

## WTO CASE REVIEW 2018<sup>1</sup>

---

<sup>1</sup> This *WTO Case Review* is the 19<sup>th</sup> in our annual series on substantive international trade adjudications issued by the Appellate Body of the World Trade Organization. Each *Review* explains and comments on Appellate Body Reports adopted by the WTO Dispute Settlement Body (DSB) during the preceding calendar year (January 1st through December 31st), excluding decisions on compliance with recommendations contained in previously adopted reports.

In this year's *Review*, we cover one case, *Brazil – Certain Measures Concerning Taxation and Charges*, which was issued in 2018, and normally might have been adopted at the December 18, 2018 DSB meeting, following its issuance on December 13th. Possibly, because of conflict over WTO dispute settlement reform, the DSB did not adopt it until January 11, 2019. The future of the multilateral dispute settlement system is in doubt. With uncertainty as to whether there will be future Appellate Body decisions to review in 2019 and beyond, we thought it best to include the *Brazil Taxes* case now.

Our preceding *Reviews* are:

- *WTO Case Review 2017*, 36 ARIZ. J. INT'L & COMP. L. 253-366 (2019).
- *WTO Case Review 2016*, 34 ARIZ. J. INT'L & COMP. L. 281-460 (2017).
- *WTO Case Review 2015*, 33 ARIZ. J. INT'L & COMP. L. 505-629 (2016).
- *WTO Case Review 2014*, 32 ARIZ. J. INT'L & COMP. L. 497-646 (2015).
- *WTO Case Review 2013*, 31 ARIZ. J. INT'L & COMP. L. 475-510 (2014).
- *WTO Case Review 2012*, 30 ARIZ. J. INT'L & COMP. L. 207-419 (2013).
- *WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287-476 (2012).
- *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239-360 (2011).
- *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83-190 (2010).
- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113-228 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75-155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299-387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99-249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317-439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

We are grateful to the Editors and Staff of the *Arizona Journal of International and Comparative Law* for their excellent editorial assistance and continuing support of our work.

The WTO reports we discuss are available on the web site of the WTO, at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm). The texts of the WTO agreements we discuss are available on the WTO web site, [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm). Those texts also are published on the University of Kansas School of Law Library Research and Study Guide Web Page on International Trade Law, <http://guides.law.ku.edu/intltrade>, from which they may be freely downloaded.

We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

Raj Bhala,<sup>2</sup> David A. Gantz,<sup>3</sup> Shannon B. Keating,<sup>4</sup>  
Eric Witmer,<sup>5</sup> and Cody N. Wood<sup>6</sup>

TABLE OF CONTENTS

I. INTRODUCTION .....52  
 A. Emasculation of the Appellate Body .....54  
 B. Other U.S. Steps that Threaten the Future of the WTO .....58

<sup>2</sup> [http://en.wikipedia.org/wiki/Raj\\_Bhala](http://en.wikipedia.org/wiki/Raj_Bhala)  
 Brenneisen Distinguished Professor, The University of Kansas, School of Law, Green Hall, 1535 West 15th Street, Lawrence, KS 66045-7577 U.S.A. Tel. 785-864-9224. Fax. 785-864-5054. [www.law.ku.edu](http://www.law.ku.edu). Senior Advisor, Dentons U.S. LLP (Kansas City, Missouri). Monthly Columnist, “On Point,” Bloomberg Quint (Mumbai), [www.bloombergquint.com](http://www.bloombergquint.com).

J.D., Harvard (1989); M.Sc., Oxford (1986); M.Sc., London School of Economics (1985); A.B., Duke (1984). Marshall Scholar (1984-86). Member, Council on Foreign Relations, Royal Society for Asian Affairs, and Fellowship of Catholic Scholars. Author of *International Trade Law: A Comprehensive Textbook* (5<sup>th</sup> ed., 4 vols., 2019), *Modern GATT Law* (2<sup>nd</sup> ed., 2 vols., 2013), *TPP Objectively* (2<sup>nd</sup> ed., 2019), *Trade, Development, and Social Justice* (2003), *Dictionary of International Trade Law* (3<sup>rd</sup> ed., 2015), and *Understanding Islamic Law (Sharī‘a)* (2<sup>nd</sup> ed., 2016).

The discussion of the cases herein may appear subsequently in modified form in the *International Trade Law Textbook* and/or other publications. The views expressed herein do not necessarily represent those of the University of Kansas, Bloomberg, or Dentons, or their employees, affiliates, or clientele.

<sup>3</sup> A. B., Harvard; J.D. & J.S.M., Stanford Law School. Samuel M. Fegtly Professor of Law Emeritus; Will Clayton Fellow for Trade and International Economics, Mexico Center, Baker Institute, Rice University. Tel. 520-490-3004; [gantz@law.arizona.edu](mailto:gantz@law.arizona.edu); web: <http://www.law2.arizona.edu/faculty/facultyprofile.cfm?facultyid=41> SSRN page: [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=361657](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=361657).

<sup>4</sup> Attorney, United States Patent and Trademark Office, Alexandria, VA. J.D., University of Kansas (2013); B.A., Austin College (2005). Member, State Bar of Texas and Bar of the Supreme Court of the United States. The views expressed herein do not represent those of the United States Patent and Trademark Office, the Department of Commerce, or the United States Government.

<sup>5</sup> Research Attorney for the Chief Justice, Supreme Court of Kansas.  
 J.D., University of Kansas (2017); B.A., Penn State University (2005); Sergeant First Class, U.S. Army (1999-2009). Member, Kansas and Missouri Bars.

The views expressed herein do not represent those of the Supreme Court of Kansas, the State of Kansas, or their employees, departments or constituents.

<sup>6</sup> Associate, Dentons US LLP, Kansas City, Missouri, J.D., University of Kansas School of Law, 2017.

The views expressed herein do not necessarily represent those of Dentons, or their employees, affiliates, or clientele.

II. DISCUSSION OF THE 2018 CASE LAW FROM THE APPELLATE BODY .....	59
A. GATT Obligations and Exceptions – National and MFN Treatment, and <i>Enabling Clause</i> .....	60
1. Citation .....	60
2. Facts .....	60
3. Issue 1: MFN Treatment Exception Under Tokyo Round <i>Enabling Clause</i> Paragraph 2(b)-(c) .....	72
a. Pertinent Text and Questions .....	72
b. Brazil’s Losing Argument on <i>Enabling Clause</i> Paragraph 2(b) .....	75
c. Appellate Body Holding on <i>Enabling Clause</i> Paragraph 2(b) .....	76
d. Appellate Body Rationale on <i>Enabling Clause</i> Paragraph 2(b): Text, Context, and Object and Purpose .....	77
e. Appellate Body Holding and Rationale on <i>Enabling Clause</i> Paragraph 2(c): “Genuine” Relationship of Preference to an RTA .....	83
4. Issue 2: National Treatment Exception for Domestic Subsidies, GATT Article III:8, and Separate Opinion .....	86
5. Issue 3: National Treatment for Non-Fiscal Measures, GATT Article III:4 .....	93
6. Commentary .....	96
a. State the Facts, Please .....	96
b. Organize the Discussion, Please .....	97
B. Trade Remedies – Antidumping and Price Suppression .....	98
1. Citation .....	98
2. Facts .....	98
3. Price Suppression Issue .....	99
4. Holding and Rationale .....	102
5. Commentary .....	106
C. Trade Remedies – Countervailing Duties, Government Revenue Foregone, and Causation .....	107
1. Citation .....	107
2. Facts .....	108

a. Pakistan’s Manufacturing Bond Scheme .....	108
b. The European Commission’s Investigation.....	109
3. Issue 1: Government Revenue Foregone and <i>SCM Agreement</i> Article	
1:1(a)(1)(ii).....	111
a. Holding and Rationale .....	117
4. Issue 2: Causation and <i>SCM Agreement</i> Article 15:5 .....	118
a. Holding and Rationale .....	122
5. Commentary .....	123
D. Trade Remedies –Safeguards and Specific Duties .....	125
1. Citation.....	125
2. Facts .....	125
3. Issue 1: GATT Article XIX and <i>SCM Agreement</i> Article 1 .....	126
a. Holding and Rationale .....	128
4. Issue 2: GATT Article I:1 MFN Rule, Specific Duty, and Terms of	
Reference.....	130
a. Holding and Rationale .....	131
5. Commentary .....	133

## I. INTRODUCTION

We [the Members of the WTO] have already begun to suffer the consequences of the lack of a full complement of Appellate Body members in several ways. The diminished number of Appellate Body members has seriously undermined the collegiality of our deliberations, envisaged in Rule 4 of the Working Procedures for Appellate Review. Second, a smaller membership of the Appellate Body has resulted in dwindling representation of the WTO membership, which threatens the legitimacy of the Appellate Body. Third, the decrease in serving members is likely to cause further delays in appellate proceedings. Indeed, by the end of my term as Chair in 2018, the Appellate Body could form only one division of three Appellate Body members . . . . If the Appellate Body cannot conduct proceedings because a Division cannot be composed, any losing party could prevent the adoption of the panel report by

appealing it to a paralyzed Appellate Body. The likely result is therefore not a reversion to the pre-GATT 1994 regime. Instead, an institutional paralysis stretching across panel and appellate proceedings will manifest. This will then impact the rights of members to procedures under Articles 21 and 22 of the DSU as regards surveillance and implementation. Furthermore, the prospect of securing agreement to new multilateral trade rules diminish if negotiating Members cannot rely on the principled and effective enforcement of those rules. The possible paralysis of the Appellate Body therefore concerns the operation of the multilateral trading system.<sup>7</sup>

Reasonable people can differ over the extent to which the Appellate Body's decisions exceeded its authority and/or rendered unwise or unnecessary interpretations of the covered agreements. However, the above-quoted statement of the Appellate Body chairman does not in our view overstate the existential crisis facing not only the WTO's dispute settlement system but the WTO as a whole. We agree that the system probably will not survive without a functioning mechanism for resolving trade disputes.

Under these circumstances, this 2018 WTO Case Review is likely to be the final or penultimate article. Not so much because we are weary after almost twenty years, but because there are not likely to be many Appellate Body reports to review after 2019, for an extended period or perhaps forever. The Appellate Body is likely to have only the three current Members—the minimum required to review panel decisions—only into December 2019. After that there will probably be only one Member left, which means appellate review will cease, and so will most of the activities of the panels, unless Members agree not to file appeals or resort to some other solution, since under the Dispute Settlement Understanding (DSU) panel reports may be appealed as a matter of right.<sup>8</sup> In other words, Members would have to renounce such right to appeal, an action that for some Members could be controversial domestically. More broadly, the Trump Administration is threatening the WTO on several fronts with a high likelihood of US withdrawal, *de facto* if not *de jure*, before the end of Mr. Trump's first term.

These issues are discussed in Part I of this Review, followed by individual reviews of the four Appellate Body reports issued during 2018.

---

<sup>7</sup> Appellate Body Report, *Annual Report for 2018*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_anrep\\_2018\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/ab_anrep_2018_e.pdf) (last visited May 29, 2019).

<sup>8</sup> See generally Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

### **A. Emasculation of the Appellate Body**

In the 2017 WTO Case Review<sup>9</sup> we discussed at length the threats posed by the Trump Administration to the future of the WTO's dispute settlement mechanism as it continued its policy of refusing to appoint or reappoint Appellate Body members, a policy that has continued through the end of December 2018.<sup>10</sup> The terms of two of the current members, Ujal Singh Bhatia and Thomas R. Graham, expire December 10, 2019.<sup>11</sup> Thus, without a change in U.S. policy blocking all new appointments to the Appellate Body, only one member will remain as of that date. Since a minimum of three members is required to adjudicate each appeal,<sup>12</sup> the Appellate Body will be forced to suspend operations, which will cripple the entire dispute settlement system.

As discussed in the earlier WTO Case Review, the United States has refused to approve new Appellate Body members until such time as modifications have been made to the system, but at the same time has declined to engage extensively in negotiations with other members over the content of those modifications. In fairness, since a consensus of 164 Members is required in most respects for major modifications, such changes are in my view unlikely. It is unclear whether the administration, which appears to be opposed to any kind of international adjudication as a violation of U.S. sovereignty, believes that no dispute settlement mechanism is better than the current system for the U.S., even though the U.S. has won numerous cases against China and other Members such as the EU and South Korea over the past several decades.<sup>13</sup>

The United States has complained since the George W. Bush Administration about many of the practices of the WTO's Appellate Body. In addition to delays in deciding cases beyond the 90-day period specified in the Dispute Settlement Understanding and permitting some judges to sit on cases after their terms have expired, substantive objections to certain Appellate Body rulings also exist. The most important in the United States' view are (a) expanding the obligations of certain members beyond what was agreed to in the negotiation of the various WTO agreements (particularly regarding subsidy and antidumping actions); (b) excessive use of dicta, deciding issues that are not necessary for the disposition

---

<sup>9</sup> Raj Bhala, et. al., *WTO Case Review*, 36 ARIZ. J. INT'L COMP. L. 253, 270 (2019).

<sup>10</sup> See, *The Key Issue for the WTO in 2019: Consensus or a Plurilateral Failure*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (Dec. 31, 2018), <https://inside-trade.com/daily-news/key-issue-wto-2019-consensus-or-plurilateral-future> (noting that the U.S. has been blocking appointments since mid-2017, and that the AB as of the end of 2018 was down to three members).

<sup>11</sup> *Appellate Body Members*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited Jan. 28, 2019).

<sup>12</sup> DSU, *supra* note 8, at art. 17.1.

<sup>13</sup> See generally WTO, *Disputes by Member*, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Jan. 28, 2019).

of a particular case; and (c) reviewing the validity of national legislation.<sup>14</sup> In my view these are all legitimate complaints and most were advanced by past administrations beginning with those of George W. Bush and Barack Obama.

More recently, the United States has strongly criticized the Appellate Body's "misguided insistence that its reports must serve as precedent absent cogent reasons."<sup>15</sup> Such criticism in our view is not persuasive; we believe that whether prior cases are treated formally as precedent or not, it makes sense for adjudicative bodies such as the Appellate Body to carefully consider prior rulings in order to comply with the DSU, which indicates that the "WTO is a central element in providing security and predictability to the multilateral trading system."<sup>16</sup>

There is no easy solution, and again, a significant problem is China. The broadly shared assumption when China became a WTO member in 2001 was that China would continue the movement away from a centrally planned economy that began before 2001 toward one that is more market-based in such areas as decreasing the powers of state-owned enterprises and reducing or eliminating WTO-illegal subsidies to specific industries that are favored as part of China's industrial policy. Thus, China's WTO accession agreement specified that China could be treated as a non-market economy for a 15-year period, which period expired several years ago, even though China today remains an economy governed largely by central planners.<sup>17</sup> These assumptions were totally incorrect. In recent years the Chinese government and the Communist Party have increased the powers of the state-owned enterprises (SOEs), and more generally increased its powers over the private sector. China, the government, and the party have also increased subsidies to such industries as steel and aluminum and made it extremely difficult for foreign enterprises to manufacture in China without divulging (through agreement or theft) their technology.<sup>18</sup>

The WTO system is not well adapted to dealing effectively with non-market economies, and it may be that there is no effective way to accommodate China in a manner that is satisfactory to the US, the EU, Japan, and many other members. This is a difficult problem to address:

---

<sup>14</sup> See Raj Bhala *supra* note 9, at 260.

<sup>15</sup> Hannah Monicken, *U.S.: WTO Appellate Body Rulings Should not be Considered Precedent*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (Dec. 18, 2019), <https://insidetradetrade.com/daily-news/us-wto-appellate-body-rulings-should-not-be-considered-precedent> (last visited Jan. 28, 2019).

<sup>16</sup> DSU, *supra* note 8, at art. 3.2; see also Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L. & POL'Y, 1-151 (1999).

<sup>17</sup> World Trade Organization, Ministerial Conference/General Council Decision on the Accession of Nov. 14, 2001, §II ¶15, WTO Doc. WT/L/432.

<sup>18</sup> See, e.g., Yu Nakamura, *Chinese Enterprises Write Communist Party's Role into Charters*, NIKKEI ASIAN REVIEW (Aug. 17, 2017), <https://asia.nikkei.com/print/article/287096>.

