)(b) of the Basic Regulation and Art. 5 of the Implementing Regulation.

DSB meeting of 10 July 2014, the EU confirmed its intention to comply with the aforesaid recommendation within a reasonable period of time, which was agreed between the parties to expire in October 2015.

### *3.2. Findings of the Panel and the Appellate Body*

#### *3.2.1. Redefining the boundaries of the TBT Agreement*

The first step in the analysis of the dispute by the Panel and the Appellate Body was on the “threshold issue” of whether the measure qualifies as a “technical regulation” within the meaning of TBT Agreement, Annex 1.1 The answer rests on the second criterion of the “three-tier test” for making such a determination – i.e. whether the measure lays down product characteristics<sup>6</sup> – and the Panel assessment thereunder is based on the premise that the EU Seal Regime has to be considered as a single measure comprising both permissive and prohibitive elements.

By upholding the complainants’ claims to this effect, the Panel found that the EU Seal Regime, taken as a whole, also meets the second criterion and, thus, is a “technical regulation”. Drawing guidance from *EC – Asbestos*, it considered that (i) the ban on seal products constitutes the prohibitive aspect of the measure and prescribes product characteristics “in the negative form”, while (ii) the exceptions represent the permissive components of the measure and constitute the “applicable administrative provisions”, in that they allow seal-containing products complying with strict administrative requirements based on a set of criteria.

In reversing the Panel’s conclusion regarding the “threshold issue”, the Appellate Body observed that the Panel (i) hastily applied the Appellate Body findings in *EC – Asbestos* without taking into account the distinctive features of the products and measures under discussion, (ii) misinterpreted the text of TBT Agreement Annex 1.1, and (iii) diverged from the premise that the EU Seal Regime is a single measure, in that it failed to distinguish the integral and essential aspects of the measure from its ancillary features and, thus, to properly weigh the measure’s constituent components according to their relative importance.

Therefore, the Appellate Body re-examined the three aspects of the measure and found that the prohibition on seal-containing products could be seen as imposing product characteristics “in the negative form”. However, it stated that this is not an essential feature of the measure. Moreover, when considering such a prohibition in conjunction with the measure’s permissive components, it becomes evident that the main feature of the EU Seal Regime is that it subjects market access of seal products to compliance with criteria relating to the identity of the hunter, the type or purpose of the hunt and the way in which the products are marketed. These criteria clearly do not prescribe product characteristics. Therefore, the related “administrative provisions” identified by the Panel cannot be considered applicable to product characteristics.

The conclusion of the Appellate Body is that the measure, as a whole, does not lay down product characteristics and, therefore, does not constitute a technical regulation within the meaning of the TBT Agreement. The Appellate Body refrained from completing the Panel’s analysis on whether the measure might be a technical regulation as “related processes and production methods” (“PPM”).

---

<sup>6</sup> See, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted on 5 April 2001 (*EC – Asbestos*), paras. 59 and 66-70, and Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted on 23 October 2002, paras. 175-79.

### 3.2.2. No implied terms allowed in the non-discrimination analysis under the GATT

In addressing the substantive claims under the GATT 1994, the Panel relied almost entirely on its findings under the TBT Agreement and upheld most of the complainants' allegations.

First, by employing the *Border Tax Adjustment* test,<sup>7</sup> it concluded that seal products conforming and non-conforming to the exceptions are like products, an argument not contested by the EU. The EU's defence was that the concept of "legitimate regulatory distinction" among like products, employed in the context of non-discrimination claims under the TBT Agreement<sup>8</sup>, should equally apply to non-discrimination claims under the GATT 1994 and cover origin-neutral legitimate objectives such as the protection of indigenous lifestyles. In rejecting this argument, the Panel recalled the contextual differences between the TBT Agreement and the GATT 1994, stemming from the absence in the TBT Agreement of a GATT-like general exception clause.

In light of the foregoing, the Panel found the EU Seal Regime to be inconsistent with GATT 1994 Articles III:4 and I:1. More precisely, while the measure is origin-neutral on its face, it entails *de facto* discrimination. Indeed, the Panel found that the MRM exception violates the national treatment principle because, while the complainants carry out MRM activities through their commercial hunts that do not qualify for exception, the EU implements an ecosystem-based approach covered by the MRM exception. As for the most-favoured-nation principle, the discrimination argument rests on the evidence indicating that, while the great part of Greenlandic products meet the IC exception's requirements, most of the Canadian and Norwegian products do not.

In substantially upholding all the Panel findings, the Appellate Body tried to fill the gaps in the reasoning of the Panel and rectify its interpretative mistakes, thus partially superseding its analysis.

To the extent that the Panel erroneously assimilated the legal standards under GATT 1994 Articles I:1 and III:4, the Appellate Body reviewed the differences between the two provisions. It then set out important new doctrine on *de facto* discrimination. The Appellate Body explained that a determination of *de facto* discrimination requires that, as a result of the assessment of the governmental measure's implications in light of its "design, structure and expected operation", the measure is deemed to detrimentally affect the competitive opportunities of the WTO Member's trading partners.<sup>9</sup> Therefore, the focus of the analysis is not on the actual trade effects of the measure.<sup>10</sup> To the extent that a formal difference in treatment is *per se* not conclusive and a genuine relationship between the measure and the adverse impact on the conditions of competition must be established, the Appellate Body stated that this approach does not rule out WTO Members' rights to attach conditions to the granting of advantages and to establish regulatory distinctions among like products which do not result in detrimental impact.<sup>11</sup> It finally concluded that there is neither textual basis nor valid justification to endorse the EU argument that the WTO adjudicator has to further assess whether such impact stems exclusively from a legitimate regulatory distinction. Indeed, the Appellate Body explained that, under the GATT 1994, the fair balance between WTO

---

<sup>7</sup> This test contains four elements: (i) properties, nature and quality of the products, (ii) end uses, (iii) consumer tastes and habits, and (iv) tariff classification. See, Report of the Working Party, *Border Tax Adjustment*, adopted on 2 December 1970, L/3464, GATT B.I.S.D. 18S/97, para. 18.

<sup>8</sup> See, Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, paras. 174-82 and 215, whose arguments have been further developed in the Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted on 23 July 2012, paras. 270-271.

<sup>9</sup> *Ibid.* See also the WTO jurisprudence referred to therein.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

Members' obligations and their right to regulate is ensured by the Article XX exceptions.

### 3.2.3. *Defining the boundaries of the public morals justification*

The Panel and the Appellate Body finally addressed the manifold issues raised by the parties to the dispute under GATT 1994 Article XX, arguably, due to the fact that the public morals justification has been directly addressed only twice before in WTO dispute settlement.<sup>12</sup>

As for the first element of the two-tier test under Article XX(a)<sup>13</sup>, they both found that the EU's public morals defence was acceptable, based upon the evidence demonstrating that the principal objective of the measure is to address the twofold EU moral concerns relating to the overall demand of seal products and the incidence of inhumanely killed seals. The fact that the exceptions "accommodat[e] [...] other interests so as to mitigate the impact of the measure" on them was deemed to be insufficient ground for questioning such characterization of the objective.

Major issues, however, arose with regard to the necessity requirement. Indeed, the Panel's analysis was inaccurate in some respects and flawed in that it relied on a standard of 'materiality' as a generally applicable pre-determined threshold in its contribution analysis.<sup>14</sup> Therefore, the Appellate Body undertook a thorough assessment of the Panel's analysis to clarify the three elements of the necessity test.

Nonetheless, the Appellate Body upheld the Panel's findings that the measure is necessary to protect public morals and, thus, provisionally justified under Article XX(a), arguing that: (i) it does contribute to the above described EU objective, although the degree of such a contribution is reduced by the exceptions; and (ii) the less trade-restrictive alternative measure – *i.e.*, a certification system combined with animal welfare and labelling requirements – might not effectively contribute to the objective, however strict the requirements, and, in any case, is not reasonably available due to, *inter alia*, the prohibitive costs and substantial technical difficulties it entails, also with regard to monitoring issues.

Turning to the second element of the two-tiered test under Article XX, the Appellate Body was again forced to clarify the requirements of the introductory clause and the differences between the legal tests under this provision and TBT Agreement, Article 2.1. Indeed, to support its finding that the EU Seal Regime is inconsistent with the requirements of the chapeau and, thus, is not ultimately justified under Article XX(a), the Panel relied entirely on its conclusions under TBT Agreement, Article 2.1 instead of carrying out an independent analysis.

Therefore, the Appellate Body reversed the Panel's finding and, by completing the analysis in light of the abovementioned interpretative explanations, reached substantially the

---

<sup>12</sup> Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted on 21 December 2009, and Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted on 20 April 2005 (*US – Gambling*).

<sup>13</sup> The two-tiered test was developed by the Appellate Body in *US – Gasoline*, where the Appellate Body explained that, for a measure to be justified under GATT Art. XX, it must not only come under one of the exceptions listed in the various sub-paragraphs of the mentioned Art. but also satisfy the requirements imposed by the introductory clause of such Art. See, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996 (*US – Gasoline*), p. 22.