[The WTO's] rule book has not been updated since the completion of the last successful round of multilateral trade talks in 1994. It works tolerably well for traditional economic sectors in market economies where the boundaries between market and state are clear. But for a country such as China, where such lines are consistently blurred, it is difficult to use WTO disciplines on subsidies and other trade-distorting interventions.<sup>19</sup>

The likelihood of consensus on major revisions of the WTO agreements is, in our view, very small. The reforms desired by the United States and some other Members would almost certainly be opposed not only by China but by Brazil, India, and Russia among others. The Doha Round of negotiations begun in 2001 to expand and modernize several agreements (such as the General Agreement on Trade in Services), and to further reduce tariffs worldwide has been a miserable failure with little in the way of new important agreements due to the lack of consensus among major developed and major developing countries. We note that unlike the United Nations, the WTO has no equivalent of the Security Council, which give the major power control over all major decisions. With very minor exceptions every decision requires consensus of the entire membership.

Several members have attempted to address at least some of the concerns raised by the United States, but the discussions have not progressed very far. The group hosted by Canada has been able to recognize the problem but remains unable to come up with solutions, in part because neither the United States nor China is participating:

An effective dispute settlement system preserves the rights and obligations of WTO members, and ensures that the rules are enforceable. Such a system is also essential in building confidence amongst members in the negotiating pillar. We are deeply concerned that continued vacancies in the Appellate Body present a risk to the WTO system. We therefore emphasize the urgent need to unblock the appointment of Appellate Body members. We acknowledge that concerns have been raised about the functioning of the dispute settlement system and are ready to work on solutions, while preserving the essential features of the system and of its Appellate Body. For this purpose, our officials will continue to engage in discussions to advance ideas to safeguard and strengthen the dispute settlement system.<sup>20</sup>

---

<sup>19</sup> *How to Save the WTO From Washington and Beijing*, FINANCIAL TIMES (Oct. 24, 2018), <https://www.ft.com/content/bd5d6652-d607-11e8-a854-33d6f82e62f8> (last visited Jan. 28, 2019).

<sup>20</sup> *Joint Communiqué of the Ottawa Ministerial on WTO Reform*, GLOBAL AFFAIRS CANADA (Oct. 25, 2018), <https://www.canada.ca/en/global-affairs/news/2018/10/joint-communique-of-the-ottawa-ministerial-on-wtoreform.html>.



The EU offered a proposal in November 2018, but it only addressed procedural issues, new rules for outgoing Appellate Body Members continuing to stay on in certain cases but not others, and taking steps to assure that appellate proceedings will be finished within the 90-day period.<sup>21</sup> It seems safe to conclude that fixing these two Appellate Body procedural issues is not likely to satisfy the U.S. government if the substantive complaints are not addressed.

Several scholars have advanced particularly useful studies on the problem and have offered possible solutions. Georgetown University Law Professor and former Appellate Body Member Jennifer Hillman has offered several solutions, including *inter alia*, (a) providing a special Appellate Body for trade remedy disputes and (b) making panel decisions on trade remedies final, recognizing that Appellate Body decisions relating to national dumping and subsidies administrative determinations are among those with which the United States is most critical.<sup>22</sup> She also suggests that if the United States continues to refuse to join the consensus for appointing or reappointing Appellate Body Members, the action would be an appointment rather than a decision of the Dispute Settlement Body. Under such circumstances, the consensus requirements of the DSU would not be applicable, and voting could take place under the WTO Agreement.<sup>23</sup> Unfortunately, such voting would be highly controversial since there has been no voting at the WTO on major issues in the past, but the severity of the crisis for some would justify a departure, although other Members, in addition to the United States might well object.

Canadian trade negotiator and scholar Robert McDougal has made, what in our view, are particularly thoughtful comments:

Assuming the United States will eventually return to rules-based trade, restoring the WTO dispute settlement system to full capacity and enhancing its legitimacy will likely require some changes. This might include improving mechanisms for political oversight, diverting sensitive issues from adjudication, narrowing the scope of adjudication, improving institutional support and providing members more say over certain procedures. Preserving compulsory, impartial and enforceable dispute settlement in the WTO will require an accommodation of different perspectives on how the system should function. Achieving this, in whatever

---

<sup>21</sup> *WTO Reform: EU Proposes the Way forward on the Functioning of the Appellate Body*, EUROPEAN COMMISSION (Nov. 26, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1945>.

<sup>22</sup> Jennifer Hillman, *Three Approaches to fixing the World Trade Organization's Appellate Body: the Good, the Bad and the Ugly?*, INST. FOR INT'L ECON. L., 6-9 (Dec. 11, 2018).

<sup>23</sup> *Id.*; see also DSU *supra* note 8, at art 2.4.

form, will contribute to maintaining and even strengthening multilateral cooperation on trade.<sup>24</sup>

If one is willing to take the longer-term view and realize that the current impasse will eventually be resolved (even if it awaits a new US administration two or six years from now), preserving the system to the extent possible in the interim seems highly desirable, if challenging, to achieve.

### **B. Other U.S. Steps that Threaten the Future of the WTO**

Apart from Appellate Body issues *per se*, the United States has taken other steps that indicate to many that the United States does not wish to be bound by WTO obligations now or in the future, including but not limited to those imposed in Appellate Body reports. First, since June the United States have unilaterally imposed high tariffs based on so-called “national security” grounds under the seldom-used section 232 of the 1962 Trade Expansion Act, on steel (25%) and aluminum (10%) and threatens to do the same with autos and auto parts.<sup>25</sup> Aside from the question of whether it makes economic and political sense to impose tariffs on steel and aluminum from our most reliable allies such as Canada, Mexico, South Korea, Japan, and the European Union, the litigation arising at the WTO has put the WTO’s Appellate Body in an impossible position (assuming, probably unwisely, that the Appellate Body will still be functioning two years from now when a panel report is issued). The General Agreement on Tariffs and Trade (GATT) suggests that what constitutes “national security” is solely determined by the member: it provides in pertinent part that “[N]othing in this Agreement shall be construed . . . (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests. . . .”<sup>26</sup>

While some members wonder what the outcome should be if the exception is being used in bad faith, there is no jurisprudence supporting that approach. The effect is a Catch-22: if the panel or Appellate Body decides to second-guess the United States in the pending cases, the US will likely ignore the results and some other members will be concerned that their national sovereignty could also be abridged in a future case. If the authorities agree with the United States’ that it has complete discretion as to when the “national security” exception applies, nothing will prevent other members, particularly the larger ones including China, India, and Russia, from abusing the national security exception to other GATT obligations

---

<sup>24</sup> Robert McDougall, *Crisis in the WTO: Restoring the WTO Dispute Settlement Function*, CENTRE FOR INT’L GOVERNANCE INNOVATION, Paper No. 194, 1 (Oct. 16, 2018), <https://www.cigionline.org/publications/crisis-wto-restoring-dispute-settlement-function> (last visited Jan. 28, 2019).

<sup>25</sup> See, e.g., Proclamation No. 9705, 83 Fed. Reg 11625 (Mar. 8, 2018); see also U.S. Cong. Research Service, Section 232 *Auto Investigation* (IF10971, Oct. 24, 2018).

<sup>26</sup> General Agreement on Tariffs and Trade, art. XXI [hereinafter GATT].

such as most-favored national treatment and limitations on a Member's right to unilaterally raise its tariffs.<sup>27</sup>

In our view, the Administration has decided that the WTO cannot be reformed to its liking and intends to withdraw, at least indirectly. The United States Congress would not likely approve legislation authorizing U.S. withdrawal from the WTO, but realistically it cannot prevent emasculation of the AB and Administration use of the 1962 trade legislation to raise tariffs without Congressional approval. This conclusion regarding Administration intentions to withdraw from the WTO was further reinforced by the introduction of new legislation on January 23, 2019, the "Reciprocal Trade Act," that would give the President even broader discretion to raise tariffs unilaterally in contravention of WTO rules.<sup>28</sup> The proposed statute would in our view constitute a flagrant violation of the separation of powers and the Commerce Clause of the U.S. Constitution as well but whether Congress would effectively oppose it is an open question.

This new legislation has almost no chance of being enacted, but it also seems highly unlikely that the current Congress has the will to rein in the Administration's use of section 232. If the U.S. expands its unilateral increases in tariffs, it seems inevitable that China, India, and other members will inevitably feel free to do the same, and that those many countries that have retaliated against the U.S. for steel and aluminum tariffs will do so if other US tariff increases occur. Such actions—mimicking the ultra-high U.S. Hawley-Smoot tariff of 193—could unfortunately have similar disastrous results on international trade and the health of the world economy. One of the many ironies of current US policy is the fact that various efforts to negotiate new WTO agreements, such as those relating to fisheries subsidies, would effectively be worthless without a functioning dispute settlement mechanism.<sup>29</sup> The U.S. approach thus suggests to many a return to a situation where the most powerful members of the world economy may do what they please without restraint, even though the United States is not likely to be the most powerful economy in the world forever.

## II. DISCUSSION OF THE 2018 CASE LAW FROM THE APPELLATE BODY

---

<sup>27</sup> Russia is already arguing the Article XXII exception to justify its interventions in the Ukraine. See *Russia—Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/8 (Oct. 21, 2015), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds499\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds499_e.htm).

<sup>28</sup> See "Reciprocal Trade Act" Now Set for Introduction Next Week; "About a Dozen" Co-Sponsors So Far, WORLD TRADE ONLINE (Jan. 17, 2019), <https://insidetrade.com/trade/reciprocal-trade-act-now-set-introduction-next-week-about-dozen-co-sponsors-so-far>.

<sup>29</sup> See *WTO Members Warn New Rules Would be Worthless Without Appellate Body*, WORLD TRADE ONLINE (Dec. 13, 2018), <https://insidetrade.com/trade/wto-members-warn-new-rules-would-be-worthless-without-appellate-body>.

## **A. GATT Obligations and Exceptions – National and MFN Treatment, and Enabling Clause**

### 1. Citation

WTO Appellate Body Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/R (complaint by European Union), WT/DS497/AB/R (complaint by Japan) (issued Dec. 13, 2018, adopted Jan. 11, 2019) (“*Brazil Taxes*”)<sup>30</sup>

### 2. Facts<sup>31</sup>

To comprehend the specific tax measures at issue in the *Brazil Taxes* case, it is helpful to appreciate the underlying types of taxes with which those measures were associated. Brazil maintained four types of taxes affecting the information and communication technology (ICT), automotive, and export sectors. It is also helpful to appreciate that, at bottom, all of the controversial tax measures served a single policy goal: import substitution. Table 1 summarizes the four tax types, which are explained below:

(1) Tax on Industrialized Products (known by its Portuguese acronym, the “*IP*” Tax).

This Federal tax applied to all manufactured products, whether produced by Brazilian or foreign companies. The *IP* Tax rates were product-specific and depended on the price or value of the industrial product on which the tax was imposed. However, the tax base differed, depending on whether a product was made in Brazil or imported into the country.

For a domestically-made product, the tax base was the transaction value of the merchandise. For an imported good, the tax base was the customs value plus the import duties and charges paid. The *IP* Tax was not paid by the party that ultimately bore the burden of the tax. For domestically-made product, the industrial

---

<sup>30</sup> Hereinafter Appellate Body Report, *Brazil Taxes*.

Fourteen WTO Members participated as Third Parties – Argentina, Australia, Canada, Colombia, India, Korea, Russia, Singapore, South Africa, Turkey, Ukraine, and United States – with the participation of both China and Taiwan (Chinese Taipei) notable. A fruitful area of research may be to examine the instances of this dual participation and evaluate the extent to which China and Taiwan do, or do not, argue similar positions, with a view to gauging the independence of their respective multilateral trade policies.

The Panel Report is *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R, WT/DS497/R (issued 30 August 2017, adopted as modified by the Appellate Body 11 January 2019) [hereinafter Panel Report, *Brazil Taxes*].

<sup>31</sup> See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶¶ 1.4-1.13.

entity selling the product charged the tax to the buyer of that product, and then remitted the retained taxes monthly to Brazil's Federal Revenue Service. For an imported good, Brazil's customs authorities charge the tax to the importer of good during the customs clearance process.

For both domestically-made and imported items, the *IPI* Tax was a value-added tax (VAT), not a cumulative tax. So, the Tax due at each stage of the supply chain was adjusted by means of a credit (deduction) for taxes paid at earlier stages in that chain.

(2) Social Integration Program/Civil Service Asset Formation Program Contribution, and Contribution to Social Security Financing (known respectively by their Portuguese acronyms, "*PIS/PASEP*" and "*COFINS*").

These Contributions were made by all legal entities to Federal authorities based on the gross revenues earned by those entities. Like the *IPI* Tax, the Contributions were non-cumulative, *i.e.*, prior supply chain stage payments of the *PIS/PASEP* and *COFINS* were deducted (debited) from current stage liabilities. This Contribution scheme (as distinct from below) applied to domestically-produced goods.

(3) Social Integration and Civil Service Asset Formation Programs Contribution Applicable to Imports of Foreign Goods or Services ("*PIS/PASEP-Importation*") and Contribution to Social Security Financing Applicable to Imports of Goods or Services ("*COFINS-Importation*").

These contributions were variants of the *PIS/PASEP* and *COFINS* Contributions for the context of individual import transactions. They were imposed on the importation of goods, and their taxable base was the customs value of the imported merchandise. Like the contributions for goods made in Brazil, these contributions were non-cumulative, which means an importer could offset the amounts it owes on imports with its liability for domestic *PIS/PASEP* and *COFINS* contributions. Importers paid these contributions on a value-added basis, that is, on the difference between the customs value of the merchandise (what the importer paid for the good) and the importers' sales price (what the importer sold the good for).

(4) Contribution of Intervention in the Economic Domain (also known by its Portuguese acronym, "*CIDE*").

The *CIDE* Contribution was made to Federal authorities and was applicable, at a 10 percent tax rate, to remittances and royalty payments abroad. The taxpayers were any legal entity with a license to acquire or use technological knowledge of, or an agreement involving technology transfer from, a person residing or domiciled abroad, which involved technology transfer from that person.

The tax base was the amount paid or remitted monthly by the taxpayer to the person overseas.

Essentially, Brazil granted whole or partial relief from one or more of these four tax measures through trade-related measures for qualifying companies engaged in the ICT or automotive sectors, or in exportation.

**Table 1:**  
**Synopsis of Four Brazilian Tax Measures**

<i>Tax Measure Acronym</i>	<i>Explanation of Tax Measure</i>
<i>IPI</i> Tax	A value added (that is, non-cumulative) tax on all manufactured products.
<i>PIS/PASEP</i> and <i>COFINS</i> Contributions	Contributions (non-cumulative) for social integration, civil service assets, and social security, applicable to domestically-manufactured goods.
<i>PIS/PASEP</i> -Importation and <i>COFINS</i> -Importation Contributions	Contributions (non-cumulative) for social integration, civil service assets, and social security, applicable to imported goods.
<i>CIDE</i>	A 10 percent tax on remittances and royalties abroad.

These four tax measures allowed benefits in three sectors (ICT, automotive, or export) through seven detailed schemes for which only certain companies could qualify.

Table 2 summarizes those schemes, that is, the seven trade-related measures that are the controversial ones at stake in the WTO case. They are explained below:

(1) Tax benefits targeting the ICT sector under one of four trade-related measures:<sup>32</sup>

(a) The Informatics Program

This Program granted exemptions or reductions on the *IPI* Tax for sales of ICT goods. It also allowed for suspensions of the *IPI* Tax on purchases of imports of raw materials, intermediate goods, and packaging used to produce ICT and

---

<sup>32</sup> *Id.* ¶¶ 1.7-1.10.

automation goods. To receive these benefits, a company had to obtain accreditation, and companies eligible for accreditation had to satisfy two criteria.

First, they needed to develop or produce ICT or automation goods in compliance with Brazil's Basic Productive Processes ("PPBs," following the Portuguese acronym), which were the minimum stages or steps of operations, *i.e.*, of an industrial process, which are performed at a manufacturing facility in Brazil. Second, they needed to invest in ICT research and development (R&D) in Brazil. Further, once a product gained the status of "Developed in Brazil," then it was eligible for additional *IPI* Tax reductions. This status was earned only if the product was developed in Brazil by skilled technicians who were residents or domiciled in Brazil, and complied with product specifications set forth in Brazilian legislation.

(b) The Program of Incentives for the Semiconductors Sector (called, following its Portuguese acronym, the "*PADIS*" Program)

The *PADIS* scheme exempted accredited companies from taxes (via a zero-tax rate for them) with respect to finished semiconductors and information displays, and the inputs, tools, equipment, and software used to make these items. To become an accredited company, a legal person had to invest in R&D, and engage in certain activities, in Brazil.

(c) The Program of Support for the Technological Development of the Industry of Digital TV Equipment (called the "*PATVD*" Program)

The *PATVD* Program exempted accredited companies from certain taxes in respect of digital television transmission equipment (*i.e.*, equipment used to transmit radio frequencies for digital TV) and production goods for this equipment (*i.e.*, machinery, apparatus, instruments, inputs, and software). To gain accreditation, a legal person had to invest in R&D, and develop and manufacture digital TV transmission equipment, in Brazil, plus must meet the relevant PPB for its product to be deemed "Developed in Brazil."

(d) The Program for Digital Inclusion (*i.e.*, the Digital Inclusion Program)

This Program exempted from taxes (via a zero-tax rate), a Brazilian retailer from the *PIS/PASEP* and *COFINS* contributions, for certain digital consumer goods that were made in Brazil.

(2) Tax benefits targeting the automotive sector, under one trade-related measure called the "Incentive to the Technological Innovation and Densification of the Automotive Supply Chain" (known as the "*INOVAR-AUTO* Program")<sup>33</sup>

---

<sup>33</sup> *Id.* ¶ 1.11.

The *INVAR-AUTO* Program lowered the *IPI* Tax burden for accredited companies on certain motor vehicles. It did so by granting them a tax credit, or by reducing the *IPI* Tax rates on vehicles they imported from certain countries, and on certain domestic (*i.e.*, Brazilian-made) vehicles they sold. To be eligible for accreditation, an entity needed to be a domestic manufacturer, an importer-distributor, or an investor. To earn accreditation, an eligible entity had to fulfill two general requirements, plus additional specific requirements that depended on the type of entity.

(a) A domestic manufacturer needed to meet three out of four specific requirements, one of which was the performance of a minimum number of engineering and manufacturing activities in Brazil.

(b) An importer-distributor needed to comply with three specific requirements, namely, invest in R&D in Brazil, source basic industrial technology and engineering from Brazilian suppliers (in effect, build their capacity to provide these goods and services), and participate in a vehicle labeling program sponsored by Brazil's National Institute of Metrology, Quality, and Technology (known by its Portuguese acronym, "*INMETRO*").

(c) An investor needed to submit its plan for importing and manufacturing vehicles, with respect to each factory, plant, or industrial project it intended to establish in Brazil, to Brazil's Ministry of Development, Industry, and Trade ("*MDIC*").

(3) Tax benefits targeting exporters, under one of two trade-related measures, namely:<sup>34</sup>

(a) A scheme for Predominantly Exporting Companies (called the "*PEC*" Program).

Under this Program, the *IPI* Tax, *PIS/PASEP*, *COFINS*, *PIS/PASEP*-Importation, and *COFINS*-Importation contributions were suspended for purchases by exporting companies of raw materials, imported goods, and packaging materials.

(b) A Special Regime for the Purchase of Capital Goods for Exporting Enterprises (called the "*RECAP* Program")

Under this Program, the *PIS/PASEP*, *COFINS*, *PIS/PASEP*-Importation, and *COFINS*-Importation contributions were suspended for purchases by exporters of apparatus, equipment, instruments, and new machinery.

---

<sup>34</sup> *Id.* ¶ 1.12.



Despite the intricacy of the facts and the jargon of the names and acronyms of the scheme, the gist of what Brazil was attempting through its tax benefits was easy to spot: Brazil advanced a policy of import substitution, by advantaging companies that engage in local economic activity.

Indeed, the shorthand case name could just as appropriately be the *Brazil Import Substitution* case as it is the *Brazil Taxes* case. Brazil's import substitution policy was a throwback to the heyday of that economic development strategy in the 1950s-1970s, was doomed to be attacked at the WTO with the familiar multilateral legal weapons against discrimination under the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*. And, so it was, by the EU and Japan.

Table 3 summarizes the European and Japanese claims that the Appellate Body approved, *i.e.*, the points on which Brazil lost the case. And, of those points, the genuinely interesting ones concern paragraphs 2(b) and 2(c) of the 1979 Tokyo Round *Enabling Clause*. In other words, across the 154-page Report, the Appellate Body holdings and rationales at pages 125 therein onward are the most noteworthy, and thus emphasized in the analysis that follows Table 3.<sup>35</sup>

---

<sup>35</sup> As the Table indicates, the Appellate Body considered whether any of Brazil's disputed measures were illegal Red-Light subsidies. See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶¶ 4.1(c), 6.20-6.21 (focusing on Red Light export subsidies contingent on export performance); *Id.* ¶¶ 4.1(d), 6.22-32 (focusing on Red Light import substitution subsidies contingent on the purchase of domestic or foreign goods. Summarized briefly here (but not discussed in detail herein), Brazil was found not guilty of export subsidization, but guilty of import substitution subsidization. These verdicts followed logically from the nature of the disputed programs and national treatment violations (discussed in detail below), and consistent with the way WTO subsidy jurisprudence has evolved, the outcomes in this case depend on a highly-complex set of mind-numbing facts. It is not an overstatement to suggest that nearly any subsidy case today is akin to complex civil litigation in U.S. courts.

On Red Light export subsidies under *SCM Agreement* Article 3:1(a) for accredited or registered companies under the *PEC* and *RECAP* Programs, the Appellate Body disagreed with the Panel's choice of benchmarks for three categories of treatment (involving tax suspensions, which constitute government revenue otherwise foregone, and are financial contributions under Article 1:1(a)(1)(ii) of the *Agreement*) under Programs. The Panel looked for a general rule of taxation, whereas the Appellate Body said the correct legal standard (under Article 1:1(a)(1)(ii)) should have been the tax treatment of comparably situated taxpayers (that is, purchases of the relevant goods by non-accredited companies). Thus, the Appellate Body reversed the Panel finding that these Programs constituted unlawful Red Light support. *Id.* ¶¶ 5:139-5:176 (covering the Appellate Body's detailed discussion).

While Brazil won that battle, it lost the Article 3:1(b) fight over whether its ICT Programs constituted import substitution subsidies. They did, and the above discussion on the nature of those Programs implicitly explains why. Essentially, Brazil argued that the Panel was wrong in comparing the treatment of intermediate ICT goods under the ICT Programs with benchmark treatment in which the Panel arbitrarily, rather than selectively, distinguished among taxpayers. The Appellate Body disagreed with Brazil, saying the Panel correctly examined all relevant factual scenarios. Brazil also argued against the Panel finding that cash availability and implicit interest are revenue otherwise due under Article 1:1(a)(1)(ii) of the

**Table 2:**  
**Synopsis of Seven Trade-Related Measures Conferring Tax Benefits in Three Sectors**

<i>Sector</i>	<i>Trade-Related Measure Conferring Tax Benefits</i>	<i>Explanation of Trade-Related Measure</i>
ICT	Informatics Program	Exemptions or reductions from the <i>IPI</i> Tax on ICT goods, sales, and suspensions of the Tax on imports of items used to produce those goods, for accredited companies.  Accreditation requires production in Brazil (in compliance with a PPB), and R&D in Brazil.  A good “Developed in Brazil” gets further <i>IPI</i> Tax benefits.

*SCM Agreement*. Again, the Appellate Body disagreed, finding that tax exemptions and reductions that the Brazilian government does not collect at the time normally due under the benchmark treatment (for non-accredited companies) constitute funds that the beneficiaries (the accredited companies) enjoy. *Id.* ¶¶ 5:177-5:211 (covering the Appellate Body’s detailed discussion).

Thus, the Appellate Body ruled each of the disputed tax exemptions, reductions, and suspensions that Brazil granted to accredited companies for (1) sales of intermediate ICT goods they manufactured, (2) their purchases of raw materials, intermediate goods, and packaging materials (under the Informatics Program), and (3) inputs, capital, and computational goods (under the *PADIS* and *PATVD* Programs) were “financial contributions,” in form of “government revenue that is otherwise due [but] is foregone,” within the meaning of *SCM Agreement* Article 1:1(a)(1)(ii). (In mind-numbing detail, the Appellate Body distinguished, as it had to, given the complex facts of the case, the scope of this holding: for ICT items, PPBs that incorporated so-called “nested PPBs” under the Informatics Program, were import substitution subsidies, but not those that entailed only production steps, nor those for autos under the *INOVAR-AUTO* Program; and, PPBs under the *PATDV* Program, though not those under the *PADIS* or Digital Inclusion Programs, were illegal.) Moreover, the PPBs were conditions requiring the use of domestic components and sub-assemblies, and this condition must be fulfilled for the pertinent merchandise to obtain a tax benefit. This requirement is illegal under Article 3:1(b), as it is a contingency for the use of domestic like products instead of imported items. *Id.* ¶¶ 5:212-5:340 (covering the Appellate Body’s detailed discussion); *see also* Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶¶ 5:437-5:464 (regarding DSU Article 11).

	<i>PADIS</i> Program	Exemption from taxes for finished semiconductors and information displays, and inputs, tools, equipment, and software used to make these items, for accredited companies.  Accreditation requires R&D and certain other activities in Brazil.
	<i>PATVD</i> Program	Exemption from taxes on digital TV transmission equipment and items used to make this equipment, for accredited companies.  Accreditation requires R&D and manufacturing in Brazil, and compliance with relevant PPB to obtain “Developed in Brazil” designation.
	Digital Inclusion Program	Exemption from <i>PIS/PASEP</i> and <i>COFINS</i> contributions, for certain digital consumer goods that are made in Brazil, for Brazilian retailers.
Automotive	<i>INOVAR-AUTO</i> Program	Reduction of <i>IPI</i> Tax burden on certain motor vehicles via tax credit, or reduced <i>IPI</i> Tax rates on imported vehicles from certain countries, and on certain domestic ( <i>i.e.</i> , Brazilian-made) vehicles, to three types of accredited companies.  For accreditation:  A domestic manufacturer must engage in engineering and manufacturing activities in Brazil. An importer-distributor must invest in R&D in Brazil, source basic industrial technology and engineering from Brazilian suppliers, and participate in a government labeling program for vehicles. Finally, an importer must submit plans to the government to make vehicles in, or import them into, Brazil.
Export	<i>PEC</i> Program	Suspension of <i>IPI</i> Tax, <i>PIS/PASEP</i> , <i>COFINS</i> , <i>PIS/PASEP</i> -Importation, and <i>COFINS</i> -Importation contributions for

		purchases by exporters of raw materials, imported goods, and packaging materials.
	<i>RECAP</i> Program	Suspension of <i>PIS/PASEP</i> , <i>COFINS</i> , <i>PIS/PASEP</i> -Importation, and <i>COFINS</i> -Importation contributions for purchases by exporters of apparatus, equipment, instruments, and new machinery.

**Table 3:**  
**Synopsis of Successful GATT-WTO Claims Against Brazil**

<i>Successful Claim</i>	<i>Relevant GATT-WTO Provision</i>	<i>Appellate Body Holding</i>	<i>Appellate Body Rationale</i>
National Treatment Violations Not Excused by Domestic Subsidy Exception	GATT Article III:8(b)	<p>Majority Opinion: government revenue otherwise foregone is not a “payment of subsidy” within the meaning of Article III:8(b), thus this exception to the national treatment obligations of Article III is inapplicable.</p> <p>Separate Opinion: Foregone government revenue is a form of “payment of subsidy.”</p>	<p>Majority Opinion: government revenue otherwise foregone must be excluded from GATT Article III:8(b) concept of “payment of subsidy” so as to avoid rendering the Article III:2 prohibition against discriminatory taxation meaningless or redundant.</p> <p>Separate Opinion: Majority decision renders GATT and <i>SCM Agreement</i> inconsistent.</p>
National Treatment for Fiscal Measures Violation	GATT Article III:2, First Sentence	<p><i>IPI</i> Tax violates GATT Article III:2, first sentence.</p> <p>Credit-debit system associated with <i>IPI</i> Tax also violates this provision.</p>	<p><i>IPI</i> Tax reduces or exempts taxes for domestic like products, but not for foreign ICT merchandise, which bear a higher burden than those products.</p> <p>The difference arises because foreign-origin articles are ineligible for</p>

			accreditation under the ICT Programs.
National Treatment for Non-Fiscal Measures Violation	GATT Article III:4	ICT Program for finished and intermediate ICT goods, and <i>INOVAR-AUTO</i> Program, violate GATT Article III:4	<p>ICT Program for finished goods imposes differential accreditation requirements on imported versus domestic ICT merchandise.</p> <p>ICT Program imposes a higher administrative burden on non-incentivized intermediate merchandise than domestic like products, and also imposes PPBs and other production-step rules that incentivize the use of domestic intermediate goods.</p> <p><i>INOVAR-AUTO</i> Program accreditation requirements impose a differential burden on importers/distributors and foreign manufacturers that are not typical for the transactions at issue.</p> <p>In all instances, the differences modify the conditions of competition in a manner adverse to foreign versus like domestic products.</p>
MFN Violation	GATT Article I	Not at issue	Not at issue
MFN Violation Not Excused by Tokyo Round	<i>Enabling Clause</i> , Paragraph 2(b)	MFN violation not excused by Paragraph 2(b)	A non-tariff measure, such as tax reductions under the <i>INOVAR-AUTO</i> Program for auto imports from Argentina, Mexico, and Uruguay,

<i>Enabling Clause</i>			<p>does not come within the scope of Paragraph 2(b), unless it is governed by specific provisions on special and differential treatment that are distinct from the provisions of GATT.</p> <p>There are no such distinct provisions from the Tokyo or Uruguay Rounds on internal tax reductions.</p>
MFN Violation Not Excused by Tokyo Round <i>Enabling Clause</i>	<i>Enabling Clause</i> , Paragraph 2(c)	MFN violation not excused by Paragraph 2(c)	There is no “close” or “genuine” relationship between the <i>INOVAR-AUTO</i> Program tax reductions for autos from Argentina, Mexico, and Brazil, and any regional or global preferential trading agreement.
Unlawful Subsidy	<i>SCM Agreement</i> Article 3:1(a)	<i>PEC</i> and <i>RECAP</i> tax suspensions are not Red-Light export subsidies.	The Panel used the wrong benchmark under <i>SCM Agreement</i> Article 1:1(a)(1)(ii)
	<i>SCM Agreement</i> Article 3(b)	Most ICT Programs are Red Light import substitution subsidies.	The ICT Programs entail government revenue that is otherwise foregone, which is a financial contribution under <i>SCM Agreement</i> Article 1:1(a)(1)(ii), and entail a contingency on the use of domestic like products over imported merchandise to receive tax benefits, which is illegal under Article 3:1(b)

### 3. Issue 1: MFN Treatment Exception Under Tokyo Round *Enabling Clause* Paragraph 2(b)-(c)<sup>36</sup>

#### a. Pertinent Text and Questions

The 1979 Tokyo Round *Enabling Clause* is a permanent waiver from a core non-discrimination rule in multilateral trade law, namely, the GATT Article I:1 general MFN obligation. This Article states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, *and with respect*

---

<sup>36</sup> See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶¶ 4.1(e)(ii)-(iii), 6.39-6.42.

The issues of whether the EU and Japan had the burden of proof under Paragraph 4(a) of the 1979 Tokyo Round *Enabling Clause*, and associated issues of the Panel's terms of reference and notification, are not discussed herein. *Id.* ¶¶ 4.1(e), 5:341-5:397, 6.33-6.38. All *Enabling Clause* issues pertained to the same set of facts, namely, the differential and more favorable treatment, in the form of internal tax reductions, Brazil granted to auto imports from Argentina, Mexico, and Uruguay, under Brazil's *INOVAR-AUTO* Program.

Essentially, Brazil argued the Panel was wrong to rule the GATT Article I:1 MFN claim the EU and Japan raised were within the Panel's terms of reference. This argument involved (*inter alia*) procedural questions under Paragraph 4(a) of the *Enabling Clause*, in particular, its notification requirement. Did Brazil properly notify the WTO of its differential tax treatment, under Paragraph 4(a), as having been adopted under Paragraphs 2(b) and 2(c) of that *Clause*? If so, then the EU and Japan were on notice, and these complainants could have been expected to raise the *Enabling Clause* and identify its relevant provisions in their requests for formation of a Panel – which they did not do. *Id.* ¶¶ 5:341-5:351.

Brazil disputed the Panel's interpretation of the notification requirement under Paragraph 4(a) of the *Enabling Clause*, and the Panel's finding that Brazil did not notify the WTO of differential tax treatment favoring auto imports from Argentina, Mexico, and Uruguay under the *INOVAR-AUTO* Program under Paragraph 2(b). *Id.* ¶¶ 5:352-5:382. Brazil offered similar arguments with respect to Paragraph 2(b). *Id.* ¶¶ 5:383-5:397.