<sup>14</sup> This approach was based on a misreading of paras. 145-150 of the Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007 (*Brazil – Retreaded Tyres*). In para. 156 of its Report, the Appellate Body set out the three elements of the necessity test as: (i) the assessment of the contribution made by the measure to the achievement of the objective pursued; (ii) the assessment of its restrictive impact on trade, in light of the importance of the interests or values at stake, and (iii) the comparison of the measure with less trade-restrictive alternatives that are reasonably available and provide an equivalent contribution to the relevant objective.

same conclusion as the Panel. More precisely, three aspects of the IC exception amount to arbitrary or unjustifiable discrimination: (i) in the absence of a clear-cut dichotomy between cruel and humane practices in the context of IC hunts, the alleged rationale for discriminating between IC hunts and commercial hunts is difficult to “reconcile with, or [...] rationally relate[...] to the policy objective” evoked to justify the measure;<sup>15</sup> (ii) the ambiguity of some implementing criteria and the resulting discretion which the recognised bodies enjoy in applying them may even defeat the mentioned objective by potentially allowing market access to seal products deriving from inhumane killing methods; (iii) the procedural requirements demonstrate that the EU efforts to facilitate the access of Canadian Inuit products to the EU market are not comparable to its efforts with respect to Greenlandic Inuit products.

### 3.3. *Not Yet a Sealed Deal on Seals: Some Comments*

The *EC – Seal Products* dispute may represent a landmark case, which is likely to have a long lasting impact both at the legal and political level. Indeed, the WTO adjudicators ultimately made clear that animal welfare is an important moral value that can legitimise trade-restrictive measures under certain conditions.

As regards the potential legal impact, we have already highlighted the Appellate Body’s evolutionary attitude and efforts in both elaborating upon the meaning of several terms under the relevant provisions and clarifying the legal standards therein, by rectifying the Panel’s considerable interpretative mistakes. The overall result of the foregoing is more than welcome because it guarantees the coherence of the WTO system. As an example, the Appellate Body assessment on the TBT Agreement threshold issue may indicate a much-appreciated countertrend move towards narrowing the scope of the TBT Agreement through a strict and, now, clearer scrutiny of each element of “technical regulation” definitional criteria.<sup>16</sup>

Nonetheless, a great deal of uncertainty remains, arguably also as a result of the manner in which the issues were appealed and the incomplete analysis of the Panel in certain respects. Indeed, the Appellate Body missed a chance to clarify the scope of PPMs, despite it acknowledged that the topic “raises important systemic issues” and although the decision might have been slightly different had it not refrained from considering the issue. The same holds true as regards the like products determination, that informed the subsequent analysis under the GATT. Indeed, there was room for the EU to argue that seal products conforming and non-conforming to the exceptions have different end-uses and commercial channels and do not target the same consumers’ tastes and habits.

Moreover, the precise scope of the legal standards established as regards the *de facto* discrimination analysis also remains unclear. Indeed, given that the Appellate Body did not elaborate on the Panel’s brief assessment that merely focussed on the detrimental impact element, it is, *inter alia*, uncertain whether all the elements of the legal standards should be reviewed, which is their exact content and how they should be examined in practice. As a result, the implications of the described *de facto* discrimination analysis are also unclear and may, arguably, be dangerous. A strict reading of such standards would, in fact, imply that

---

<sup>15</sup> The relevance of this factor in the “arbitrary or unjustifiable discrimination” assessment was already stated by the Appellate Body in *Brazil – Retreaded Tyres*, para. 227, and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras. 165 and 176.

<sup>16</sup> This is not without its critics: See US comments during the adoption of the Reports, according to which the case law on the TBT Agreement might become a historical footnote: DSB, Minutes of Meeting of 18 June 2014, WT/DSB/M/346 (28 August 2014), p. 21.

almost every measure is *prima facie* illegal, irrespective of the rationale underlying the regulatory distinction among like products. Here lies one of the potential political impacts of the case: the outcome may even affect the legitimacy of the WTO, given its implications with respect to both WTO Members' sovereignty and people's ethical choices.

The same holds true as regards the Appellate Body findings under the chapeau because the requirement to "reconcile with" the policy objective evoked to justify every single exception under the measure, even when it pursues a different but legitimate objective protected under international law as in the case of the IC exception<sup>17</sup>, is unworkable in the real world. Indeed, it renders WTO-inconsistent every legislation attempting to reconcile diverse or diverging policy goals, that is the very essence of policymaking and of the domestic regulatory autonomy.

Last but not least, the EU's reaction in implementing the ruling might prove problematic to the extent that the recommendations are not easy to address. Disregarding the more unlikely scenario (i.e. the repeal of the measure), only two options are left. The easiest available option is to remove the IC exception, which results in a more trade-restrictive measure and, thus, runs counter to WTO objectives. Indeed, this has been the preferred option in two recent cases that might be deemed similar in that the findings of inconsistency were also based on the assessment of the required means to an end relationship between every element of the regulation and the objective.<sup>18</sup> As a second option, the EU might adjust the IC exception to rectify the inconsistencies identified by the Appellate Body. However, the proposed alternatives were considered unfeasible by the Panel, to the extent that they entail economic and technical obstacles. Moreover, while certification and monitoring systems require the cooperation of other WTO Members – that should be *per se* enough to rule out their availability, according to WTO past precedent –<sup>19</sup> animal welfare and labelling requirements may (i) qualify as PPMs, falling within the scope of the TBT Agreement, (ii) distort trade flows, violating GATT 1994, Article XI, and (iii) breach a consistent body of international law, by imposing on indigenous communities a model of development.<sup>20</sup>

To the extent that the available options so far considered result in strengthening the measure in contrast with the complainants' aim, one question still remains unanswered: who will benefit from the WTO-consistency of the resulting measure?

GUENDALINA CATTI DE GASPERI\*

---

<sup>17</sup> See above, note 3.

<sup>18</sup> See the reactions of Brazil and the US in this regard in, respectively, Status Report by Brazil, *Brazil – Retreaded Tyres*, WT/DS332/19/Add.6, 19 September 2009, para. 6, and Status Report by the US, *US – Tuna II (Mexico)*, WT/DS381/18/Add.3, 12 July 2013.

<sup>19</sup> Appellate Body Report, *US – Gambling*, para. 326.

<sup>20</sup> Interestingly, such concern was already raised by organizations representing Inuit communities both against the EU Seal Regime and the US long-lasting regime on marine mammal products, even though they both provide for relevant exceptions for indigenous communities. With regard to the EU Seal Regime, the appeal against the judgment of the General Court was dismissed by the Court of Justice only for lack of locus standi (Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council*, EU:C:2013:625. It is important also to highlight that the *Nunavut Wildlife Act*, that regulates also the seal hunting activities carried out by the Inuit, codifies a set of pro-animal welfare principles and behaviours.

\*LLM in European Law and Competition Law, King's College London; Ph.D. candidate in International Law and Economics, Bocconi University (Milan); research assistant, King's College London.

#### 4. APPELLATE BODY REPORT, *UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA*<sup>1</sup>

##### 4.1. *Facts of the Dispute*

This dispute arose out of the complaints brought by China against several countervailing and antidumping measures adopted by the US. In particular, China challenged Section 1 of the Public Law (P.L.) 112-99 which included the new Section 701(f) of the US Tariff Act of 1930. This section expressly allows for the imposition of countervailing duties (“CVDs”) on merchandise imported (or sold for importation) in the US from non-market economy (“NME”) countries<sup>2</sup> unless the US administration is unable to identify and measure the subsidy because the economy of the exporting State consists of a single entity.<sup>3</sup> This provision applies to all proceedings initiated on or after 20 November 2006. In China’s view, Section 1 was inconsistent with Articles X(1), X(2) and X(3)(b) of the GATT 1994. China’s complaints also concerned the imposition of double remedies as well as the failure of the US to investigate and avoid them in 26 CVD investigations between 2006 and 2012. Such measures and omissions allegedly violated Articles 10, 19 and 32 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”).

##### 4.2. *Procedural History*

China requested consultations in accordance with Article 4 of the DSU. An attempt to find a MAS failed in November 2012. Consequently, China requested and obtained the establishment of a panel pursuant to Article 4(7) of the DSU. Upon the request of the US, in May 2013, the Panel issued a preliminary ruling under Article 6(2) of the DSU, which constituted an integral part of the Panel report circulated on 27 March 2014. Both China and the US appealed the Panel report. After its circulation on 7 July 2014, the DSB adopted the Appellate Body Report on 22 July 2014.

##### 4.3. *The Panel Report*

As outlined above, a preliminary ruling under Article 6(2) of the DSU preceded the Panel decision on the merits. The Panel rejected the US contention that China did not provide sufficient legal basis for its panel request. Notably, the Panel found that China’s request permitted to *plainly connect* the contested measures with the allegedly violated provisions.

Turning to the merits of the case, the Panel considered first China’s claims regarding Section 1 of P.L. 112-99. As regards Article X(1) of the GATT 1994, it had little difficulty in concluding that Section 1 was a law of general application concerning tariffs and other duties or requirements, restrictions or prohibitions on imports. Drawing on the Panel Report in *US-Underwear*<sup>4</sup>, it also made clear that country-related measures, such as this one, could be of *general application*. Then, the Panel proceeded to determine whether the measure had been promptly published after its enactment. Although Section 1 produced retroactive effects, the

---

<sup>1</sup> Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014.

<sup>2</sup> It is worth noting that the imposition of these countervailing duties is subject to the conditions under Section 701(a) of the US Tariff Act of 1930.

<sup>3</sup> Section 2 of the P.L. 112-99 sets out the antidumping duties adjustment mechanism in proceedings concerning imports from NME countries subject to countervailing duties under Section 1.