The Panel found Brazil failed to notify the WTO of its disputed tax measure under Paragraph 4(a), thus the EU and Japan had no such notice, and could not have been expected to mention Paragraphs 2(b) or 2(c) in their request for formation of a Panel. In other words, there was no burden on the complainants to invoke these Paragraphs in their initial pleadings, precisely because they had no notice from Brazil under these Paragraphs. Hence, their claims involving them were appropriate and inside the Panel's terms of reference.

The Appellate Body upheld all related Panel findings: Brazil did not satisfy the *Escape Clause* notification obligations in Paragraph 4(a), so the EU and Japan had no burden to mention their Paragraphs 2(b) and 2(c) points when they called for a Panel to be established. Once established, the complainants could make these points, and the Panel could consider them within its terms of reference. These procedural losses for Brazil mattered in that, had Brazil won, then Brazil would knock out the European and Japanese *Enabling Clause* claims.



*to all matters referred to in paragraphs 2 and 4 of Article III, \* [Ad Article omitted] any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*<sup>37</sup>

The key provisions (for purposes of the *Brazil Taxes* case) of the *Clause*, however, say:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties.

---

<sup>1</sup> The words “developing countries” as used in this text are to be understood to refer also to developing territories.

2. The provisions of paragraph 1 apply to the following:<sup>2</sup>
  - (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,<sup>3</sup>
  - (b) Differential and more favorable treatment with respect to the provisions of the General Agreement concerning *non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;*
  - (c) *Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs* and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the *mutual reduction or elimination of non-tariff measures*, on products imported from one another;
  - (d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favor of developing countries.

---

<sup>2</sup> It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favorable treatment not falling within the scope of this paragraph

---

<sup>37</sup> GATT, art. I:1 (emphasis added).

<sup>3</sup> As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of “generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries” (BISD 18S/24) [*i.e.*, GATT B.I.S.D. (18th Supp.) at 24 (1972).]

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favorable treatment so provided shall:<sup>4</sup>
- (a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;
  - (b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.<sup>38</sup>

<sup>4</sup> Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

The substantive *Escape Clause* questions in the *Brazil Taxes* case were:

- (1) Whether the Panel was wrong – as Brazil contended – in its interpretation and application of Paragraph 2(b);<sup>39</sup>
- (2) Whether Brazil’s differential tax treatment, in the form of internal tax reductions, for auto imports from Argentina, Mexico and Uruguay under Brazil’s *INOVAR-AUTO* Program was – as Brazil claimed – within the scope of Paragraph 2(b);<sup>40</sup> and
- (3) Whether – again as Brazil claimed – Brazil could justify under Paragraph 2(c) its differential taxation under a trade

<sup>38</sup> Differential and More Favorable Treatment Reciprocity and Fuller Participation of developing Countries, Nov. 28, 1979 (emphasis added).

<sup>39</sup> See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶¶ 4.1(e)(ii), 5:398-5:415, 4:28-4:36, 6:39-6:40.

<sup>40</sup> *Id.* ¶¶ 4.1(e)(ii), 5:398-5:415, 4:28-4:36, 6:39-6:40.

arrangement that had a genuine link to the *INOVAR-AUTO* Program internal tax reductions.<sup>41</sup>

On all three questions, Brazil lost at the Panel and Appellate Body stage. Thus, Brazil could not excuse its MFN violation, *i.e.*, its differential and more favorable tax treatment, in the form of tax reductions, for Argentine, Mexican, and Uruguay motor vehicles, but not like products originating from all other WTO Members with the *Enabling Clause*.

b. Brazil's Losing Argument on Enabling Clause Paragraph 2(b)

The Appellate Body examined Paragraph 2(b) of the *Enabling Clause*, specifically the phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT.” What is the scope of this phrase? Was Brazil correct in arguing the differential tax treatment of the *INOVAR-AUTO* Program fell within that scope?

Brazil urged that tax reductions were a non-tariff measure (NTM), *i.e.*, a non-tariff barrier (NTB), within the scope of Paragraph 2(b). That is because they constitute internal taxes, and “internal taxes” are expressly referenced in the first sentence of GATT Article III:2 (quoted and highlighted below). In turn, matters covered by Article III:2 subject to Article I, thanks to the fourth clause of Article I (quoted and highlighted above). Conceptually, Brazil's argument was to trace the thread of its tax reductions to the *Enabling Clause* through the national treatment obligation, and then back to the MFN obligation. Brazil had to make this argument, because the *Clause* is an excuse for—a waiver from—the MFN obligation. Brazil needed to fit its disputed measure inside the coverage of the *Clause*. But that fit was not explicit (because the *Clause* does not mention taxes), so Brazil needed to trace through a connection. Brazil supplemented this argument with the point that internal taxes are NTMs governed—in the language of Paragraph 2(b)—by “instruments negotiated multilaterally under the auspices of GATT.” Significantly, according to Brazil there is no specific multilateral instrument on internal taxes; rather, that instrument is GATT itself.

Brazil's argument hinged on its starting point: that a tax reduction is a type of NTM. The Panel eschewed a general, conceptual, and isolated definition of “NTM,” and instead examined the term in the context of Paragraph 2(b). At the time the GATT contracting parties adopted the *Enabling Clause*, they meant the phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” to connote NTMs other than those NTMs that GATT exclusively governed. During this time, the 1976-1979 Tokyo Round, the contracting parties negotiated and agreed to several plurilateral accords, namely, the Tokyo Round *Codes* (listed below). They

---

<sup>41</sup> *Id.* ¶¶ 4.1(e)(iii), 5:416-427, 4:28-4:36, 6:41-6:42.

intended to limit the scope of application of Paragraph 2(b) to discrimination expressly allowed in the special and differential (S&D) treatment provisions of those *Codes*.

That is, the *Enabling Clause* drafters wanted Paragraph 2(b) to excuse MFN violations that took the form of discrimination via S&D treatment that a *Code* authorized. Simply put, they wanted the Paragraph to complement the *Codes*: if a *Code* carved out S&D treatment, then it should be matched by a waiver from the MFN obligation under the *Enabling Clause*. In contrast, GATT Article III:2 and III:4 do not introduce S&D treatment, whether in the original GATT 1947, or the GATT 1994 of the Uruguay Round. So, if an NTM were to come within the scope of Paragraph 2(b), then it must be governed by a specific S&D treatment rule that is not in GATT (either GATT 1947 or GATT 1994). Brazil was wrong to look to those Articles, and indeed to GATT, *i.e.*, the Panel and Appellate Body were correct to think the Paragraph 2(b) phrase “‘instruments multilaterally negotiated under the auspices of the GATT’ must be ‘distinct from the provisions of the GATT 1994 incorporating GATT 1947.’”<sup>42</sup>

Brazil hoped the Panel would agree with it that (1) GATT 1994 itself is an “instrument” that was “multilaterally negotiated under the auspices of the GATT” as an institution, (2) GATT 1994 is the covered agreement that governs internal taxation, in Article III, (3) the *Enabling Clause* was incorporated into the Uruguay Round agreements as part of GATT 1994, and (4) the *Clause* itself thus an “instrument multilaterally negotiated under the auspices of the GATT.”<sup>43</sup> The Brazilian argument was confusing, if not circular, or as the EU politely put it, an “over-creative reading” of the relevant texts.<sup>44</sup>

### c. Appellate Body Holding on *Enabling Clause* Paragraph 2(b)

Brazil did not bamboozle the Panel or Appellate Body. The judges in Geneva appreciated (as the EU and Japan argued) that Brazil erroneously viewed the scope of Paragraph 2(b) as too expansive, covering any provision in GATT that relates to any NTM negotiated under the auspices of GATT or the WTO. This view, said the judges, had no foundation in the text, context, or object and purpose of Paragraph 2(b) of the *Enabling Clause*. Hence, Brazil’s tax reductions for merchandise originating in three WTO members (Argentina, Mexico, and Uruguay), but no others, was not excepted from the GATT Article I:1 obligation.

---

<sup>42</sup> *Id.* ¶ 5:403.

<sup>43</sup> *Id.*

<sup>44</sup> See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶ 5.404.

Simply put, the inconsistency of the *INVAR-AUTO* Program with the MFN rule did not fit within Paragraph 2(b).

d. Appellate Body Rationale on *Enabling Clause* Paragraph 2(b): Text, Context, and Object and Purpose

As to the textual rationale, Paragraph 2(b) is not a general endorsement of all exceptions to the MFN principle with respect to NTMs *per se*. It also is not an exception that permits differential and more favorable treatment on NTMs governed by GATT itself. Rather, the text carves out only a narrow exception to the MFN obligation. If Paragraph 2(b) were read the way Brazil wished, then the phrase “provisions of instruments multilaterally negotiated under the auspices of GATT” would have no meaning. Neither the Panel nor the Appellate Body is free to read words of a GATT-WTO instrument out of existence; to the contrary, the judges must figure out what the text with which they are confronted means.

A careful reading of the text indicates it allows for S&D treatment with respect to provisions in GATT only if those provisions (1) concern an NTM, and (2) that NTM is itself governed by a treaty other than GATT (or a WTO agreement) that has been negotiated by the contracting parties (or WTO Members). Further, as to the textual rationale, neither GATT Article III:2 nor Article III:4 introduce any S&D treatment, in the form of differential taxation, into GATT. There is no specific WTO agreement that deals with internal taxation. So, the scope of Paragraph 2(b) excludes Brazil’s disputed tax measure: that measure is not imported into the Paragraph 2(b) by Article III, and it is not the subject of any multilateral instrument referenced in that Paragraph.

As for the contextual rationale, the context in which the *Enabling Clause* was negotiated was the 1976-1979 Tokyo Round. During this Round, the CONTRACTING PARTIES adopted several plurilateral agreements dealing with NTMs, and those agreements are—in the language of Paragraph 2(b)—the

“instruments multilaterally negotiated under the auspices of ... GATT.” Indeed, there were nine such instruments, or *Codes*:<sup>45</sup>

- (1) Agreement on Technical Barriers to Trade (TBT Agreement)
- (2) Agreement on Government Procurement (GPA)
- (3) Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies and Countervailing Duties)
- (4) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Agreement)
- (5) Agreement on Import Licensing Procedures
- (6) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement)
- (7) Agreement on Trade in Civil Aircraft
- (8) International Dairy Agreement
- (9) International Bovine Meat Agreement

Several of these plurilateral *Codes*, in fact all except for (2) and (7)-(9), would become multilateral instruments through the 1986-1994 Uruguay Round.) As the Appellate Body indicated in the crucial part of its Report, this context also framed the purpose for Paragraph 2(b). On context and purpose, the Appellate Body rightly explained:

5.408 [A] number these plurilateral agreements sought to further the objectives of and/or build upon existing provisions of the GATT 1947, and contained provisions on S&D treatment for developing countries. The reference in Paragraph 2(b) to differential and more favorable treatment “with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” was in relation to these plurilateral agreements [the Tokyo Round *Codes*] that were negotiated [by the contracting parties] under the auspices of the GATT, as an institution, and furthered the objectives of and/or build upon existing provisions of the GATT 1947. Moreover, in using the phrase “provisions of instruments multilaterally negotiated under the auspices of the GATT,” as opposed to “instruments multilaterally negotiated under the auspices of the GATT,” Paragraph 2(b) referred to specific provisions of these plurilateral agreements, in particular, the

---

<sup>45</sup> *Id.* ¶ 5:408, n 1093.

S&D treatment provisions, and not the entire agreements themselves.

5.409. We find additional support from contemporaneous decisions adopted during the Tokyo Round of multilateral trade negotiations. In particular, we recall the *Decision* entitled “Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations,” which recognized in Paragraph 2 thereof that, “as a result of the Multilateral Trade Negotiations, a number of Agreements covering certain non-tariff measures ... have been drawn up.” We observe that Paragraph 1 of that *Decision* provided that the CONTRACTING PARTIES “reaffirm their intention to ensure the unity and consistency of the GATT system, and to this end they shall oversee the operation of the system as a whole and take action as appropriate.” Paragraph 3, in particular, stated that “[t]he CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements.”

5.410. In other words, the GATT CONTRACTING PARTIES addressed the issue of MFN treatment arising out of Article I of the GATT 1947 by reaffirming “their intention to ensure the unity and consistency of the GATT system” and expressly confirming that the benefits of the Tokyo Round plurilateral agreements were to accrue to all the contracting parties to the GATT, even those that were not parties to the plurilateral agreements, insofar as the subject matter of those agreements were covered by Article I of the GATT 1947. (In technical parlance, the Tokyo Round *Codes* were “open” plurilateral agreements, creating the free-ridership problem). Therefore, at the time of the conclusion of the Tokyo Round *Codes*, absent the *Enabling Clause*, a Contracting Party who [sic] was not a party to a Tokyo Round plurilateral agreement could have challenged a measure taken by a party to that plurilateral agreement pursuant to a S&D treatment provision thereof in favor of a developing country as being inconsistent with Article I of the GATT 1947.

5.411. The adoption of the *Enabling Clause*, particularly Paragraph 2(b), addressed this situation. Paragraph 2(b) provided an umbrella by excepting differential and more favorable treatment concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the

auspices of the GATT, i.e., differential and more favorable treatment accorded pursuant to the S&D treatment provisions of the Tokyo Round *Codes*, from the purview of a challenge under Article I of the GATT 1947.

(For example assume Canada, but not the United States, was a measure of the Tokyo Round *Customs Valuation Agreement*, and Canada provided S&D treatment under this *Agreement* to India and other less developed contracting parties. The U.S. could have sued Canada for violating the Article I:1 MFN rule, because Canada did not give the U.S. the S&D treatment it gave to poor countries. However, Canada would successfully defend the suit, invoking Paragraph 2(b)).

5.412. The foregoing considerations therefore suggest that the phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” in Paragraph 2(b), at the time of the adoption of the *Enabling Clause*, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round *Codes* and not the provisions of the GATT 1947.

5.413. ... [W]ith the entry into effect of the *WTO Agreement* [on 1 January 1995], the Tokyo Round *Codes* are no longer in force. The *Enabling Clause*, however, stands incorporated as an “integral part” of the GATT 1994. The Appellate Body considered in *EC – Tariff Preferences*, i.e., *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (adopted 20 April 2004), that “Members reaffirmed the significance of the *Enabling Clause* ... with [its] incorporation ... into the GATT 1994.” The Uruguay Round of multilateral trade negotiations culminated in the establishment of the WTO, following which GATT as an institution was replaced by the WTO. Article II:1 of the *WTO Agreement* expressly recognizes that “[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement.” The *Enabling Clause* as an “integral part” of the GATT 1994 falls within the scope of Article II:1 of the *WTO Agreement*. Therefore, while at the time of its adoption, Paragraph 2(b) of the *Enabling Clause* speaks of “instruments multilaterally negotiated under the auspices of the GATT” as an institution, following the entry into force of the *WTO Agreement*, Paragraph



2(b) refers to “instruments multilaterally negotiated under the auspices of the [WTO]” as an institution. Paragraph 2(b) of the *Enabling Clause*, following the entry into force of the *WTO Agreement*, thus provides for the adoption of a limited category of differential and more favorable treatment, namely treatment that concerns non-tariff measures governed by provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of the *WTO Agreement*, was not negotiated under the auspices of the WTO as an institution.<sup>46</sup>

Accordingly, the Appellate Body, upholding the Panel, ruled that Paragraph 2(b) applies only to S&D provisions in a covered agreement other than GATT (1947 or 1994) itself:

5.414. These considerations, read in light of the text, context, and circumstances surrounding the adoption of the *Enabling Clause* and thereafter the establishment of the WTO, indicate that Paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, Paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of “instruments multilaterally negotiated under the auspices of the [WTO].” Brazil’s contention that Paragraph 2(b) applies to non-tariff measures taken pursuant to the provisions of the GATT 1994 incorporating the GATT 1947, in our view, calls for Paragraph 2(b) to be given a meaning that was not ascribed to it either at the time of its adoption or thereafter with the establishment of the WTO. We therefore uphold the Panel’s finding ... that “a non-tariff measure within the scope of Paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.”<sup>47</sup>

Summarizing its holding and rationale on Paragraph 2(b), the Appellate Body said:

5.432. [P]aragraph 2(b) provides for the granting of “[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT.” Paragraph 2(b) provides for the adoption of a limited category

---

<sup>46</sup> *Id.* ¶¶ 5:408-5:413.

<sup>47</sup> *Id.* ¶ 5:413.

of differential and more favorable treatment, namely treatment that concerns “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT” as an institution. The phrase “non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT,” at the time of the adoption of the *Enabling Clause*, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round *Codes*, and not the provisions of the GATT 1947. Following the entry into force of the *WTO Agreement*, Paragraph 2(b) of the *Enabling Clause* provides for the adoption of a limited category of differential and more favorable treatment, namely treatment that concerns non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the WTO. The GATT 1994, while an integral part of the *WTO Agreement*, was not negotiated under the auspices of the WTO. These considerations read in light of the text, context, and circumstances surrounding the adoption of the *Enabling Clause* and thereafter the establishment of the WTO indicates that Paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, Paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of “instruments multilaterally negotiated under the auspices of the [WTO].”

5.433. We therefore uphold the Panel’s finding ... that “a non-tariff measure within the scope of Paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.” We also uphold the Panel’s findings ... that the tax reductions accorded under the *INOVAR-AUTO* program to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under Paragraph 2(b) of the *Enabling Clause*.<sup>48</sup>

Thus, because the internal tax reductions Brazil accorded to Argentine, Mexican, and Uruguayan imports, but not to imports from other WTO Members, were not distinct from GATT 1994—they were unconnected to any S&D treatment in any non-GATT instrument—they were not within the scope of

---

<sup>48</sup> *Id.* ¶¶ 5:432-5:433.

Paragraph 2(b) of the *Clause*. As they were not excused by the *Enabling Clause* waiver, they were illegal under the MFN rule of GATT Article I:1. What Brazil needed to save its differential tax reductions from this violation did not exist: an NTM, specifically a tax reduction, set out in a Tokyo Round *Code*, or a Uruguay Round agreement, other than GATT 1947 or GATT 1994.

e. Appellate Body Holding and Rationale on *Enabling Clause* Paragraph 2(c): “Genuine” Relationship of Preference to an RTA

Paragraph 2(c) of the *Enabling Clause* excuses from the Article I:1 MFN obligation preferences connected with Regional Trade Agreements (RTAs) (*i.e.*, Free Trade Agreements (FTAs) or Customs Unions (CUs)), and also global arrangements between or among developing countries (as distinct from GSP, which Paragraph (a) covers, and which concerns preference grants by developed to developing countries), which a preference-granting WTO Member enters into with one or more developing country Members. The RTAs or global scheme must concern the mutual reduction or elimination of tariffs, and likewise for NTMs.

The Appellate Body disagreed with the Panel view that for differential and more favorable treatment to be justified under Paragraph 2(c) of the *Enabling Clause*, there must be a “close *and* genuine link” between that treatment, on the one hand, and a regional agreement entered into among less developed WTO Members, on the other hand.<sup>49</sup> Both are not required, as it is not necessary to show a “close” plus a “genuine” link. That said, the Appellate Body upheld the Panel’s finding against Brazil. For differential tax treatment under the *INOVAR-AUTO* Program to be excused by Paragraph 2(c), Brazil needed to show it entered into an RTA with the beneficiaries: Argentina, Mexico, and Uruguay. That is, Brazil had to show either a “close” or “genuine” relationship between an FTA, CU, or GSP-like scheme with those countries and the internal tax reductions on motor vehicle imports from those countries. Brazil could not do so.

As the Appellate Body indicated in its key passages about Paragraph 2(c) of the *Enabling Clause*:

5.423. Paragraph 2(c) excepts differential and more favorable treatment accorded pursuant to “[r]egional or global arrangements entered into amongst” developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) limits the kind of differential and more favorable treatment to the: (i) mutual reduction or elimination of tariffs; and (ii) mutual reduction or elimination of

---

<sup>49</sup> See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶ 5.417 (emphasis added).

non-tariff measures. In case of the latter, Paragraph 2(c) adds that the “mutual reduction or elimination of non-tariff measures” have to be “in accordance with criteria or conditions which may be prescribed” by the WTO Members. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under Paragraph 2(c) for the differential and more favorable treatment it accords, has a “genuine” link or a rational connection with the regional or global arrangement adopted and notified to the WTO. Therefore, we disagree with the Panel to the extent it considered that, in order for any differential and more favorable treatment to be justified under Paragraph 2(c), there must exist *both* a “close” and “genuine” link to a “regional arrangement entered into amongst” developing country Members.

5.424. Brazil submits that the Panel rested its finding on its “flawed conclusion that because the [1980] *Treaty of Montevideo* and the provisions of the relevant *ECAs* do not expressly make reference to internal taxation, they did not have a genuine link with Paragraph 2(c).” Brazil mischaracterizes the Panel’s finding. The Panel did not find, as Brazil contends, that the 1980 *Treaty of Montevideo* and the relevant *ECAs* do not bear a genuine link with the requirements of Paragraph 2(c). Instead, the Panel found that “Brazil has not demonstrated how *the relevant tax reductions* [under the *INOVAR-AUTO* Program] found to be inconsistent under Article I:1 of the GATT 1994 are *related* to the RTA that Brazil has notified to the WTO (the *Treaty of Montevideo*) or the *ECAs* allegedly implementing that RTA.” Consequently, the Panel was not satisfied “how the relevant differential and more favorable treatment could be justified under Paragraph 2(c).” In reaching this conclusion, the Panel examined the provisions of the 1980 *Treaty of Montevideo* and found that “none of the provisions cited to in the [1980] *Treaty of Montevideo*” had any relation “in and of themselves” to the differential tax treatment under the *INOVAR-AUTO* Program (in the form of internal tax reductions accorded to some but not other Members) found to be inconsistent with Article I:1 of the GATT 1994. Turning to the relevant *ECAs*

referred to in Articles 21 and 22(I) of Decree 7,819/2012, the Panel noted that it “could not discern any ... relationship” that would attest to “the fundamental premise of Brazil’s argument, namely that the *INOVAR-AUTO* program is implementing the objectives of the *ECAs*.”

5.427. [W]e uphold the Panel’s finding ... to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the *INOVAR-AUTO* Program. Consequently, we also uphold the Panel’s finding ... that the internal tax reductions accorded under the *INOVAR-AUTO* Program to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under Paragraph 2(c) of the *Enabling Clause*.

5.434. [P]aragraph 2(c) excepts differential and more favorable treatment accorded pursuant to “[r]egional or global arrangements entered into amongst” developing country Members from a finding of inconsistency with Article I of the GATT 1994. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under Paragraph 2(c) for the differential and more favorable treatment it accords, has a “genuine” link or a rational connection with the regional or global arrangement adopted and notified to the WTO.

5.435. [T]he Panel did not find, as Brazil contends, that the 1980 *Treaty of Montevideo* and the relevant *ECAs* do not bear a genuine link with the requirements of Paragraph 2(c). Instead, the Panel found that Brazil has not demonstrated how the internal tax reductions under the *INOVAR-AUTO* Program found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA (the 1980 *Treaty of Montevideo*) that Brazil has notified to the WTO or the *ECAs* allegedly implementing that RTA. Consequently, the Panel was not satisfied how the relevant differential and more favorable treatment under the *INOVAR-AUTO* Program could be justified under Paragraph 2(c). Therefore, to the extent that the Panel relied on its earlier analysis concerning whether or not the *INOVAR-AUTO* Program, according the differential and more favorable treatment (i.e., the differential tax treatment in the form of

internal tax reductions accorded to some but not other Members), had a genuine link to “the arrangement notified to the WTO” in determining if the differential and more favorable treatment was substantively justified under paragraph 2(c), we find no error in the Panel’s approach. Indeed, if there is no genuine link between the measure at issue according the differential and more favorable treatment and the arrangements notified to the WTO, we find it difficult to see how the measure at issue could be substantively justified under Paragraph 2(c). 5.436. We therefore uphold the Panel’s finding ... to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the *INOVAR-AUTO* program. Consequently, we also uphold the Panel’s findings. . . . that the tax reductions accorded under the *INOVAR-AUTO* program to imported products from Argentina, Mexico, and Uruguay, and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under Paragraph 2(c) of the *Enabling Clause*.<sup>50</sup>

As the Appellate Body intimated, Brazil’s best argument—a losing one because of a lack of factual support—was that it had participated in the 1980 *Treaty of Montevideo* and *Economic Cooperation Agreements (ECAs)*.

But Brazil could not point to any provision in that *Treaty* or the *ECAs* that referenced tax preferences. Those agreements made no reference to internal taxation. And, Brazil could not explain how the *INOVAR-AUTO* Program tax breaks related to the *Treaty* or the *ECAs*. Indeed, the pertinent Brazilian decrees spoke only in general terms about tax treatment, with no specific identification of countries receiving preferences. In other words, reasoning in either direction – from the agreements to the Program, and from the Program to the agreements – Brazil failed to show a “close” or “genuine” link.

#### 4. Issue 2: National Treatment Exception for Domestic Subsidies, GATT Article III:8, and Separate Opinion<sup>51</sup>

Brazil’s threshold national treatment argument was that its disputed measures were exempt from GATT Article III:1-2 and 4, thanks to the exception for domestic subsidies to those rules in Article III:8. Brazil viewed this exception

<sup>50</sup> *Id.* ¶¶ 5:423-5:424, 5:427, 5:434-5:436.

<sup>51</sup> *Id.* ¶ 4.1(a), 6.17-6.19.

as prophylactic, that is, as applying automatically in all instances of domestic subsidies paid solely to a domestic producer. Brazil lost.

The Panel held a subsidy provided exclusively to a domestic producer pursuant to the GATT Article III:8(b) is not *per se* exempted from the national treatment disciplines of Article III. Paragraph 8(b) of this Article states:

The provisions of this Article shall not prevent the *payment of subsidies exclusively to domestic producers*, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products (emphasis added).<sup>52</sup>

In a minor victory for Brazil, the Appellate Body disagreed with the Panel, and overturned its finding, which it characterized as “overly broad and unqualified,” and not based on an assessment of whether Brazil’s disputed measures constituted the “payment of subsidies.”<sup>53</sup>

5:123. [T]he Panel’s interpretation of Article III:8(b) and its application to the measures at issue obfuscate the distinction between the effects of the payment of a subsidy to a domestic producer on the conditions of competition in the relevant product market(s) and the conditions for eligibility attaching thereto, on the one hand, and any other effects arising from requirements to use domestic over imported inputs in the production process, on the other hand. . .

5.124. By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy would not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III.

The Appellate Body observed that the measures which Brazil disputed entailed requirements to use domestic over imported goods in order to be eligible for receipt of a subsidy. Article III:8 does not cover such requirements.

In other words, said the Appellate Body, there is a distinction between what a beneficiary must do to receive a subsidy, and payment of the subsidy. Article III:8 exempts from the national treatment non-discrimination rule payments of subsidies to domestic, but not to foreign producers. But, it does not exempt the rules with which a beneficiary must comply to get the subsidy. Those rules must be non-discriminatory. In this case, they patently discriminated against foreign imported inputs in favor of domestic ones, i.e., they called for import

---

<sup>52</sup> *Id.* ¶ 5.82(b) (emphasis added).

<sup>53</sup> *Id.* ¶ 4.1(a).

substitution. Obviously, if Article III:8 allowed a preference to buy local over foreign goods as a condition for eligibility to get a subsidy, then that allowance would seriously undermine the national treatment rule.

So, the Appellate Body looked to the text and context of Article III:8(b), in light of its object and purpose, and checked the negotiating history of the provision—the familiar algorithmic interpretative methodology under Article 31 of the 1969 *Vienna Convention on the Law of Treaties*. Requirements to obtain a subsidy exclusively available to domestic entities are not exempt from the Article III national treatment disciplines. Rather, the exemption covers the narrow fact that the subsidy—the expenditure of revenue by a government—is paid exclusively to domestic producers. As support for these propositions, the Appellate Body cited its precedent in the 1997 *Canada Periodicals* case.<sup>54</sup>

Though the Appellate Body overturned the Panel holding under GATT Article III:8, Brazil still lost the overall battle under this provision. That is because the Appellate Body found that none of Brazil's disputed measures could be justified by Article III:8.<sup>55</sup> They all involved the exemption or reduction of internal taxes that affected the conditions of competition between like products. Applying a *Vienna Convention* analysis into the text, context, object, purpose, and negotiating history, and considering the *Canada Periodicals* precedent, the Appellate Body confirmed the phrase “payment of subsidies” in Article III:8(b) does not include the exemption or reduction of internal taxes that alter the conditions of competition between like products. Some of Brazil's disputed schemes were tax exemptions or reductions that tilted the competitive playing field in favor of Brazilian, and against foreign like product producers. Such schemes were not “subsidies” that were “paid” to domestic producers. Simply put, none of Brazil's measures fit within the key phrase of this exception.

Unfortunately, however, this ruling is incongruous with the definition of a “financial contribution” in Article 1:1(a)(ii) of the *SCM Agreement*, which expressly lists government revenue otherwise foregone as a potential type of subsidy. The Appellate Body did not attempt to square the point, but perhaps it can be said that the incongruity is explicable by virtue of the fact that two different treaties are involved—GATT and the *SCM Agreement*. What it did do,

---

<sup>54</sup> See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶ 6.19 (citing Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/A/R (adopted 30 July 1997)).

<sup>55</sup> See *id.* ¶ 5.124.



unsurprisingly, is rendered a tedious, unedifying 42-paragraph long discussion of Article III:8(b), spanning 14 single-spaced, small-font pages.<sup>56</sup>

Arguably then, the truly intellectually stimulating and legally intriguing portion of the Report on this issue is in the separate opinion of one Appellate Body member.<sup>57</sup> The gist of this four-paged concurrence is support for the majority's reversal of the Panel's "overly broad and unqualified" findings about GATT Article III:8(b), but disagreement on the interpretation of the term "payment of subsidies." The Separate Opinion points out that though the term "subsidy" is defined nowhere in GATT (not even in Article XVI), it is defined in Article 1:1 of the *SCM Agreement*. The Opinion acknowledges that the definition is (as per the Article 1 *chapeau*) "for purposes of this *Agreement*," but also observes that the *Agreement* contains several references and textual linkages to GATT (especially Article XVI), including with respect to government revenue that otherwise due and is forgone (for instance, through tax credits), as in Article 1:1(a)(ii) and footnote 1 thereto. In addition to this textual argument, the Separate Opinion reasons that the object and purpose of both GATT and the *SCM Agreement* are to enhance and improve disciplines on subsidies. So, they should be viewed together as part of a package that defines the rights and obligations of WTO Members with respect to subsidies. Thus, the Opinion persuasively argues the term "subsidies" as used in GATT (be it Article III:8(b) or XVI) should be defined in the same manner as in Article 1:1 of the *Agreement*.

In respect of the term "payment" as used in GATT Article III:8(b), the separate opinion reasoned from the *Oxford English Dictionary (OED)*, the 1997 *Canada Periodicals* case, and the 1999 *Canada Dairy* case.<sup>58</sup> The *OED* clearly does not define "payment" as restricted to a monetary transfer, because it explicitly refers to monetary equivalents. The *Canada Periodicals* precedent identified the scope of Article III:8(b) as exempting from the Article III national treatment disciplines the payment of a subsidy, meaning the expenditure of revenue by a government. And, the *Canada Dairy* precedent clarified the *Canada Periodicals* precedent by stating a "payment" need not be a direct monetary transfer, but rather can be provision of a good or service, or any charge on the public account, or foregone government revenue. Thus, said the Opinion, the majority view was wrongly narrow: a "payment" can be made through foregone revenue, such as reducing, exempting, or suspending taxes otherwise due, as that entails a charge on the public account, and thus involves governmental expenditure of revenue. In turn, Brazil's disputed measures would be covered as

---

<sup>56</sup> See *id.* ¶¶ 5.80-5.122 (little, if anything, of importance is found in these Paragraphs that is not already summarized above).

<sup>57</sup> See *id.* ¶¶ 5.125-5.138.

<sup>58</sup> See Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R (adopted Oct. 27, 1999).

“payments.” They are non-monetary transfers and have the equivalent “subsidy effect as do monetary transfers, and would be justified by Article III:8(b).

That interpretation, said the separate opinion, both of “payment” and “subsidy” is consistent with the *Vienna Convention*, and creates a single, harmonized package of rights and obligations about subsidies across both treaties, GATT and the *SCM Agreement*. Moreover, the Opinion rebutted the majority’s view about the phrase in GATT Article III:8(b), namely, “including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article [III].” This phrase is one example in a non-exclusive list of programs that qualify as “payments of subsidies exclusively to domestic producers.” The majority limited the phrase in an unduly narrow manner, to exclude foregone government revenue, because foregone revenue is not “derived from the proceeds of internal taxes or charges.” But, that limitation represents a misreading of the phrase because it excludes the context of the phrase, which, again, is just an illustrative, non-exhaustive, list of “payment of subsidy” schemes that qualify for the Article III:8(b) exemption from the national treatment rules of Article III.<sup>59</sup> Finally, under the majority’s narrow approach,

---

<sup>59</sup> The separate opinion also disputed the majority view that interpreting “payment of subsidies” to include “revenue foregone” would render the GATT Article III:2 prohibition against tax discrimination meaningless, and consequently disagreed with the Majority’s conclusion that “revenue foregone” is not a “payment of [a] subsid[y].” See Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶¶ 5:132-5:136. The Separate Opinion pointed to Article 1:1(a)(1)(ii) of the *SCM Agreement*, which lists “government revenue that is otherwise due but which is foregone as a type of financial contribution, and to the 2000 *FSC* precedent in which the Appellate Body explained that “foregoing” revenue “otherwise due” means the government raises less revenue that it would have against a benchmark comparison under the tax rules of the government in question. See Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations,”* WT/DS108/AB/R (adopted March, 20 2000).