<sup>4</sup> Panel Report, *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, adopted on 25 February 1997, para. 7.65.

Panel found that it was promptly published and thus was consistent with Article X(1) of the GATT 1994.

With respect to the claims based on Article X(2) of the GATT 1994, it found that Section 1 had been enforced before its publication.<sup>5</sup> Nevertheless, in order to find a violation of such a provision, it was necessary to assess whether the domestic measure brought about an increase in the rate of duties or other charges or whether it imposed new or more restrictive requirements. The majority of the Panel agreed that this had to be ascertained by comparing Section 1 with the prior US Department of Commerce's practice.<sup>6</sup> In reaching its conclusion, the Panel rejected China's argument that the relevant baseline for comparison was prior municipal law. On the basis of this test, the Panel found that Section 1 did not cause an increase in the rate of duties nor did it introduce new or stricter requirements. It followed that the US did not violate Article X(2) of the GATT 1994. The Panel rejected China's claim under Article X(3)(b) of the GATT 1994. In particular, it held that this provision could not be interpreted as prohibiting a legislative measure displacing a previous judicial decision.<sup>7</sup>

The Panel addressed thereafter the complaint concerning the "double remedies" allegedly imposed by the US. Following the Appellate Body Report in *US – Anti-Dumping and Countervailing duties (China)*<sup>8</sup>, it stated that the concurrent imposition of CVD and antidumping duties was contrary to Article 19(3) of the SCM Agreement. With this in mind, it found that in 25 proceedings out of the 26 under scrutiny the US had infringed Article 19(3) and, consequently, Articles 10 and 32(1) of the SCM Agreement.

#### 4.4. The Appellate Body Report

The US and China appealed the Panel decisions on two different grounds. On the one hand, the US claimed that, in the preliminary ruling, the Panel erred in finding that Part D of China's panel request was consistent with Article 6(2) of the DSU. On the other hand, China maintained that the Panel misinterpreted Article X(2) thereby acting in violation of Article 11 of the DSU. The Panel's findings relating to the "double remedies" were not appealed by any of the parties.

In terms of the former, the Appellate Body started by clarifying that Article 6(2) of the DSU requires more than the mere listing of the relevant norms in the panel request, particularly when such norms contain several obligations. However, it found that the complaints set out in Part D of China's request were sufficiently detailed. In fact, China left no doubt as to what obligations in Articles 10, 19 and 32 of the SCM Agreement were allegedly infringed.

Subsequently, the Appellate Body assessed whether, as argued by China, the Panel erred in finding that Section 1 of P.L. 112-99 had not caused an increase in the rate of duties

---

<sup>5</sup> According to Art. X(2) of the GATT 1994 measures of general application effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, should be officially published before being enforced.

<sup>6</sup> One of the panellists disagreed on this point: See, Panel Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/R and Add.1, adopted 22 July 2014, as modified by Appellate Body Report WT/DS449/AB/R, paras 7.212 ff. The dissenting panellist held that the benchmark of comparison should be the rate of duty that would have existed if Section 1 of P.L. 112-99 had not been enacted.

<sup>7</sup> The US openly admitted that the P.L. 99-112 was enacted to supersede the judgement of Federal Court of Appeals for the Federal Circuit in *GPX V*. See US Court of Appeals for the Federal Circuit, *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011).

<sup>8</sup> Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted on 25 March 2011, paras. 547-583.

or the introduction of a new or more restrictive requirements under Article X(2) of the GATT 1994. In this connection, it found that the phrase “under an established practice” contained in Article X(2) merely characterizes the “measures of general application” referred to in the same provision. It also observed that only this interpretation was capable of reconciling the meaning of the provision in the three WTO official languages, as required by Article 33(4) of the Vienna Convention on the Law of Treaties. Accordingly, the phrase did not constitute a benchmark geared to determine whether an increase in the rates of duties or new restrictions or requirements were imposed.<sup>9</sup> Rather, pre-existing domestic law constitutes the baseline of comparison. Such a baseline, however, must not be considered in isolation. Drawing on *US-Carbon Steel*<sup>10</sup>, the Appellate Body held that domestic law must be *holistically* assessed, by taking into consideration not only the wording of the specific provision but also the practice of the relevant administrative or judicial authorities.

With this in mind, the Appellate Body went on to assess whether Section 1 caused an increase in the rate of duties or imposed new or more burdensome requirements, or whether it merely clarified Section 701(a) of the US Tariff Act. Firstly, the Appellate Body compared the language of the two relevant provisions. However, this analysis did not allow the Appellate Body to reach any definitive conclusion. Consequently, it also took into account further elements, such as the practice of the Federal Court of Appeals, of the US Department of Commerce and of the International Trade Court. Given the Panel’s limited analysis of such practice, the Appellate Body lacked crucial factual elements for completing its analysis. Thus, it refrained from applying the above-mentioned test to the facts of the case. In doing so, the Appellate Body *de facto* upheld the finding of the Panel according to which the US had not breached Article X(2) of the GATT 1994.

#### 4.5. Comment

In the present case the Appellate Body shed some light on an unexplored issue concerning the interpretation of Article X(2).<sup>11</sup> Overturning the Panel’s finding, it found that pre-existing domestic law is the relevant benchmark when assessing whether a domestic measure caused one of the changes subject to publication under Article X(2) of the GATT 1994.

The Appellate Body’s interpretation seems to be more consistent with the literal meaning of the provision at issue than the one adopted by the Panel. As correctly observed by the Appellate Body, the phrase “under an uniform and established practice” does not stand alone, but is an attribute of the measures which fall within the scope of Article X(2) of the GATT 1994. In addition, it seems to serve better the transparency purpose embedded in the provision.<sup>12</sup> In fact, the Panel’s ruling would have rendered more difficult the identification of the amendments, thereby enabling WTO Members to circumvent the obligation under Article X(2) of the GATT 1994.

Nevertheless, the Appellate Body’s benchmark may not always lead to a definitive conclusion as to whether an amendment has occurred. Further elements are needed in order to

---

<sup>9</sup> Panel Report, *European Communities and its Member States - Tariff Treatment of Certain Information Technology Products*, WT/DS375/R ; WT/DS376/R ; WT/DS377/R, adopted on 21 September 2010, para. 7. 1120.

<sup>10</sup> Appellate Body Report, *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted on 19 December 2002, para. 157.

<sup>11</sup> Panel Report, *European Communities and its Member States - Tariff Treatment of Certain Information Technology Products*, WT/DS375/R ; WT/DS376/R ; WT/DS377/R, adopted on 21 September 2010, paras. 7.105-7.110.

<sup>12</sup> See ALA’I, “From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance”, *Journal of International Economic Law*, 2008, p. 779 ff, p. 801. As professor Ala’I observed: “Article X of the GATT 1994 is the oldest good governance provision of the WTO Agreements”.

carry out such a test and, notably, the practice concerning the relevant domestic legislation.<sup>13</sup> However, in the instant case, even this element did not suffice to dispel all doubts. Faced with this situation, the Appellate Body followed its previous decisions according to which it is possible to complete the analysis insofar as there is a sufficient factual basis.<sup>14</sup> Undoubtedly, such an approach implies mixed consequences. It certainly leaves a dispute unjudged and, if adopted too frequently, may run counter to judicial economy.<sup>15</sup> Nevertheless, it enables the Appellate Body to respect its mandate under Article 17(6) of the DSU, according to which it does not have the authority to (re)assess the facts of the case.<sup>16</sup> Although the Appellate Body's solution may seem unsatisfactory, it is the only viable solution to this thorny dilemma. An unresolved dispute is, all in all, a reasonable price to pay in exchange for an interpretation of Article X(2) of the GATT 1994 that is likely to ensure more transparency.

FRANCESCO MONTANARO\*

---

<sup>13</sup> In such circumstances, the Appellate Body test, albeit theoretically very different from that suggested by the Panel, may lead to similar outcomes.

<sup>14</sup> Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327, para. 118; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted on 6 November 1998, para. 124; Appellate Body Report, *US – Section 211 Appropriations Act of 1998*, WT/DS176/AB/R, adopted on 2 January 2002, para. 352.

<sup>15</sup> YANOVICH and VOON, “Completing the Analysis in WTO Appeals: the Practice and its limitations”, *Journal of International Economic Law*, 2006, p. 933 ff., pp. 946-47.

<sup>16</sup> *Ibid.*

\* LLM in European Law, College of Europe (Bruges); Dual PhD Candidate in International Law and Economics, Bocconi University (Milan) and Panthéon-Assas University (Paris).

## 5. APPELLATE BODY REPORTS, *CHINA – MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN AND MOLYBDENUM*<sup>1</sup>

### 5.1. Introduction

*China – Rare Earths* is the second WTO dispute challenging China's policies restricting the exportation of raw materials.<sup>2</sup> The case was brought by the US, the EU and Japan in March 2012, challenging China's export restrictions on various forms of rare earths, tungsten, and molybdenum. In July 2012, a single WTO panel was established to examine the three complaints. While the complainants maintained that the restrictions were protectionist measures inconsistent with WTO rules, China invoked the general exceptions under Article XX(b) and (g) of the GATT 1994. The Panel issued its report on 26 March 2014, rejecting China's environmental and conservation defences and finding that the challenged restrictions were inconsistent with China's obligations under the WTO covered agreements and China's Accession Protocol ("AP" or "Accession Protocol" or "Protocol"). Both the US and China appealed certain issues of law and legal interpretation developed by the Panel. The Appellate Body, which circulated its report on 7 August 2014, upheld the Panel's rulings, albeit for slightly different reasons. Following DSB adoption, China eased its export controls on rare earths.<sup>3</sup> The dispute raised significant issues of systemic importance, such as the relationship between China's AP and the WTO Agreement and WTO covered agreements. Brief comments on this issue are provided in the last section.