The majority rather bizarrely and unfathomably reasoned that “revenue foregone” that is “otherwise due” is a concept coextensive with discriminatory taxation, because discrimination in favor of a domestic producer of a like product against a foreign import (e.g., in the form of a lower tax rate, or a tax deduction, deferral, or exemption) is revenue the government otherwise could have collected, but opted to forego. So, thought the Majority, any discriminatory taxation is *ipso facto* foregone government revenue. In turn, including foregone government revenue within the meaning of “payment of subsidies” in Article III:8(b) renders the prohibition against discriminatory taxation in Article III:2 meaningless.

To the contrary, said the separate opinion, government revenue otherwise foregone is a narrower concept than discriminatory taxation. Including foregone government revenue within the meaning of “payment of subsidies” gives effect to both Article III:8(b) and Article III:2, and to the key terms of the *SCM Agreement*.

staying only within the confines of GATT, the disciplines on actionable (Yellow Light) subsidies, with respect to foregoing of government revenue, would be undermined.

For both finished ICT products and intermediate goods, the *IPI* Tax presented a textbook violation of GATT Article III:2. This provision (coupled with its companion provisions, Paragraph 1 and the *Ad Article*) states:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to *internal taxes* or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered inconsistent with the provisions of the second sentence, but only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Thanks to the criteria for accreditation, finished ICT products that were imported into Brazil were ineligible for both tax reductions and exemptions.

The ICT Programs—the Informatics, *PADIS*, *PATVD*, and Digital Inclusion schemes—did not allow finished foreign ICT products to qualify for those tax benefits, hence the imports bore the full brunt of Brazilian taxes. In contrast, finished ICT goods, which were like products with the imports, enjoyed tax reductions and/or exemptions. Specifically, if an importer of finished ICT articles sold them to a wholesaler, retailer, or distributor, the importer charged, i.e., passed on, the *IPI* Tax to that purchaser, and then remitted the taxes due to the Brazilian government. However, for a like domestic product, no such passing on of the *IPI* Tax from the Brazilian-based producer-seller to the wholesaler, retailer, or distributor occurred; that is, the seller either charged no taxes, because of the

tax exemption for locally-made goods, or charged a lower tax (in comparison with that due on an imported item), because of the tax reduction.

Manifestly, the tax rate on imported merchandise exceeded that on like domestic products. The difference fit squarely within the language of “in excess of” in GATT Article III:2’s first sentence. Because the first sentence brooks no difference whatsoever—there is a *de minimis* exception for a violation of the second sentence, but not the first—the Panel and Appellate Body holdings were inevitable: a defeat for Brazil.

Likewise, for intermediate goods, the credit-debit system required tax payments up front if non-incentivized intermediate ICT articles were used in lieu of incentivized domestic intermediate goods. The latter group was exempt from taxes to which the former group were subject, or at least faced a lower tax burden than the former group. That is, buyers of imported intermediate ICT products had to pay a tax under the relevant ICT Program from which buyers using Brazilian-made intermediate goods were entirely or largely free. The Appellate Body wrote of the “effect” of this difference in terms of a reduced cash flow for companies purchasing the non-incentivized imported intermediate ICT articles.<sup>60</sup> But, as the 1996 *Japan Alcoholic Beverages* case dispensed with any “aims or effects” test for national treatment violations,<sup>61</sup> the Appellate Body took care to observe that the limitations on cash flow availability result in—in effect, are evidence of—the “higher effective tax burden on imported intermediate ICT products.”<sup>62</sup>

Still, more evidence of the discriminatory tax burden against non-incentivized, imported intermediate goods was the value of any tax credit generated from the up-front payment of taxes. When such a goods were sold, a tax credit connected to the tax payment was created, but its value depreciated over time until it was used (or adjusted). The “time lag” between the establishment and use of the tax credit meant that the value of the money—the sum total of accrued tax credits—declined over time.<sup>63</sup> So, as with finished goods, on intermediate ones the tax burden was higher under all of the ICT Programs for foreign than for like domestic products. The Panel and Appellate Body saw through the jungle of Brazil’s ICT tax rules to Brazil’s import substitution efforts. They held that

---

<sup>60</sup> Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶ 6.4.

<sup>61</sup> See Raj Bhala, *International Trade Law: A Comprehensive Textbook*, Vol. 1 (Interdisciplinary Foundations and Fundamental Obligations), Chs. 26-27, 31 (Durham, North Carolina: Carolina Academic Press, 5th ed., 2019) (excerpting and analyzing the Appellate Body Report, *Japan –Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996).

<sup>62</sup> Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶ 6.4.

<sup>63</sup> *Id.* ¶ 6.4.

Brazil's push to get ICT producers in Brazil to source intermediate goods from Brazilians rather than foreigners was a national treatment violation.

5. Issue 3: National Treatment for Non-Fiscal Measures, GATT Article III:4<sup>64</sup>

The ICT Programs—all of them, the Informatics, *PADIS*, *PATVD*, and Digital Inclusion schemes—also ran afoul of GATT Article III:4. Further, the Automotive Programs—specifically, the *INOVAR-AUTO* scheme—also violated this national treatment rule. Article III:4 states:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The ICT Programs accorded to imported ICT merchandise, and the *INOVAR-AUTO* Program to imported auto goods, treatment less favorable than that to similar domestic products.

One GATT Article III:4 problem with the ICT Programs lay in the accreditation requirements, which were more administratively burdensome on companies that imported finished ICT merchandise vis-à-vis companies that bought like domestic products. If those requirements were fulfilled, then a company would qualify for a tax exemption, reduction, or suspension on purchases or sales of finished ICT products. Conversely, failure to meet these requirements rendered companies ineligible for the tax benefits. The discriminatory accreditation requirements (which constitute the Article III:4 violation) obviously were associated with the differential tax burden (which constitute the Article III:2, first sentence, violation): foreign producers cannot be accredited under the ICT Programs; hence they never were able to qualify for a tax benefit. The Appellate Body used the familiar test for defining “treatment no less favorable,” namely, it inquired whether the competitive playing field was un-leveled thanks to the disputed measure. The answer was obvious: Brazil's ICT tax

---

<sup>64</sup> See *id.* ¶¶ 4.1(b)(ii)-(v), 5.43-5.79, 6.6-6.10, 6.13-6.14 (the *TRIMs* issue, holding, and rationale followed ineluctably from those under GATT Article III:4, and are not discussed herein); see also *id.* ¶¶ 4.1(b)(vi), 5.62-5.64, 5.77-5.79, 6.11-6.12, 6.15-6.16.

incentives were restricted to domestic ICT products, and it was the accreditation requirements that caused this restriction to “modify the conditions of competition to the detriment of imported products.”<sup>65</sup>

Another GATT Article III:4 problem concerned the credit-debit system of the ICT Programs, which affected non-incentivized intermediate ICT merchandise. The analysis and conclusion of the Appellate Body on this problem was essentially the same as it was for the accreditation requirements affecting finished ICT products. Under the credit-debit system, an importer or other purchaser of intermediate ICT merchandise paid the full amount of tax due on that merchandise upon importation (or purchase) of that merchandise. To be sure, the importer received a tax credit associated with the tax it paid. But, it also confronted an administrative burden to utilize that credit that a purchaser of an incentivized, domestic ICT product did not face. The importer had three taxation periods to accumulate debits against which it could offset its accrued credits. If the importer did not do so within those three periods, then it could be compensated for its unused tax credit through reimbursement by the Brazilian government of other taxes it incurred. However, to obtain that compensation was burdensome, and domestic intermediate ICT products had no such hurdle. The differential administrative impositions meant Brazil accorded treatment less favorable to imported versus domestic intermediate ICT goods.

A third GATT Article III:4 problem with the ICT Programs—the Informatics, *PADIS*, *PATVD*, and Digital Inclusion schemes—lay in their PPBs and other production-step requirements. These requirements were contingencies, namely, conditions obliging the use of domestic over foreign goods. Here, too, the underlying Brazilian government policy was one of import substitution, redolent of its mid-20<sup>th</sup> century approach.<sup>66</sup> That policy, as implemented through

---

<sup>65</sup> *Id.* ¶ 6.7 (at this point in its Report, the Appellate Body failed to clarify whether the accreditation requirements were less of an imposition on companies that bought incentivized domestic intermediate ICT articles than on those ones that used foreign inputs, i.e., whether its holding that the accreditation requirements violate GATT Article III:4 pertained to finished and intermediate goods, or just finished goods. Logically, the Appellate Body holding with respect to accreditation requirements would not apply to intermediate goods, because (as per the discussion above), importers of those goods were eligible for a tax credit (albeit only if they surmounted the relatively higher administrative burden), which is a kind of benefit, whereas this holding indicates that importers never could qualify for any tax benefit).

<sup>66</sup> See Raj Bhala, *International Trade Law: A Comprehensive Textbook*, Vol. 4 (Preferences, Labor, Environment, and Intellectual Property), Ch. 17 (discussing import substitution) (Durham, North Carolina: Carolina Academic Press, 5th ed., 2019).

the PPBs and production-steps, accorded less favorable treatment to imported intermediate ICT articles than to like domestic products.

As for the *INOVAR-AUTO* Program, its accreditation requirements imposed a more severe headache for companies that sought accreditation as importers or distributors of imports than on domestic producers. Accreditation entitled a company to accrue and use *IPI* Tax credits, which would reduce *IPI* Tax liability. The accreditation requirements affected three categories of entities: importers (or distributors of imports), investors, and manufacturers. A firm that was an importer (or distributor of imports), or a domestic manufacturer, could not gain accreditation unless it was located and operated in Brazil. Moreover, in locating and operating in the country, the importer (or distributor) needed to:

- (1) Invest in R&D in Brazil.
- (2) Purchase basic industrial technology, and engineering goods and services, in Brazil, plus expend funds to enhance the capacity of Brazilian suppliers.
- (3) Participate in a vehicle-labeling program (sponsored by *INMETRO*).
- (4) Performance of certain manufacturing steps in Brazil.

No domestic manufacturer faced these requirements to qualify for *IPI* Tax credits. And, none of these requirements were normally associated with foreign direct investment, i.e., “[t]hese activities cannot be considered to be typical for foreign manufacturers seeking to import motor vehicles into Brazil.”<sup>67</sup>

If a firm hoping for *IPI* Tax credits was an investor, then it could not obtain accreditation unless it was in the process of establishing itself in Brazil as a domestic manufacturer. What about a purely foreign manufacturer—how could it become accredited, and thereby enjoy *IPI* Tax credits? It would have to become accredited as an importer (or distributor), and thus would have to locate (or relocate) itself and operate in Brazil, plus meet the above-listed four requirements.

Therein lay the GATT Article III:4 national treatment violation: a domestic manufacturer already is located in Brazil, and thus gets the *IPI* Tax credit immediately, but a foreign producer has the burden of setting up in Brazil, and only if it satisfies this condition, and all the corollaries that go with this condition, gets that credit. Here again, “[t]he fact that foreign manufacturers have to undertake these activities to get accredited as importers/distributors implies that foreign manufacturers face a burden that domestic manufacturers do not face.” These activities are “typical” of a domestic manufacturer, as “any domestic manufacturer will carry out and perform a minimum number of manufacturing activities in Brazil.” A domestic—but not foreign—producer would be likely to

---

<sup>67</sup> Appellate Body Report, *Brazil Taxes*, *supra* note 30, ¶ 6.13.

invest in R&D locally, buy industrial technology and engineering items locally. This difference in “accreditation requirements . . . modif[ied] the competitive conditions,” and it was “adverse” to imports in comparison with like domestic products, because the requirements were atypical for foreign entities.

In reaching this correct conclusion, the Appellate Body was careless in one respect. The Appellate Body spoke of the “design” of the *INOVAR-AUTO* Program. Yet, it did not clarify whether or why “design” matters in finding a GATT Article III:4 violation. The modification of the conditions of competition, the playing field, as it were, is what traditionally matters, and should matter. Studying “design” can be a slippery slope into searching for legislative intent, a search endeavor for which the Appellate Body is ill-situated.

Note, too, that the Appellate Body equated “adversity” against foreign manufactures with “typicality.” If a transaction is typical for foreign and like domestic producers, then—following the Appellate Body logic—there is no adverse burden imposed on the foreign ones. After all, the mere modification of competitive conditions is not a violation of Article III:4. Article III:4 permits favoritism in favor of foreign players, and if there are differences in requirements that leave the playing field level between them, then the situation is one of “no harm, no foul.” A violation occurs only when the field is imbalanced against the foreigner, and that means finding an adversity that the foreigner uniquely faces. Here, the Appellate Body considered the typical behavior of foreign and domestic players. In other cases, the Appellate Body impliedly left open the possibility to measure “adversity” by a yardstick that is different, i.e., that does not evaluate typicality.

## 6. Commentary

### a. State the Facts, Please

It is a disappointment that after 23 years of jurisprudence, the Appellate Body still fails to write a clear summary of the facts in its decisions. It labels Part I of its opinions “Introduction,” and dedicates several paragraphs to what is properly known as the “procedural posture” of a case. That posture has little to do with the underlying facts that generated the issues of the case. The Appellate Body tends to bury those facts in footnotes, and render those footnotes all the less accessible with unconscionably small font. That is exactly what it did with respect to the disputed Brazil tax measures. Readers are forced to pour over (with



high-power reading glasses) footnotes 17-20, 25, 27, and 36 of the Report, in addition to the pertinent paragraphs in the text, to learn what the case is all about.

The disappointment is all the greater because a general trend in WTO litigation has been the increasing complexity of the cases, that is, of the facts, and the fact-intensive, fact-dependent nature of Appellate Body conclusions and rationales. It is difficult to understand those holdings and the reasons for them without a grasp of the facts, and a simple adjustment in how the Appellate Body constructs its Reports would go a long way in enhancing their value, both practical and pedagogical. So too, would a few simple summary tables, along the lines of those provided above.

#### b. Organize the Discussion, Please

The 154-page *Brazil Taxes* manuscript is one of the least well-organized among the Appellate Body's prodigious corpus of opinions. The logical flow of issues, holdings, and rationales—following a clear statement of the facts—would have been to cover as we did here, the GATT Article I MFN violation and its possible excuse under the *Enabling Clause*, Article III national treatment violation and its possible excuse under Article III:8(b), and finally—if necessary—the Red Light subsidy issues (plus the attendant *DSU* Article 11 claims). In other words, why not start with the non-discrimination claims that lie at the core of GATT? With a finding against Brazil on any of them (as the Appellate Body rendered), then why not exercise judicial economy on the subsidy contentions? Finding Brazil's measures violated the MFN and national treatment rules ought to have been enough to recommend that Brazil annul them. That several measures constituted import substitution subsidies perhaps was not necessary to dispense with the case, nor to have Brazil change its ways.

Regrettably, the Appellate Body members started with national treatment, then moved to the Red-Light subsidies, then to MFN and the *Enabling Clause*, and then to subsidy-related *DSU* Article 11 issues. The result is a jarring, post-modern, stream-of-seemingly endless technical points, not a concise, cogent linear narrative.

## **B. Trade Remedies – Antidumping and Price Suppression**

### 1. Citation

Appellate Body Report, *Russia – Antidumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R (issued Mar. 22, 2018, adopted Apr. 9, 2018) [hereinafter *Russia Vehicle ADs*].<sup>68</sup>

### 2. Facts

On November 16, 2011, the Department of Internal Market Defense (DIMD) of the Eurasian Economic Commission (EEC) began an antidumping investigation into certain vehicles coming into Russia from the EU.<sup>69</sup> The DIMD identified Russian manufacturers of like domestic vehicles, Sollers-Elabuga LLC (Sollers) and Gorkovsky Avtomobilny Zavod (GAZ).<sup>70</sup> The DIMD’s investigation resulted in the Russian Federation levying antidumping duties on certain light commercial vehicles from Germany and Italy pursuant to Decision No. 113 of May 14, 2013 of the EEC including any and all annexes, notices, and reports of the DIMD.<sup>71</sup> The EU challenged the antidumping duty on numerous grounds, including the definition of “domestic industry” and the DIMD’s failure to properly analyze price suppression.<sup>72</sup>

Although the Appellate Body report provides some useful guidance to administrating authorities on how to conduct an antidumping investigation, it breaks little new ground on any issue outside of price suppression. A prime example of the Appellate Body implementing precedent with little variation was its holding on the definition of “domestic industry.” “Domestic industry” was defined by the DIMD as including only Sollers, which accounted for 87.8% of the domestic industry during the investigatory period.<sup>73</sup> The Appellate Body held that the exclusion of GAZ from the definition of “domestic industry” was inconsistent with

---

<sup>68</sup> Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WTO Doc. WT/DS479/R (issued Jan. 27, 2017, adopted as modified by the Appellate Body, Apr. 9, 2018) [hereinafter Panel Report, *Russia Vehicle ADs*]. At the Appellate stage, there were four third party participants: Brazil, Japan, Ukraine, and the United States.

<sup>69</sup> *Id.* ¶¶ 2.1, 7.12.

<sup>70</sup> *Id.* ¶ 7.12.

<sup>71</sup> *Id.* ¶ 2.1.

<sup>72</sup> Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, ¶ 1.3, WTO Doc. WT/DS479/AB/R (adopted Apr. 9, 2018) [hereinafter Appellate Body Report, *Russia Vehicle ADs*].

<sup>73</sup> Panel Report, *Russia Vehicle ADs*, *supra* note 68, ¶ 7.4(a).

Russia's obligations under Article 3.1 of the Anti-Dumping Agreement.<sup>74</sup> The Appellate Body's reliance on *EC Fasteners – China* in this part of its holding, states that further explication would be redundant for readers already familiar with *EC Fasteners - China*.<sup>75</sup> *Russia Vehicle ADs* is primarily useful for its clarification of a proper (and improper) analysis of price suppression.

### 3. Price Suppression Issue

Both Russia and the EU disagreed with the Panel's conclusions, each raising issues on appeal related to price suppression.

- i. whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions because it failed to consider the impact of the financial crisis in determining the rate of return used to construct the target domestic price for its price suppression analysis (raised by Russia);
- ii. whether the Panel failed to make an objective assessment under Article 11 of the DSU in finding that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement when assessing the "explanatory force" of dumped imports for price suppression and whether the degree of price suppression was "significant" (raised by the European Union);
  - o conditionally, in the event the Appellate Body disagrees with the European Union's claims under Article 11 of the DSU, whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology will necessarily show that the dumped imports have "explanatory force" for the existence of price suppression (raised by the European Union); and
  - o in the event that the Appellate Body reverses the Panel's findings in this regard, whether the Appellate Body can complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether the dumped

---

<sup>74</sup> Appellate Body Report, *Russia Vehicle Ads*, *supra* note 72, ¶ 5.23.

<sup>75</sup> *Id.* at n. 71-77, n. 79, n. 93-95, n. 98, n. 104-109, and most especially n. 113.

imports have explanatory force for the existence of “significant” price suppression (requested by the European Union);

- iii. whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the record was not sufficient to require an objective and unbiased investigating authority to consider whether the market would absorb price increases beyond those that actually took place in the context of its consideration of price suppression (raised by the European Union);
  - conditionally, in the event that the Appellate Body reverses the Panel’s findings in this regard, whether the Appellate Body can complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine whether the market would accept additional domestic price increases (requested by the European Union).<sup>76</sup>

On balance, the Panel report favored the EU, finding Russia’s (or more precisely the DIMD’s) calculation of price suppression inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.<sup>77</sup>

*Russia Vehicle ADs* is a useful Appellate Body report for future anti-dumping calculations in one major respect. It tackles the question of whether outside economic forces can suppress prices such that an import erroneously appears to be dumped:

Russia challenges the Panel’s findings that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price. To Russia, the focus on one particular factor—such as the financial crisis—would lead to a biased price suppression analysis because the rate of return could be potentially influenced by a number of factors, and an analysis of all known factors is not required under Article 3.2. Russia requests us to reverse the Panel’s findings at issue. The European Union disagrees with Russia’s contention that an investigating

---

<sup>76</sup> *Id.* ¶ 4.1.b.

<sup>77</sup> *Id.* ¶ 5.55.

authority is not obliged to consider evidence that questions the rate of return used to construct the domestic target price. The European Union seeks to have the Panel's findings at issue upheld.<sup>78</sup>

In short, the DIMD calculated a rate of return based on market prices during the worst period of the global financial crisis.<sup>79</sup> Was it proper for the DIMD to expect prices to remain at those levels? The Panel said no.<sup>80</sup>

The Panel noted that Sollers had a particularly good year in 2009.<sup>81</sup> In fact, "Sollers' performance in 2009 was positively affected by the financial crisis."<sup>82</sup> The Panel attributed Sollers' good performance to "the financial crisis, when 'consumers preferred the cheaper light commercial vehicles' manufactured in the Customs Union between the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation."<sup>83</sup> The DIMD's mistake was simply assuming these favorable conditions for Sollers would continue, as "an investigating authority would act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement if the rate of return used in constructing a counterfactual target domestic price is not one that the domestic industry could have expected to achieve in the subsequent years under normal conditions of competition and in the absence of dumped imports."<sup>84</sup>

Russia's appeal on the issue of whether the DIMD should have accounted for the financial crisis breaks out into two different flavors of the same argument, which can be summarized as "we cannot account for every little thing." The first version of Russia's argument asserts a certain lopsidedness to AD investigations if dumping must be weighed against all other factors which could affect the rate of return. If the investigating authority must eliminate all other factors, individually and collectively, before concluding prices are suppressed by dumped imports, then the investigation has a strong bias against ever finding that dumping has affected domestic price.<sup>85</sup> The EU contended the DIMD took the idea to its extreme by assuming it is "not obliged to consider any evidence that questions the rate of return used to construct the domestic target prices."<sup>86</sup> The EU argued that the DIMD would not have to account for everything, just contradictory evidence. "To the European Union, if there is evidence before the investigating authority that the rate of return selected is very high because of exceptional circumstances in the market,

---

<sup>78</sup> *Id.* ¶ 5.43.

<sup>79</sup> Appellate Body Report, *Russia Vehicle Ads*, *supra* note 72, ¶ 5.45.

<sup>80</sup> *Id.* ¶ 5.55.

<sup>81</sup> *Id.* ¶ 5.57.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ¶ 5.47.

<sup>84</sup> Appellate Body Report, *Russia Vehicle Ads*, *supra* note 72, ¶ 5.57.

<sup>85</sup> *Id.* ¶ 5.56.

<sup>86</sup> *Id.*

relying on this rate without considering whether these circumstances will likely continue to exist, and without making any adjustments, leads to a biased price suppression analysis.”<sup>87</sup>

The second flavor of Russia’s “you cannot expect us to account for everything”-style argument asserts Article 3.2 obligations cannot be as broad as Article 3.5 obligations. As characterized by the Appellate Body, Russia argued:

The examination of “*all* known factors” is not required in the price suppression analysis under Article 3.2 of the Anti-Dumping Agreement. Russia submits that considering the impact of the financial crisis in the price suppression analysis would put an additional burden on the investigating authority to conduct, under Article 3.2, an exhaustive causation and non-attribution analysis analogous to the one required under Article 3.5 of the Anti-Dumping Agreement.<sup>88</sup>

Naturally, the EU’s rebuttal was that a consideration of *all* factors is not necessary, just the “exceptional circumstances” of the financial crisis which might “call[] into question the explanatory force of the dumped imports for the significant price suppression.”<sup>89</sup>

#### 4. Holding and Rationale

If the entire Appellate Body report could be summarized by one paragraph, that paragraph would be 5.46, where the Appellate Body strongly foreshadows its holding:

The Panel noted that the reference price for assessing price suppression under Article 3.2 of the Anti-Dumping Agreement is the domestic price “which otherwise would have occurred”. Article 3.2 does not provide specific guidance on how such a counterfactual situation should be constructed. According to the Panel, the investigating authority is guided by the principle set out in Article 3.1 of the Anti-Dumping Agreement. Thus, where an investigating authority constructs a target domestic price, it must use a rate of return that is objective and based on positive evidence. The Panel therefore considered that an investigating authority would act inconsistently with Articles 3.1 and 3.2 if the rate of return used in constructing a counterfactual target domestic price is not one that the domestic industry could have

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* ¶ 5.60.

<sup>89</sup> Appellate Body Report, *Russia Vehicle Ads*, *supra* note 72, ¶ 5.61.

expected to achieve in the subsequent years under normal conditions of competition and in the absence of dumped imports. If there is evidence before the investigating authority of market conditions during the selected year that calls into question whether that rate of return could be achieved in subsequent years under normal conditions of competition and in the absence of dumped imports, an investigating authority may not ignore such evidence.<sup>90</sup>

The Appellate Body is clearly signaling to the reader that the DIMD, the investigating authority which ignored such evidence, acted inconsistently with Articles 3.1 and 3.2 providing a shortcut to its holding.

Better still, the Appellate Body provides a paragraph-long instruction manual for investigating authorities that is useful and concise enough that an AD investigator could print it out and keep it by her desk. Because the Appellate Body signaled a clear order to the steps with the phrase “logical progression,” and with carefully ordered writing, the paragraph is reproduced here with numbers added:

This dispute calls for us to examine the disciplines of Article 3 of the Anti-Dumping Agreement, and in particular those paragraphs relating to price suppression. The paragraphs of Article 3 stipulate, in detail, an investigating authority’s obligations in determining the injury to the domestic industry caused by dumped imports. These provisions contemplate a logical progression of inquiry leading to an investigating authority’s ultimate injury and causation determination. This process entails a consideration of 1) *the volume of dumped imports* and 2) *their price effects*, and requires an examination of 3) *the impact of such imports on the state of the domestic industry*. These various elements are linked through a 4) *causation* and 5) *non-attribution* analysis between the dumped imports and the 6) *injury* to the domestic industry, taking into account all factors that must be considered and evaluated.<sup>91</sup>

The order of the steps in that paragraph mirrors the language in Articles 3.1 and 3.2 and draws on Appellate Body precedent like *China – GOES* to steer the progression of inquiry.<sup>92</sup> The way the Appellate Body summarized it here is quite handy.

---

<sup>90</sup> *Id.* ¶ 5.46.

<sup>91</sup> *Id.* ¶ 5.49.

<sup>92</sup> *Id.* ¶ 5.49, n. 147, n. 148.

Less helpful generally, but appropriate for this report specifically, the Appellate Body explains what the term “unbiased” means within the context of Article 3.1 almost as if speaking directly to Russia.

Article 3.1 is an overarching provision that sets forth a Member’s fundamental, substantive obligation with respect to the determination of injury and informs the more detailed obligations in the succeeding paragraphs. . . . The word “examination” relates to the way in which the evidence is gathered, inquired into, and, subsequently, evaluated. The word “objective” indicates that the examination process must conform to the principles of good faith and fundamental fairness. Thus, an “objective examination” requires the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.<sup>93</sup>

While WTO Members already acting in good faith and with fundamental fairness may consider these definitions redundant, this paragraph is nonetheless a concise summation of applicable Appellate Body precedent.<sup>94</sup>

An investigating authority, or at least one acting in good faith and accounting for all factors that must be considered and evaluated in determining price suppression, will have a certain degree of discretion in relying on reasonable assumptions and drawing inferences.<sup>95</sup> However, that discretion does have its left and right limits:

The exercise of this discretion must nonetheless comply with the requirements of Articles 3.1 and 3.2. Accordingly, when an investigating authority’s determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified. An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis.<sup>96</sup>

---

<sup>93</sup> *Id.* ¶ 5.51.

<sup>94</sup> See generally Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R (adopted Aug. 31, 2015).

<sup>95</sup> Appellate Body Report, *Russia Vehicle Ads*, *supra* note 72, ¶ 5.52.

<sup>96</sup> *Id.*



The “methodology premised on unsubstantiated assumptions” used by the DIMD here was applying the Sollers rate of return from 2009 while ignoring the global financial crisis.<sup>97</sup>

In price suppression investigations, causation can never be assumed, but must be weighed against contraindicating evidence.

[I]n *China GOES* – the Appellate Body stated that an investigating authority is required to consider whether dumped imports have “explanatory force” for the occurrence of significant suppression of domestic prices. In this respect, an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression. Where there is evidence on the investigating authority’s record concerning elements other than dumped imports that may explain the significant suppression of domestic prices, the investigating authority must consider relevant evidence pertaining to such elements for purposes of understanding whether dumped imports indeed have a suppressive effect on domestic prices.<sup>98</sup>

Here, the DIMD should not have ignored the “elements other than dumped imports,” which might have explained why Sollers had lower rates of return in succeeding years than it did in 2009.

The Appellate Body upheld the Panel’s finding that the DIMD should not have ignored the effect of the global financial crisis in its price suppression investigation.<sup>99</sup> The Appellate Body also rejected Russia’s argument that the Panel was blending together Article 3.2’s *price* investigation with Article 3.5’s *injury* investigation as a mischaracterization of what the Panel actually held.

We do not consider that the Panel’s interpretation of Article 3.2 of the Anti-Dumping Agreement suggests that an investigating authority is required to conduct a non-attribution analysis of all known factors that may be causing *injury* to the domestic industry in the context of its price suppression analysis. Rather, the Panel considered that it was not reasonable for an investigating authority to base its analysis on facts relating to a period where extraordinary conditions prevailed without, at a minimum,

---

<sup>97</sup> *Id.* ¶¶ 5.57, 5.61, 5.65.

<sup>98</sup> *Id.* ¶ 5.53.

<sup>99</sup> *Id.* ¶ 5.58.

explaining why the extraordinary conditions are not relevant to its price suppression analysis or making pertinent adjustments.<sup>100</sup> And the Appellate Body affirmed the Panel’s holding on price suppression.<sup>101</sup>

### 5. Commentary

As usual, the Appellate Body buried its harshest critique in a footnote. It began by showing a somewhat unfavorable opinion of Russia’s argument which has been characterized here as “we cannot account for every little thing.”

In our view, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression. Thus, we do not believe that the consideration of evidence regarding factors or elements – such as, in this dispute, the financial crisis – that call into question the explanatory force of dumped imports for the existence of price suppression would lead to biased analysis simply because there could be other factors that could also potentially affect the selected rate of return.<sup>102</sup>

The language of paragraph 5.59 hints that the Appellate Body found the argument, shall we say, unconvincing. But if that was not enough, the Appellate Body dropped footnote 178 in the middle of the paragraph.

We note that Russia has not identified, before the Panel or on appeal, any other relevant factor that should have influenced the rate of return used by the DIMD to construct the target domestic price.<sup>103</sup>

To the casual reader, the criticism may not seem like much, but it is as close to open critique as the Appellate Body ever comes. Essentially, the DIMD did not need to account for “every little thing,” just the one big, obvious, glaring, price-affecting factor of the global financial crisis. Russia could not name another factor that the DIMD would need to consider.

Perhaps this no-nonsense critique of specious arguments signals a growing confidence of the Appellate Body in its own critical faculties. Certainly, *Russia Vehicle ADs* shows a growing confidence in the Appellate Body’s own definitions.

---

<sup>100</sup> Appellate Body Report, *Russia Vehicle Ads*, *supra* note 72 ¶ 5.62

<sup>101</sup> *Id.* ¶¶ 5.64, 6.3 (a).

<sup>102</sup> *Id.* ¶ 5.59.

<sup>103</sup> *Id.* n. 178.

Paragraph 5.51 of the report is packed with definitions of relevant terms from Article 3.1 of the Anti-Dumping Agreement. But the Appellate Body does not once turn to the Oxford English Dictionary to explicate a single relevant term, as it frequently has in the past. In a well-deserved move, the Appellate Body instead consults itself and relies on its own precedents to show how the terms “positive evidence,” “objective,” “examination,” and “objective examination” have been used in the context of antidumping disputes.<sup>104</sup>

While the Appellate Body may deserve to have confidence in its abilities, confidence in its existence is less assured. As this publication has recently noted, the United States has been blocking the appointment or reappointment of Appellate Body members, potentially leading to the destruction of the Dispute Settlement Mechanism.<sup>105</sup> Thus, an analysis of *Russia Vehicle ADs* is perhaps incomplete without noting one U.S. reaction to the report.