### 5.2. Factual Background

The dispute concerned Chinese export restrictions on various forms of rare earths, tungsten, and molybdenum, which are raw materials widely used in the defence and high-tech industries. With China being the world's largest producer of these materials<sup>4</sup>, the restrictions at issue (export duties, export quotas, and limitations on the trading rights of enterprises seeking to export these raw materials) were viewed as giving Chinese industries an unfair advantage over foreign competitors. The complainants challenged China's imposition of (i) export duties as inconsistent with China's obligation under para. 11.3 of China's AP not to apply export taxes and charges, except for those applied to the products listed in Annex 6 of the AP; (ii) export quotas as inconsistent with China's obligation under GATT Article XI:1 and paras. 162 and 165 of China's Working Party Report ("CWPR") not to restrict exports; and (iii) restrictions on the trading rights of enterprises seeking to export rare earths and molybdenum, as inconsistent with China's obligations under para. 5.1 of the AP and paras. 83-84 of the CWPR to give foreign enterprises and individuals (as well as enterprises in China) the right to export goods. In response, China claimed that the restrictions were justified under GATT Article XX. By invoking Article XX(b), it asserted that the export duties were necessary to protect human, animal and plant life or health from the pollution

---

<sup>1</sup> Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014.

<sup>2</sup> The first was *China - Raw Materials*, which considered the same main legal issues as those discussed here. For a review of that dispute, see ESPA, 'Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*' in CONFORTI et al. (eds.), *Italian Yearbook of International Law*, vol. XXII, Martinus Nijhoff Publishers, 2012, p. 300 ff.

<sup>3</sup> According to the 2015 Ministry of Commerce's trade guidelines, export quotas will no longer cover rare earths. "Chinese Government Abolishes Rare Earth Export Quotas", 19(1) *Bridges News*, ICTSD, 15 January 2015.

<sup>4</sup> China is the largest global producer of rare earths (90%) and tungsten (over 80%) and a significant producer of molybdenum (over 35%). See, *supra* note 1, para. 4.12.

caused by mining the minerals at issue. Similarly, it argued that the export quotas and the trading rights' restrictions were justified under Article XX(g) since they related to the conservation of exhaustible resources. However, as explained in greater detail below, China did not succeed in justifying its measures as legitimate conservation or environmental protection measures.

### *5.3. Decision of the Panel and Arguments on Appeal*

#### *5.3.1. Export duties*

First, having established that the export duties at issue constituted "taxes and charges applied to exports" within the meaning of para. 11.3 of China's AP and that the products concerned were not included in Annex 6 of the Protocol, the Panel found that China's export duties were inconsistent with para. 11.3. Further, the Panel rejected China's defence under GATT Article XX(b). The majority of the Panel found that the obligation in para. 11.3 was not subject to the GATT 1994 general exceptions and that China had not presented any "cogent reason" to justify a departure from the same finding made by the Appellate Body in *China – Raw Materials* on the same legal issue. Yet, one panellist dissented on this issue and considered that Article XX was available to defend China's AP violations unless a contrary intention was explicitly expressed. The Panel ultimately concluded, assuming *arguendo* that Article XX was available to para. 11.3, that China had not met any of the requirements under Article XX(b) and had failed therefore to demonstrate that the export duties were justified under that provision.

#### *5.3.2. Export quotas*

The Panel found that the export quotas concerned were inconsistent with GATT Article XI:1 and paras. 162 and 165 of CWPR, and could not be justified on conservation grounds under GATT Article XX(g). Specifically, after having reviewed the design and structure of the quotas, the Panel concluded that they (i) did not "relate to" conservation since China did not demonstrate that they had a "substantial", "close" and "real" relationship with the goal of conserving exhaustible rare earths, tungsten, and molybdenum resources; (ii) were not "made effective in conjunction with restrictions on domestic production or consumption" since (contrary to the even-handedness requirement) the overall effect of the foreign and domestic restrictions was to encourage domestic extraction and secure domestic use of the materials concerned by Chinese downstream industries; and (iii) were applied in a discriminatory manner and designed to achieve industrial rather than conservation policy goals.

#### *5.3.3. Trading rights commitments*

The Panel found that the challenged eligibility criteria (export performance, prior export experience, and minimum registered capital) for selecting enterprises to receive a share of the export quota on rare earths and molybdenum were inconsistent with para. 5.1 of China's AP and paras. 83-84 of CWPR, which require China to grant all enterprises the right to trade most products and to eliminate the eligibility criteria at hand. The Panel further found that while GATT Article XX(g) was available to justify the export restrictions concerned, China had failed to make a *prima facie* case in this regard.

#### *5.3.4. Arguments on appeal*

China and the US appealed various aspects of the Panel Report. China's appeal was limited to certain intermediate findings and some aspects of the Panel's reasoning. Thus, it first challenged the finding that GATT Article XX cannot justify a violation of para. 11.3 of China's AP. For China, the Panel erred in rejecting its interpretation that para. 1.2 of the AP and Article XII:1 of the WTO Agreement indicate that specific protocol provisions form an integral part of the WTO Agreement or the covered agreements to which the provisions "intrinsically relate". According to China, the obligation in para. 11.3 to eliminate export duties was intrinsically related to GATT Articles II and XI, and therefore para. 11.3 was subject to Article XX general exceptions. Secondly, China claimed that the Panel erred in the interpretation and application of Article XX(g) and further failed to make an objective assessment of the matter as required under Article 11 of the DSU, in finding that (i) the export quotas on rare earths and tungsten did not "relate to" conservation and (ii) the export quotas on rare earths, tungsten, and molybdenum were not "made effective in conjunction with" domestic restrictions. Furthermore, to the extent that these errors tainted the Panel's conclusion that the export quotas could not be justified under Article XX(g), China requested the Appellate Body to reverse this finding of the Panel. For its part, the US requested the Appellate Body to find that the Panel acted inconsistently with DSU Articles 11 and 12.4 by rejecting ten exhibits submitted by the complainants at a late stage of the proceedings.

#### *5.4. Findings of the Appellate Body*

##### *5.4.1. Claims on the relationship between China's Protocol and other WTO legal texts*

The Appellate Body rejected China's interpretation of paragraph 1.2 of its AP and Article XII:1 of the WTO Agreement and found that the Panel did not err in concluding that according to the paragraph, individual Protocol provisions were not integral parts of the WTO covered agreements. For the Appellate Body, Article XII:1 provides the general rule for acceding to the WTO and does not speak to the question of how individual protocol provisions relate to individual provisions of WTO Agreement and the covered agreements. It further established that paragraph 1.2 of China's AP, which provides that it "shall be an integral part of the WTO Agreement", serves to build a bridge between the Protocol provisions and the existing rights and obligations contained in the Agreements; yet, this bridge is of a general nature and as such it does not answer the question as to how individual protocol provisions are linked to individual provisions of the other WTO Agreements. The Appellate Body clarified that this substantive question must be answered on a case-by-case basis, through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the specific circumstances of the dispute.

##### *5.4.2. Claims under GATT Article XX(g) and DSU Article 11*

With respect to the Panel's assessment of whether China's export quotas on rare earths and tungsten "relate to" conservation under Article XX(g), the Appellate Body dismissed China's allegation that the Panel limited its analysis to an examination of the design and structure of the measures only, and did not examine evidence concerning the broader operation of China's conservation scheme. According to the Appellate Body, the Panel rightly considered that it should focus on the design and structure of the measures and did not err in considering that the analysis under subparagraph (g) does not require an evaluation of the actual effects of the measures concerned. Yet, the Appellate Body clarified that an analysis of subparagraph (g)

does not preclude the examination of the measures' actual operation or impact. The Appellate Body also found that the Panel did not err, as suggested by China, in its reasoning regarding the signals sent to foreign and domestic consumers by the export quotas, nor was the Appellate Body persuaded by China's argument that the Panel should have found that China's scheme "related to" conservation because there were domestic production caps that could mitigate any existing "perverse signals". The Appellate Body further concluded that the Panel did not fail to make an objective assessment of the matter in this regard as claimed by China.

With respect to the Panel's finding that China's export quotas on rare earths, tungsten, and molybdenum did not meet the "made effective in conjunction with" requirement, the Appellate Body found that the Panel did not err in focusing on the design and structure of the measures. Yet, the Appellate Body held that the Panel erred to the extent that it considered (i) that "even-handedness" was a separate requirement that must be fulfilled in addition to the other requirements under Article XX(g); and (ii) that Article XX(g) required the burden of conservation to be evenly distributed (for instance, between foreign consumers and domestic producers or consumers). Despite these flaws, the Appellate Body concluded that they did not taint the Panel's interpretation of subparagraph (g), since the Panel did not engage in such assessment to make its final determination; yet, the Panel's finding was based on the absence of specific restrictions on domestic production or consumption. The Appellate Body also rejected China's allegation that the Panel failed to make an objective assessment on the matter in this regard, upholding therefore the Panel's findings that China's export quotas were not justified under Article XX(g).

#### 5.4.3. *US' conditional appeal*

As the US appeal was conditional on the Appellate Body reversing or modifying any of the Panel's findings and conclusions, the Appellate Body did not rule on it.

#### 5.5. *Brief comments*

At the heart of the dispute was China's request to clarify the systemic relationship between its AP and other WTO legal texts. Indeed, questions concerning the legal status of accession protocols within the WTO framework or their relation with other WTO Agreements are issues of particular relevance to acceded countries, which today not only constitute a significant proportion of the WTO membership<sup>5</sup>, but also have agreed to "WTO-plus" commitments in their protocols. However, while this relationship has been a controversial issue among trade commentators<sup>6</sup> and in other WTO disputes<sup>7</sup> (the dissenting opinion and third-party positions in the case are revealing in this connection)<sup>8</sup>, the Appellate Body in

---

<sup>5</sup> Thirty-two States and territories have acceded to the WTO and twenty-three other States are in the accession negotiation process. It has been estimated that acceded Members will comprise a quarter (or more) of the WTO Membership. KENNEDY, "The Integration of Accession Protocols into the WTO Agreement" 47(1) *Journal of World Trade*, 2013, p. 45 ff.

<sup>6</sup> See, for instance, QIN, "Judicial Authority in WTO Law: A Commentary on the Appellate Body's Decision in China-Rare Earths" 13 *Chinese Journal of International Law* 2014, p. 1 ff; and KENNEDY, *ibid.*

<sup>7</sup> The first case dealing with this issue was *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, in which the Appellate Body held that China was entitled to rely on GATT Art. XX as a defence to a violation of para. 5.1 of China's AP.

<sup>8</sup> The third-parties' fragmentation on this issue is of extremely significance: four out of the eight third-parties having a view on this issue supported China's position (Argentina, Brazil, Columbia, and Russia); three opposed (Canada, Norway and Saudi Arabia); and one (Korea) requested the Appellate Body to examine the drafting history.

*China – Rare Earths* finally provided a clarification in this regard. Now it is clear that the specific relationship between individual protocol provisions and individual provisions of other WTO Agreements (including exceptions under those agreements) must be established on a case-by-case basis. Basically, the Appellate Body considered that the relationship between an accession protocol and the WTO Agreement and WTO covered agreements annexed thereto is analogous to the relationship among the provisions of the Multilateral Trade Agreements, since they are all “integral parts” of the WTO Agreement. Following this approach, the Appellate Body ultimately dismissed the arguments advanced by China<sup>9</sup> and upheld the Panel majority’s conclusion that GATT Article XX was not applicable to para. 11.3 of China’s Accession Protocol.

This ruling of the Appellate Body has significant implications for other acceding Members<sup>10</sup> and potentially also for those countries currently negotiating its WTO accession. More importantly, the Appellate Body approach carries important systemic implications for the entire WTO Membership: for instance, it might be relevant to the question regarding the applicability of GATT Article XX exceptions to non-GATT agreements such as the SCM Agreement.<sup>11</sup>

The ultimate result of the case also has large consequences for Members’ policy space to pursue fundamental public goals such as conservation and public health. As noted before, the Appellate Body confirmed that there were neither textual basis nor contextual elements that could sustain the applicability of GATT Article XX exceptions to justify breaches of China’s export duties commitments under paragraph 11.3 of its AP.<sup>12</sup> By pre-empting China from invoking Article XX exceptions in respect to export duties, the Appellate Body clearly limited China’s sovereign right over its natural resources. This has raised extensive debates in the trade community, which has strongly objected the assumption that sovereign states can relinquish their rights to pursue public policies (such as environmental and public health ones) which are generally available to the WTO membership.<sup>13</sup> Indeed, some authors have viewed this as an unreasonable outcome and have advanced alternative interpretative approaches that allegedly would have allowed WTO adjudicatory bodies to rule in favour of the application of Article XX exceptions to China’s export duties obligations.<sup>14</sup> For instance, it has been argued that the preamble of the WTO Agreement (viz. its first recital comprising the environmental and natural resources objectives as well as the principle of sustainable

---

<sup>9</sup> Namely, that Protocol provisions are an integral part of the WTO Agreement or one of the covered Agreements to which they intrinsically relate.

<sup>10</sup> For example, Latvia, which as China, has undertaken stringent commitments on the use of export duties.

<sup>11</sup> The Appellate Body’s decision in *China – Raw Materials* (followed also in *China – Rare Earths*) took into consideration certain aspects that are also present in the SCM Agreement, such as the explicit reference to other exceptions in contrast to the lack of reference to Art. XX (for instance, while the SCM Agreement does not refer to GATT Art. XX exceptions, it explicitly refers to agricultural exemptions).

<sup>12</sup> This outcome, which was also the conclusion in *China – Raw Materials*, has since then been subject to strong criticism. See, for instance, QIN, *supra* note 6; BRONCKERS and MASKUS, “China Raw Materials: A Controversial Step Towards Evenhanded Exploitation of Natural Resources” 13(2) *World Trade Review*, 2014, p. 393 ff; BARONCINI, “The China – Rare Earths WTO Dispute: A Precious Chance to Revise the China – Raw Materials Conclusion on the Applicability of GATT Article XX to China’s WTO Accession Protocol”, 4(2) *Cuadernos de Derecho Transnacional*, 2012, p. 49 ff; and ESPA, “The Appellate Body Approach to the Applicability of Article XX GATT in the Light of China – Raw Materials: A Missed Opportunity?” 46(6) *Journal of World Trade* 2012, p. 1399 ff.

<sup>13</sup> BRONCKERS and MASKUS, *ibid.*

<sup>14</sup> QIN, *supra* note 6, BARONCINI and ESPA, *supra* note 12.

development) provides the legal basis for invoking Article XX defences for violations of paragraph 11.3 of China's AP.<sup>15</sup>

Finally, it is worth noting that this case (together with *China – Raw Materials*) evidences that export restrictions, an almost neglected issue until very recently, are becoming an important concern in international trade.<sup>16</sup> Indeed, the use of export restrictions has proliferated in recent years<sup>17</sup> and the international competition over raw materials has intensified among export-oriented and import-dependent countries.<sup>18</sup> While this may cause some concerns—indeed the GATT/WTO system is ill-equipped to discipline export restrictions, the two recent Chinese disputes have provided important clarifications on the scope and applicability of the main GATT (and other) export restriction provisions.<sup>19</sup> This is of particular importance as WTO disputes over restrictions on exportation are expected to increase.<sup>20</sup> The fact that China committed itself to refrain from imposing export duties (except for 84 specific tariff lines listed in Annex 6 of the AP) and it still applies these restrictions on 346 tariff lines is germane to this point.<sup>21</sup>

DORA CASTAÑEDA \*

---

<sup>15</sup> BARONCINI and ESPA, *supra* note 12. A critical analysis of whether these approaches might be justified is beyond the object of this case note. However, it should be noted that the mere unsuitability of legal provisions to address environmental or public health concerns (even if such unsuitability has been unintentional) should not justify unintended and/or groundless interpretations since it could amount to improper judicial activism.

<sup>16</sup> Before these two cases, export restrictions were sporadically challenged before the WTO. Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (“*Argentina – Hides and Leather*”), WT/DS155/R, adopted on 16 February 2001; and Panel Report, *US – Measures Treating Export Restrictions as Subsidies* (“*US – Export Restraints*”), WT/DS194/R, adopted on 29 June 2001.

<sup>17</sup> In 2004, about one third of WTO Members imposed various forms of export restrictions: BARFIELD, ‘Trade and Raw Materials-Looking Ahead’, American Enterprise Institute, 29 September 2008: <https://www.aei.org/publication/trade-and-raw-materials-looking-ahead/> (accessed 12 February 2015). More recently, the 2014 World Trade Report reveals that export taxes accounted for about half of the 5,000 restrictions applied by 57 countries between 2009 and 2012. WTO, *World Trade Report 2014 Trade and Development: Recent Trends and the Role of the WTO*, 2010, p. 12. For more statistical information on export restrictions, see also, BRONCKERS and MASKUS, *supra* note 12, p. 2.

<sup>18</sup> The recent disputes reveal the friction between China and importing Members over access to natural resources.

<sup>19</sup> ESPA, *supra* note 12 and KAPARINAR, “Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis” 15(2) *Journal of International Economic Law*, 2012, p. 443 ff. According to Karapinar, the emerging case law also informs the current debate on how the relevant GATT/WTO provisions should be reformed to tighten the regulation on export restrictions.

<sup>20</sup> KAPARINAR, *ibid.*, p. 475.

<sup>21</sup> European Commission, “WTO Appellate Body Confirms: China’s Export Restrictions on Rare Earths and other Raw Materials Illegal”, 7 August 2014, available at: <[http://europa.eu/rapid/press-release\\_MEMO-14-504\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-504_en.htm)>.

\* LL.M. in International Legal Studies, Georgetown University (Washington DC); Ph.D. candidate in International Law and Economics, Bocconi University (Milan); former junior legal officer in the WTO Secretariat.

## 6. APPELLATE BODY REPORT, *UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL PRODUCTS FROM INDIA*<sup>1</sup>

### 6.1. Introduction to the Dispute

This dispute arose from India's challenge to the US' imposition of countervailing duties on certain hot-rolled carbon steel flat products from India. India challenged two types of measures: (i) the relevant legislation; and (ii) the specific determinations leading to the imposition of countervailing duties. First, India brought claims against certain provisions of the US Tariff Act<sup>2</sup> and Code of Federal Regulations.<sup>3</sup> Second, India challenged several measures related to the US' original investigation initiated in December 2000, the 2002, 2004, 2006, 2007, and 2008 administrative reviews, and the 2006 sunset review. India claimed that the countervailing duty investigation and related measures were inconsistent with Articles I and VI of the GATT 1994 and with Articles 1, 2, 10, 11, 12, 13, 14, 15, 19, 21 and 22 of the SCM Agreement. India also claimed that the challenged provisions of US Law were inconsistent "as such" with Articles 12, 14, 15, 19 and 32 of the SCM Agreement.

In April 2012, India filed its complaint. At its meeting in August 2012, the DSB established a panel, which was composed by the DG in February 2013. On 14 July 2014, the Panel Report was circulated and shortly thereafter, India and the US appealed. At its special meeting on 19 December 2014, the DSB adopted the Appellate Body report and the Panel report, as modified in appeal, after an intensive and prolonged (re-)debate between all the parties on some of the key issues, especially on the Appellate Body's interpretation of "public body" in Article 1.1.(a) (1) of the SCM agreement.<sup>4</sup>

### 6.2. Main Findings of the Panel

With respect to the US requests for preliminary rulings, the Panel found that: (i) the 2013 sunset review was within the Panel's terms of reference; (ii) India's claim that the US acted inconsistently with Article 11 of the SCM Agreement by failing to "initiate" an investigation into new subsidies was within the Panel's terms of reference; and (iii) India's claims that the US acted inconsistently with Articles 11.1, 11.2, and 11.9 of the SCM Agreement in connection with the alleged initiation of an investigation, despite the insufficiency of evidence in the domestic industry's written application, fell outside the Panel's terms of reference.<sup>5</sup>

In connection with the provision of high-grade iron ore by the National Mineral Development Corporation ("NMDC"), the Panel upheld two of India's claims, relating to the determination of specificity by the US Department of Commerce ("USDOC"), and its methodology in the calculation of benefit to the recipients.<sup>6</sup>

As regards the Captive Mining of Iron Ore Programme and the Captive Mining of Coal Programme, the Panel upheld three claims by India. These claims related to, *inter alia*, the USDOC's appreciation of the evidence, its determination that India provided a financial

---

<sup>1</sup> Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014.

<sup>2</sup> United States Tariff Act of 1930, Public Law No. 1202-1527, 46 Stat. 741.

<sup>3</sup> The United States Code of Federal Regulations, Title 19, Volume 3, Chapter III, Part 351 ("US Regulations").

<sup>4</sup> See DSB, Minutes of the meeting of 19 December 2014, WT/DSB/M/354 (nine pages).

<sup>5</sup> Panel Report, *US – Carbon Steel (India)*, issued on 14 July 2014, WT/DS436/R, para. 8.1. See also paras. 1.42 and 1.43.

<sup>6</sup> *Ibid.*, paras. 7.193 and 7.15.

contribution by providing iron and coal for less than adequate remuneration, and its methodology in the calculation of benefit to the recipients.<sup>7</sup>

Additionally, the Panel upheld several more of India's claims. These claims related to, *inter alia*, the US International Trade Commission's ("USITC") assessment of injury including its use of cross-cumulation, its application of "facts available", and its failure to observe its public notice obligations.<sup>8</sup>

However, the Panel rejected several of India's claims. These claims related to, *inter alia*, the USDOC's appreciation of the evidence, its assessment of adequacy of remuneration and its determination of benefit, its assessment of "prevailing market conditions" within the meaning of Article 14(d) of the SCM Agreement, its determination of whether the Steel Development Fund ("SDF") constituted a public body, its examination of new subsidy allegations in the conduct of administrative reviews, and the USITC's assessment of injury.<sup>9</sup>

### 6.3. Major Legal Issues Before the Appellate Body

#### 6.3.1. Public body under Article 1.1(a)(1)

India appealed the Panel's findings regarding the USDOC's determination that the National Mineral Development Cooperation ("NMDC") is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.<sup>10</sup> According to India, an entity only constitutes a public body if it performs a governmental function, and has the powers and authority to perform that function.<sup>11</sup> In response, the US argued that the Panel interpreted and applied Article 1.1(a)(1) in a manner consistent with the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. Further, the US requested, in its other appeal, that the Appellate Body clarify that "an entity that is controlled by the government, such that the government may use the entity's resources as its own" is also a public body within the meaning of the SCM Agreement, "irrespective of whether the entity also possesses 'governmental authority' or exercises this authority in the performance of governmental functions".<sup>12</sup>

The Appellate Body recalled its finding in *US – Anti-Dumping and Countervailing Duties (China)* that a public body is "an entity that possesses, exercises or is vested with governmental authority", and explained that whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.<sup>13</sup> The Appellate Body believed that the Panel in grappling with the case-by-case nature of public body determinations, correctly articulated the appropriate standard when it observed that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." However, the Appellate Body found that the Panel erred in its substantive interpretation of Article 1.1(a)(1) by construing the term "public

---

<sup>7</sup> *Ibid.*, paras. 7.217, 7.252, 7.263 and 7.265.

<sup>8</sup> *Ibid.*, paras. 7.352, 7.356, 7.369, 7.452, 7.456, 7.465, 7.468, 7.471, 7.473, and 7.475.

<sup>9</sup> *Ibid.*, para. 8.3.

<sup>10</sup> Under Art. 1.1(a)(1) of the SCM Agreement, a subsidy shall be deemed to exist if "there is a financial contribution by a government or any public body within the territory of a Member...".

<sup>11</sup> Appellate Body Report, *US – Carbon Steel (India)*, issued on 8 December 2014, WT/DS436/AB/R, para. 4.1.

<sup>12</sup> *Ibid.*, para. 4.6.

<sup>13</sup> *Ibid.*, para. 4.29.

body” to mean any entity that is “meaningfully controlled” by a government.<sup>14</sup> Consequently, the Appellate Body reversed the Panel's findings, and found that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1).

### 6.3.2. *Financial contribution under Article 1.1(a)(1)*

India appealed the Panel's findings regarding whether India's captive mining rights and SDF loans constitute financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement.

In interpreting the term “provides” in Article 1.1(a)(1)(iii), the Appellate Body recalled that there must exist a “reasonably proximate relationship” between the governmental action of providing a good or service, and the use or enjoyment of that good or service by a beneficiary. India argued that the extraction process undertaken by Indian steel producers, due to its complexity and uncertainty, was a significant intervening act that undermined any reasonably proximate relationship between its grant of mining rights and the final goods consisting of extracted iron ore and coal. The Appellate Body found that the Panel relied on several features of the mining rights in rendering its conclusion regarding the proximate nature of the link with the final extracted goods, including as it relates to the nature and certainty of the extraction results as reflected in the terms of the mining rights.<sup>15</sup> Finding that the Panel substantiated its conclusion that there is a reasonably proximate relationship between the grant of mining rights and the final goods consisting of extracted iron ore and coal, the Appellate Body upheld the Panel's finding in respect of Article 1.1(a)(1)(iii).

With respect to SDF loans, India argued that Article 1.1(a)(1)(i) covers only transfers of funds that are direct, which means that the action and its consequence must be immediately linked without involving any intermediary or intervening agency. The Appellate Body observed that the use of the term “direct” in Article 1.1(a)(1)(i) suggests a certain immediacy in the conveyance of funds, which in turn points to the existence of a close nexus concerning, for instance, the parties to, and/or the actions relating to, the transfer of the funds but did not consider that the fact that a government effects a transfer through an intermediary necessarily negates a finding of financial contribution under Article 1.1(a)(1)(i).<sup>16</sup> Finding that the Panel correctly found that the role of the SDF Managing Committee in making critical decisions regarding the issuance and terms of the SDF loans supported a conclusion that the SDF loans constitute direct transfers of funds, the Appellate Body upheld the Panel's finding in respect of Article 1.1(a)(1)(i).

### 6.3.3. *Benefit under Article 14*

India appealed multiple findings of the Panel concerning Section 3.51.511(a)(2)(i)-(iv) of the US Code of Federal Regulations, setting forth the benchmarking mechanism for calculating benefit. The Panel rejected all of India's “as such” claims against the US benchmarking mechanism.<sup>17</sup> Although the Appellate Body disagreed with the Panel to the extent it suggested that investigating authorities could, at the outset, discard all prices of government-related entities in a benchmark analysis, it considered that, under Section 3.51.511(a)(2)(i), the USDOC is required to consider in its benchmark analysis all market-determined prices in the country of provision for the good in question, including such prices of government-related

---

<sup>14</sup> *Ibid.*, para. 4.36.

<sup>15</sup> *Ibid.*, paras. 4.69, 4.70 and 4.73.

<sup>16</sup> *Ibid.*, para. 4.93 and 4.94.

<sup>17</sup> *Ibid.*, paras. 4.104 and 4.105.

entities other than the entity providing the financial contribution.<sup>18</sup> The Appellate Body also rejected India's "as such" claims that the Panel erred in finding that Article 14(d)<sup>19</sup> permits the use of out-of-country benchmarks in situations in which the government is not the predominant provider of the good in question, and that Section 3.51.511(a)(2)(ii) requires the USDOC to make adjustments to out-of-country benchmarks to ensure that such benchmarks reflect prevailing market conditions in the country of provision. The Appellate Body also rejected India's claims that the Panel erred in finding that the use of "as delivered" benchmarks under Section 3.51.511(a)(2)(iv) is not "as such" inconsistent with Article 14(d). Contrary to India's suggestion, the Appellate Body did not consider that the US benchmarking mechanism precludes adjustments to benchmarks to reflect delivery charges that approximate the generally applicable delivery charges for the good in question in the country of provision.<sup>20</sup>

India advanced several "as applied" claims under Article 14 of the SCM Agreement. With respect to iron ore provided by the NMDC, the Appellate Body found that the Panel erred by suggesting that government prices are not an indicator of prevailing market conditions, and reversed the Panel's finding rejecting India's claim that the USDOC's exclusion of the NMDC's export prices from its benchmark is inconsistent with Article 14(d). The Appellate Body also reversed the Panel's finding rejecting India's claim that the use of benchmarks from Australia and Brazil is inconsistent with Article 14(d), finding that the Panel had not properly concluded that the "as delivered" prices at issue reflect prevailing market conditions in India. As regards India's claim in respect of captive mining rights, the Appellate Body found it permissible for an investigating authority to construct a government price in a benefit calculation, and upheld the Panel's finding rejecting India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d). Regarding India's claim in respect of SDF loans, the Appellate Body found that the Panel improperly excluded consideration of a borrower's costs in assessing the cost of a loan programme to the recipient. The Appellate Body reversed the Panel's finding rejecting India's claim as it relates to the USDOC's determination that loans provided under the SDF conferred a benefit under Articles 1.1(b) and 14(b), but found that it was unable to complete the legal analysis.<sup>21</sup>

#### 6.3.4. *Specificity under Article 2.1(c)*

India appealed aspects of the Panel's analysis concerning the USDOC's determination that the sale of iron ore by the NMDC is specific within the meaning of Article 2.1(c) of the SCM Agreement because it concerns the "use of a subsidy programme by a limited number of certain enterprises". The Appellate Body considered that the term "limited number" is meant to convey a finite and limited quantity of "certain enterprises" and that a limited quantity of enterprises or industries qualifying as "certain enterprise" must be found to have used the subsidy programme, without requiring that the limited quantity represent a subset of some larger grouping of "certain enterprise". The Appellate Body thus upheld the Panel's finding that there was no obligation on the USDOC to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy programme.<sup>22</sup>

---

<sup>18</sup> *Ibid.*, paras. 4.174 and 4.177.

<sup>19</sup> Art. 14(d) of the SCM Agreement states that where adequate remuneration is provided for the provision or purchase of goods or services by governments, no benefit is conferred.

<sup>20</sup> Appellate Body Report, *US – Carbon Steel (India)*, issued on 8 December 2014, WT/DS436/AB/R, paras. 4.199, 4.259 and 4.263.

<sup>21</sup> *Ibid.*, paras. 4.291, 4.143, 4.335, 4.349 and 4.353.

<sup>22</sup> *Ibid.*, paras. 4.354, 4.378 and 4.380.

### 6.3.5. Cumulative assessment of imports in countervailing duty investigations

The US appealed the Panel's finding that Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize investigating authorities to assess cumulatively the effects of subsidized imports with the effects of non-subsidized, but dumped imports. Although the Appellate Body found that the Panel did not err in this regard, it found that the Panel failed to comply with its duty under Article 11 of the DSU to make an objective assessment. Completing the legal analysis, the Appellate Body found that Section 1677(7)(G)(iii), on its face, required the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports when petitions to initiate countervailing duty investigations or anti-dumping duty investigations are initiated by the investigating authority. Consequently, it found that Section to be inconsistent "as such" with Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.<sup>23</sup>

### 6.4. Comments

This dispute raised a number of legal issues which concerns all WTO Members. The most important systemic issues are: (i) the interpretation of what constitutes a "public body"; and (ii) cross-cumulation. On what constitutes a public body, the Appellate Body rejected the interpretations put forward by both parties. In *US – Anti-Dumping and Countervailing Duties (China)*, it had found that "considerations of the object and purpose of the SCM Agreement do not favour either a broad or narrow interpretation of the term 'public body'."<sup>24</sup> In the present case, the Appellate Body noted that on the one hand, India's restrictive reading may shield transfers of a government's financial resources from WTO subsidies disciplines.<sup>25</sup> On the other hand, too broad an interpretation of the term public body could "risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies."<sup>26</sup> Thus, "meaningful control" remains a central but not the sole consideration in determining whether an entity is a public body.

With respect to the question whether an investigating authority may cumulate the effects of subsidized imports with the effects of non-subsidized imports subject to anti-dumping investigations, the US had argued that Article 15 of the SCM Agreement is silent on this issue and that it therefore does not prohibit such cumulative assessment.<sup>27</sup> The Appellate Body clarified that Article 15.3 requires that the examination by investigating authorities is limited to imports subject to countervailing duty investigations, thereby declaring US' cross-cumulation practice as inconsistent with the SCM Agreement.<sup>28</sup> From the perspective of

---

<sup>23</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.563, 4.600, 4.615 and 4.629.

<sup>24</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, issued on 11 March 2011, WT/DS379/AB/R, para. 303.

<sup>25</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 2.187.

<sup>26</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 303.

<sup>27</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.564.

<sup>28</sup> *Ibid.*, paras. 4.565, 4.586 and 4.629.

\* LLM in International Dispute Settlement, Graduate Institute (Geneva) and University of Geneva; PhD Candidate, University of Geneva; Marie Curie Early Stage Research Fellow, Bocconi University (Milan). She has recently served as a legal intern with the Legal Affairs Division of the WTO Secretariat. The views expressed here are personal and should not be attributed to the WTO Secretariat. She previously worked as a consultant at the United Nations and served as a scholarship holder at the Max Planck Institute for Intellectual

importing Members which adopt cross-cumulation, this finding may affect their ability to address the effects of cumulative imports. For exporting Members like India and China, it could also have a significant trade impact, because the US had been applying cross-cumulation to many of their products.

WEI ZHUANG\*

## 7. PANEL REPORT, *CHINA – ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES*<sup>1</sup>

### *7.1. Introduction and Procedural History of the Dispute*

The dispute involved China's imposition of antidumping and countervailing duties on automobiles imported from the US having engine displacement capacity of equal to or greater than 2500 cubic centimeters (cc). According to China's Ministry of Commerce ("MOFCOM"), dumped and subsidized imports from six US automobile producers, including General Motors, Chrysler Group and Honda, had caused material injury to China's domestic industry. It determined individual dumping margins and countervailing duties for respondent companies in its investigation except the sixth respondent company, Ford Motor Company, that was not included in the dumping margin determination as it did not export during the investigation period.

In July 2012 the US requested consultations with China on this matter. In October 2012, the DSB established a panel, which was composed by the DG in February 2013. On 23 May 2014, the Panel Report was circulated. It was adopted by the DSB on 18 June 2014. China had notified its withdrawal of the duties in December 2013, i.e. before the Panel Report was issued. Hence no further action was required from China in respect of the findings and recommendations of the Panel.<sup>2</sup>

### *7.2. Arguments of the Parties and Findings of the Panel*

According to the US, China breached various transparency and notification obligations contained under the Anti-Dumping Agreement and the SCM Agreement, imposed residual anti-dumping and countervailing duty rates inconsistent with Articles 6(8) of the Anti-Dumping Agreement and 12(7) of the SCM Agreement, and failed to undertake price effects analysis based on positive evidence. In addition the US alleged that various errors were made in defining the domestic industry in accordance with Article 4.1 of the Anti-Dumping Agreement and 16(1) of the SCM Agreement. While the Panel accepted most of the US' arguments, it rejected one of the important claims on the approach to be taken in defining the domestic industry.

#### *7.2.1. Article 6.9 of the Anti-Dumping Agreement*

According to the US, China acted inconsistently with its obligations under Article 6(9) of the Anti-Dumping Agreement as MOFCOM failed to inform US manufacturers of all essential facts forming the basis of its decision to apply antidumping duties.<sup>3</sup> According to the US, all information of any data adjustments and manipulations having a bearing on determination of the normal values, export prices and costs of production should have been disclosed. The US also argued that it neither has in its position copies of the final disclosure letters which are necessarily in China's possession. China argued that the burden of proof lies on the US to provide evidence of the alleged deficiencies in the final disclosures. China also argued that

---

<sup>1</sup> Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014.

<sup>2</sup> See DSB, Minutes of Meeting of 18 June 2014, WT/DSB/M/346 (28 August 2014), para. 6.4.

<sup>3</sup> According to Art. 6.9 of the Anti-Dumping Agreement investigating authorities must inform all interested parties of the essential facts under consideration which form the basis for the decision, before a final determination is made. The provision also states that such disclosure should provide sufficient response time for the same parties.

data underlying dumping margin calculations may or may not constitute essential facts, while “calculations” in contrast, constitute the “consideration” of facts and hence fall outside Article 6(9).

According to the Panel, Article 6(9) does not purport to impose an obligation to disclose the investigating authority’s reasoning or all facts and references to it. In addition the panel referred to *China – Broiler Products*<sup>4</sup>, and found the formula used by MOFCOM to calculate dumping margins calculations, constitutes an essential fact within the meaning of Article 6(9).<sup>5</sup> In doing so the panel held that China, despite having been given the opportunity to object, exclusively relied on objections relating to burden of proof and procedural matters and therefore there is nothing for China to rebut on substantive grounds, while it found that the US had made a *prima facie* case on MOFCOM’s failure to disclose essential facts to the respondents which was not countered by China. Accordingly, the Panel found that China had acted inconsistently with Article 6(9) of the Anti-Dumping Agreement.<sup>6</sup>

### 7.2.2. Residual anti-dumping and countervailing duty rates

MOFCOM made a preliminary anti-dumping determination and provided individual dumping margins for five respondents, while it made a preliminary dumping margin and subsidy rate determination of 21.5 per cent and 12.9 per cent respectively for “all other” US companies which had not registered with MOFCOM. The US argued the “all other” anti-dumping and countervailing duty rates imposed by MOFCOM are inconsistent with Articles 6(8), 6(9), 12(2), 12(2)(2)) and paragraph 1 of Annex II of the Anti-Dumping Agreement and Articles 12(7), 12(8), 22(3), and 22(5) of the SCM Agreement.

The Panel classified the claims as having substantive (Article 6(8) and Annex II) and procedural (Articles 6(9) and 12(2)) aspects. In dealing with the substantive claims under Article 6(8) and Annex II, it observed that the main claim asserted by the US is based on the observation that MOFCOM failed to make a further effort to identify other exporters than those identified as respondents. The Panel stated it was undisputed that MOFCOM announced the call on its website and public reading room; therefore, it considers that MOFCOM took the steps that could reasonably be expected of it under paragraph 1 of Annex II. The Panel, however, found violation of the same provision as it found MOFCOM relied on a much wider scope of the information than requested in the notice of initiation.<sup>7</sup> Meanwhile with respect to allegations by the US under Article 6(9) that MOFCOM failed to disclose essential facts such as details of the calculation of the 21.5 per cent residual duty rate, the Panel disagreed with the US and noted that “the final disclosure explains the efforts made by MOFCOM following the initiation of the investigation to contact the US exporters”.<sup>8</sup> A similar conclusion was reached with respect to Articles 12(2) and 12(2)(2), regarding public notice.<sup>9</sup> Similarly, with respect to Articles 12(7), 12(8), 22(3), and 22(5) of the SCM Agreement, the panel found it appropriate to rely on its conclusion reached under the Anti-Dumping Agreement and held that MOFCOM acted inconsistently with Articles 12(8), 22(3) and 22(5) of the SCM Agreement.<sup>10</sup>

---

<sup>4</sup> Panel Report, *China - Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013.

<sup>5</sup> Panel Report, *China – Autos (US)*, para. 7.72.

<sup>6</sup> *Ibid.*, paras. 7.85-7.86

<sup>7</sup> *Ibid.*, para. 7.136.

<sup>8</sup> *Ibid.*, para. 7.150.

<sup>9</sup> *Ibid.*, para. 7.158.

<sup>10</sup> *Ibid.*, paras. 7.175, 7.178, and 7.180.

### 7.2.3. Definition of “domestic industry”

The US argued that MOFCOM failed to properly define the domestic industry for the purposes of its injury determination in accordance with Article 4(1) of the Anti-Dumping Agreement and Article 16(1) of the SCM Agreement, as it was distorted and failed to capture a major proportion of total production of the domestic like product. China denied the claim. The Panel held that Articles 4(1) and 16(1), without hierarchy and alternation, define the domestic industry as either producers of the domestic like product “as a whole”, or a subset of those producers, who collectively account for a "major proportion" of total domestic production. The Panel stated that it was unconvinced by the US claim that MOFCOM’s registration requirement led to distortion in the form of self-selection within among domestic producers in the definition of the domestic industry and rejected the US claim that China had acted inconsistently with Article 3(1) of the Anti-Dumping Agreement and Article 15(1) of the SCM Agreement.<sup>11</sup>

### 7.2.4. Price depression analysis

The US argued that MOFCOM found price depression inconsistently with Articles 3(1) and 3(2) of the Anti-Dumping Agreement and Articles 15(1) and 15(2) of the SCM Agreement, *inter alia* due to the fact that MOFCOM’s findings were invalidated by the evidence presented since prices of subject imports and the domestic like product moved in opposite directions in the 2006-2007 period; and secondly that “MOFCOM erred in using annual average unit values without adjustments in its price effects analysis”.<sup>12</sup> China denied all these claims. The Panel noted that “neither Article 3(2) nor Article 15(2) impose a specific methodology on an investigating authority” and recalled that panels and the Appellate Body have recognized that an investigating authority has a margin of discretion in choosing the methodology.<sup>13</sup> The Panel found that the record does show that from 2006 to 2007, the average unit values of subject imports and of the domestic like products moved in opposite directions while MOFCOM’s determination showing price parallelism fell short of meeting the requirements of Articles 3(2) and 15(2). It also found that “MOFCOM’s price depression analysis failed to reflect an objective examination based on positive evidence within the meaning of AD Agreement Article 3(1) and SCM Agreement Article 15(1).”<sup>14</sup>

### 7.2.5. Causation

According to the US, MOFCOM’s causation analysis failed to conform to the expectation of Articles 3(1) and 3(5) of the Anti-Dumping Agreement and Articles 15(1) and 15(5) of the SCM Agreement on several grounds including but not limited to “errors in MOFCOM’s domestic industry definition and price effects analysis”, and “failure to address the role of a sharp decline in industry productivity”.<sup>15</sup> China argued that the US focused on isolated elements of MOFCOM’s causation analysis. The Panel emphasized the need to have a reasoned and adequate determination by investigating authorities of the causal relationship

---

<sup>11</sup> *Ibid.*, para. 7.5.6.

<sup>12</sup> *Ibid.*, para. 7.241.

<sup>13</sup> *Ibid.*, para. 7.255.

<sup>14</sup> *Ibid.*, para. 7.283.

<sup>15</sup> *Ibid.*, paras. 7.302-7.308. Art. 3 of the Anti-Dumping Agreement prescribes standards for injury determinations. Art. 3(1), in particular, states that a determination of injury should be backed by positive evidence and involves an objective examination of both the volume and price trigger and the consequent impact of these imports on domestic producers. Art. 3(5) provides for proof of causation between the dumped imports and the injury to the domestic industry. Art. 15 of the SCM Agreement carries a parallel notion.

between subject imports and injury to the domestic industry and regarding non-attribution an investigating authority is under no obligation to seek out and identify all other possible other factors causing injury to the domestic industry in a given investigation other than those raised before it by interested parties. However, in providing its opinion with respect to causation, the Panel recalled it had already found that MOFCOM's price effects analysis was inconsistent with Articles 3(1) and 3(2) of the Anti-Dumping Agreement and Articles 15(1) and 15(2) of the SCM Agreement and hence concluded that MOFCOM's causation analysis was inconsistent with Articles 3(1) and 3(5) of the Anti-Dumping Agreement and Articles 15(1) and 15(5) of the SCM Agreement.

### 7.3. Commentary

This dispute is the third one brought by the US against China dealing with anti-dumping and countervailing measures imposed by China on US exports.<sup>16</sup> The Panel's conclusions are consistent with the interpretations and approaches established by preceding panels and the Appellate Body, such as *EC – Salmon (Norway)*, *EC – Bed Linen*, and *EC – Fasteners (China)*.<sup>17</sup> This, in addition to the fact that the duties were withdrawn, may explain why the Panel Report was not appealed. One interesting issue that may substantiate this conclusion is a matter that was also dealt with by preceding jurisprudence but was contested by the US, including in its address during the DSB meeting where the Report was adopted, namely the US claim on the alleged “self-selection” impact among domestic producers of MOFCOM's practice of conditioning the inclusion of domestic producers based on willingness to participate in the injury investigations.<sup>18</sup> According to the US, this has the inherent risk of defining the domestic industry around weaker-performing industries that will have the tendency to engage in the investigation process compared to well-performing ones. This claim was rightly rejected by the Panel, especially seen in the light of the Appellate Body's jurisprudence. Just like in the current case, the US had raised the claim in *EC – Fasteners (China)*, participating as a third party, and it was rejected by both the panel in that dispute and the Appellate Body.<sup>19</sup> However both disputes were silent on the issue of who bears the burden of proof in showing that the alleged selection mechanism did not result in the said material risk of distortion. It seems that, while the Appellate Body generally confirmed that investigating authorities enjoy a broad discretion in defining domestic producers<sup>20</sup>, there is less clarity as to which party should bear the burden presenting evidence that such discretion was or was not properly used.

TILAHUN ESMAIL KASSAHUN\*

---

<sup>16</sup> The two preceding cases are, Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, and Panel Report, *China Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013.

<sup>17</sup> Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008; Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001; and Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (EC – Fasteners (China))*, WT/DS397/AB/R, adopted 28 July 2011.

<sup>18</sup> See DSB, Minutes of Meeting of 18 June 2014, *supra* note 2, para. 6.4.

<sup>19</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 446.

<sup>20</sup> *Ibid.*, para. 451.

\* LLB (HU), LLM in Business Law (AAU), LLM in International Economic Law and Policy (IELPO-UB); Ph.D Candidate in International Law and Economics, Bocconi University, Milan; Research Fellow (OBREAL, IELPO).