The tremendous money that we’ve paid since the founding of the World Trade Organization—which has actually been a disaster for us. It’s been very unfair to us. The arbitrations are very unfair. The judging has been very unfair. And knowingly, we always have a minority and it’s not fair.<sup>106</sup>

The timing of this particular criticism seems bizarre because 1) it is factually incorrect;<sup>107</sup> and 2) the remarks were not made on the day of an unfavorable decision against the U.S. The only report issued on March 22, 2018—the day these remarks were made—was *Russia Vehicle ADs*. The choice of the U.S. President to criticize Appellate Body unfairness to the U.S. on a day the Appellate Body issued an unfavorable decision against only Russia, not the U.S., has no readily apparent explanation.

## **C. Trade Remedies – Countervailing Duties, Government Revenue Foregone, and Causation**

### 1. Citation

---

<sup>104</sup> *Id.* ¶ 5.51 nn. 150-153.

<sup>105</sup> Raj Bhala et al., *WTO Case Review 2017*, 36 ARIZ. J. INT’L & COMP. L. 257, 265 (2018).

<sup>106</sup> Remarks by President Trump at Signing of a Presidential Memorandum Targeting China’s Economic Aggression (Mar. 22, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-presidential-memorandum-targeting-chinas-economic-aggression/>.

<sup>107</sup> RAJ BHALA, *INTERNATIONAL TRADE LAW: A COMPREHENSIVE TEXTBOOK*, 505-06 (5th ed., 2019).

Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R (issued May 16, 2018, adopted May 28, 2018) [hereinafter *Pakistan Polyethylene CVDs*].<sup>108</sup>

## 2. Facts

This dispute revolves around the countervailing duty investigation into Pakistan’s Manufacturing Bond Scheme (MBS) and subsequent findings of injury and causation by the European Commission (hereinafter “Commission”). As a result of the Commission’s findings, the European Union (EU) imposed countervailing measures on certain polyethylene terephthalate imports from Pakistan. Polyethylene terephthalate, also known as PET, is commonly used in the plastics industry to make beverage bottles.<sup>109</sup> It also is used to make synthetic fabrics like polyester, as well as flexible food containers, thermal insulation for space blankets, 3D printing filament, and backing for adhesive tape.<sup>110</sup>

### a. Pakistan’s Manufacturing Bond Scheme

Both the EU and Pakistan acknowledged the MBS is a duty drawback scheme.<sup>111</sup> Such a scheme allows domestic producers who import production inputs to obtain “exemptions or remissions of import duties otherwise payable[.]” as long as those inputs contribute to the manufacturing of finished goods for export.<sup>112</sup> Under the MBS, a producer deposits an indemnity bond and post-dated checks covering the total customs duty and sales tax for the imported inputs to the Pakistan Customs Department.<sup>113</sup> Once the company is ready to export its finished goods, it submits a declaration to a Pakistani customs official that includes an attachment

---

<sup>108</sup> The Panel Report in *Pakistan Polyethylene CVDs* is WTO Panel Report, *European Union – Countervailing Duties on Certain Polyethylene Terephthalate from Pakistan*, WTO Doc. WT/DS486/R (adopted May 28, 2018) [hereinafter Panel Report, *Pakistan Polyethylene CVDs*] (at the Appellate stage, China and the United States were third party participants).

<sup>109</sup> Appellate Body Report, *European Union–Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R (issued May 16, 2018, adopted May 28, 2018) [hereinafter *Pakistan Polyethylene CVDs*], at n. 3.

<sup>110</sup> *Polyethylene Terephthalate*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Polyethylene\\_terephthalate](https://en.wikipedia.org/wiki/Polyethylene_terephthalate), (last visited Mar. 3, 2019).

<sup>111</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, at n. 173.

<sup>112</sup> *See id.* ¶ 5.68.

<sup>113</sup> *Id.* ¶ 5.70.

listing all the inputs used in manufacturing the goods.<sup>114</sup> If the customs official accepts the declaration, then the previously submitted indemnity bond and post-dated checks are released to the producer.<sup>115</sup>

#### b. The European Commission's Investigation

Novatex is a Pakistani company that benefited from the MBS. On September 3, 2009, the Commission began a countervailing duty investigation into imports of PET produced and exported by Novatex from July 1, 2008 to June 30, 2009. The Commission found the MBS to be “an impermissible duty drawback system” because Pakistani authorities failed to apply a “proper verification system to monitor the amount of duty-free imported inputs” used to produce the finished goods for export.<sup>116</sup> Thus, upon finding the scheme was a countervailable subsidy, the Commission reasoned that “the benefit consisted of the remission of the total import duties normally due upon importation of inputs.”<sup>117</sup> Had the Commission deemed the MBS to be a permissible drawback system, then the exception for drawback systems would have applied and “only an excess remission of duties [could] be countervailed.”<sup>118</sup>

The Commission undertook its injury causation analysis in two steps. First, the Commission looked at the impact of the subsidized imports and whether they caused injury to the EU industry. According to the Commission, “it is considered that a causal link exists between those imports and the [EU] industry’s injury.”<sup>119</sup> Second, the Commission examined “other factors” that could have caused injury to the EU industry. The Commission found the following “other factors” did not cause injury to the EU industry:

- EU industry’s export activity;
- imports from third countries other than Korea;
- competition from the non-cooperating producers in the EU;
- geographic location of the EU’s industry, and
- lack of vertical integration of the EU industry.<sup>120</sup>

---

<sup>114</sup> *See id.* ¶ 5.71.

<sup>115</sup> *See id.*

<sup>116</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.72.

<sup>117</sup> *Id.* ¶ 5.73.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ¶ 5.150.

<sup>120</sup> *See id.* ¶ 5.152.

However, the Commission did find the following factors made a limited contribution to the EU industry's injury:

- imports from Korea, and
- economic downturn in 2008 and the contraction in demand that accompanied the downturn.

Despite finding these two factors contributed to the domestic industry's injury, the Commission stated the factors "did not 'break the causal link' found between the subsidized imports and the injury to the EU industry."<sup>121</sup> Thus, on May 31, 2010, the Commission issued a Provisional Determination that imposed provisional countervailing duties on PET from Pakistan.

Several months later, the Council of the European Commission (hereinafter "Council") largely confirmed the Commission's Provisional Determination findings. Notably, the Council expanded its analysis to include an assessment of the following additional "other factors" that may have contributed to the injury to the EU industry:

- Low prices of crude oil;
- financial and technical problems experienced by certain EU producers;
- lack of investment by the EU PET producers; and
- contraction in demand during the July 1, 2008 to June 30, 2009 period.<sup>122</sup>

The Council found the first three of these additional factors "did not materially contribute to the injury observed."<sup>123</sup> It also found that while the contraction in demand in the wake of the 2008 economic downturn did contribute to the injury experienced by the EU industry, its impact "did not break the causal link" found between the subsidized imports and the injury to the EU industry.<sup>124</sup> The Council issued its Definitive Determination on September 27, 2010, and concluded the MBS was "a countervailable subsidy contingent in law upon export performance."<sup>125</sup> The Definitive Determination imposed definitive countervailing duties on PET from Pakistan and definitively collected the provisional countervailing duties under the earlier Provisional Determination.<sup>126</sup>

Unsatisfied with the European investigation and subsequent imposition of countervailing duties on Pakistani PET imports, Pakistan lodged a formal complaint with the WTO. The WTO established a Panel on March 25, 2015. Shortly

---

<sup>121</sup> *Pakistan Polyethylene CVDs*, supra note 109, ¶ 5.152.

<sup>122</sup> *See id.* ¶ 5.154.

<sup>123</sup> *Id.* ¶ 5.155.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* ¶ 1.3.

<sup>126</sup> *See Pakistan Polyethylene CVDs*, supra note 109, ¶ 1.4.

thereafter, the EU lifted the countervailing duties at issue on September 30, 2015. Thus, the Panel did not make recommendations to the Dispute Settlement Body (DSB) in its report circulated on July 6, 2017.<sup>127</sup>

This review will focus on two key issues that arose on appeal. First, whether a subsidy only exists in a duty drawback scheme “when an ‘excess’ remission occurs representing government revenue foregone that is otherwise due.”<sup>128</sup> Specifically, this issue concerned the meaning of the wording “in excess of those which have accrued” in Article 1.1(a)(1)(ii) and footnote 1 of the Agreement on Subsidies and Countervailing Measures (hereinafter “SCM Agreement”). Second, whether the Commission violated Article 15.5 of the SCM Agreement by finding a “causal link” between subsidized PET imports and the injury *before* completing a non-attribution analysis into other known factors causing injury.

### 3. Issue 1: Government Revenue Foregone and SCM Agreement Article 1:1(a)(1)(ii)

The first key issue on appeal concerned the Commission’s finding of government revenue foregone and determination that “the MBS is a countervailing subsidy contingent upon export performance.”<sup>129</sup> According to the Panel, this determination by the Commission violated Article 1:1(a)(1)(ii), footnote 1, and Annexes I, II, and III of the SCM Agreement. The Panel determined Article 1.1(a)(1)(ii) requires a comparison “between the remission duties obtained by a company under a duty drawback scheme,” and “the duties that accrued on imported production inputs used by that company to produce” the final good for export.<sup>130</sup> Specifically, the Panel articulated an “excess remissions principle” that states “in the context of duty drawback schemes, a subsidy exists only when an ‘excess’ remission occurs representing government revenue foregone that is otherwise due.”<sup>131</sup>

In reaching its conclusion, the Panel analyzed the additional provisions cited in footnote 1. The EU had asserted “the cited provisions in footnote 1, particularly Annex II(II)(2) and Annex III(II)(3) to the SCM Agreement, limit the situations in which the excess remissions principle applies.”<sup>132</sup> However, the Panel disagreed and stated the Ad Note of Article XVI of the GATT articulates “the excess

---

<sup>127</sup> *See id.* ¶1.8.

<sup>128</sup> *See id.* ¶ 5.62.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* ¶ 5.79.

<sup>131</sup> *Pakistan Polyethylene CVDs, supra* note 109, ¶ 5.63.

<sup>132</sup> *Id.* ¶ 5.80.

remissions principle ‘without qualification.’”<sup>133</sup> In its analysis, the Panel determined Annex I(i) *reiterates* the excess remissions principle, while Annex II(I)(2) *does not restrict* the excess remissions principle. The Panel also found the wording in Annex II(II)(1) “*assumes the operation* of the excess remissions principle.”<sup>134</sup>

In particular, the Panel considered that Annex II(II)(2) provides guidance for an investigating authority when there is no functional verification system, namely, that “further examination” should be carried out to determine “whether an excess payment occurred.”<sup>135</sup> Although Article II(II)(2) offers “incomplete guidance” as to “what would happen if an exporting Member did not carry out the envisaged further examination,” the Panel determined the “silence” *does not restrict* the application of the excess remissions principle.<sup>136</sup> According to the Panel, “this ‘silence’ in Annex II(II)(2) does not mean that other portions of Annex II cease to speak.”<sup>137</sup> In a similar way, the Panel found the “silence” in Annex III(II)(3) *does not restrict* the excess remissions principle.<sup>138</sup> In applying the excess remissions principle to the case at hand, the Panel recalled “the Provisional Determination made it clear that the financial contribution was not the excess remissions but rather the total amount of unpaid duties.”<sup>139</sup> The Commission attempted to justify this approach by finding Pakistan did not have a functional verification system and finding no “further examination” was undertaken by Pakistan.<sup>140</sup> However, the Panel did not find these reasons sufficient to exempt application of the excess remissions principle. Instead, the Panel considered “if an exporting Member’s system is found to be wanting under Annex II(II), the amount of excess remissions would need to be determined on the basis of information available to the investigating authority.”<sup>141</sup> Thus, the Panel found the Commission violated Article 1.1(a)(1)(ii) of the SCM Agreement because it did not provide a “reasoned and adequate explanation for why the entire amount of unpaid duties was a financial contribution and that those duties were ‘in excess of those which have accrued.’”<sup>142</sup>

On appeal, the EU argued the “excess remission principle” as set forth by the Panel is an incorrect interpretation of Article 1:1(a)(1)(ii), footnote 1 of the SCM Agreement. First, the EU asserted that the Panel incorrectly interpreted the wording “in accordance with” in footnote 1 of the SCM Agreement.<sup>143</sup> Second, the EU claimed that the Panel “incorrectly interpreted the alleged ‘silence’ in Annexes II

---

<sup>133</sup> *Id.* ¶ 5.81.

<sup>134</sup> *Id.* ¶ 5.84 (emphasis added).

<sup>135</sup> *Id.* ¶ 5.85.

<sup>136</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶¶ 5.85-5.86 (emphasis added).

<sup>137</sup> *Id.* ¶ 5.86.

<sup>138</sup> *Id.* ¶ 5.87 (emphasis added).

<sup>139</sup> *Id.* ¶ 5.89.

<sup>140</sup> *Id.* ¶ 5.85.

<sup>141</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.90.

<sup>142</sup> *Id.* ¶ 5.91.

<sup>143</sup> *See id.* ¶ 5.93.



and III to the SCM Agreement.”<sup>144</sup> In addition, the EU proffered a policy argument for reversing the Panel’s “incorrect” interpretation, namely, that applying the Panel’s interpretation in practice would “relieve WTO Members from ‘making any efforts’ to establish a reliable and effective monitoring system” to comply with Annexes I, II, and III.<sup>145</sup> Thus, the EU requested the Appellate Body “to declare moot and of no legal effect the entirety of the Panel’s findings with respect to the MBS on the grounds that the Panel applied the wrong legal standard.”<sup>146</sup>

In response, Pakistan argued that a subsidy under a duty drawback system is defined as the excess remission, and that definition does not change nor is it “subject to any conditions.”<sup>147</sup> Rather, “the existence of any excess must be determined on the basis of the facts.”<sup>148</sup> In addition, Pakistan refuted the EU’s policy argument, stating “the continued threat of either multilateral or unilateral action against an export subsidy is a ‘powerful incentive’ to ensure adequate monitoring of duty drawback systems.”<sup>149</sup>

The initial question before the Appellate Body was “what, in the context of duty drawback schemes, constitutes a financial contribution element of the subsidy within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement.”<sup>150</sup> Article 1.1(a)(1)(ii) of the SCM Agreement reads:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [.]

Footnote 1 reads:

In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for

---

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.64.

<sup>147</sup> *Id.* ¶ 5.104.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ¶ 5.132.

<sup>150</sup> *Id.* ¶ 5.94.

domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.<sup>151</sup>

The Appellate Body considered Article 1.1(a)(1)(ii) to set forth a “general description of revenue foregone.”<sup>152</sup> Footnote 1 adds color to this description because it “identifies specific instances of revenue foregone that ‘shall not be deemed to be’ subsidies.”<sup>153</sup>

The Appellate Body sought a more detailed examination of the wording in footnote 1 “in accordance with.” It stated footnote 1 and all the provisions identified therein contribute to the meaning of a financial contribution “in the form of government revenue forgone that is otherwise due within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement.”<sup>154</sup> The Annexes of the SCM Agreement provide guidelines for determining the “precise level of the excess amount or remission or drawback,” and thus “inform the understanding of duty and substitution drawback schemes.”<sup>155</sup> In addition, Annexes II and III are comprised of two parts each. The first part of each Annex describes the export subsidies to which the guidelines in each Annex apply. The second part of Annex II sets forth guidelines for “examining whether inputs are consumed in the production of the exported product.” The second part of Annex III sets forth guidelines for “examining any substitution drawback system as part of a countervailing duty investigation.”<sup>156</sup>

The Appellate Body stated Annex I(i) to the SCM Agreement “makes it clear that duty drawback schemes are concerned with the ‘import charges’ that are ‘levied on imported inputs that are consumed in the production of the exported product.’”<sup>157</sup> Accordingly, the Appellate Body asserted that, for duty drawback schemes, the “government revenue foregone” in footnote 1 “is concerned with the ‘duties or taxes’ in the form of ‘import charges’ on inputs that are consumed in the production of goods destined for export.”<sup>158</sup>

The Appellate Body pointed to three aspects under footnote 1 that contribute to the meaning of “what constitutes the financial contribution element of a subsidy, in the

<sup>151</sup> WTO Agreement on Subsidies and Countervailing Measures, art. 1.1(a)(1)(ii), n. 1.

<sup>152</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.97.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* ¶ 5.105.

<sup>155</sup> *Id.* ¶ 5.113.

<sup>156</sup> *Id.* A detailed examination of Annex II and III of the SCM Agreement was carried out by the Appellate Body and set forth in Appellate Body Report, *Pakistan Polyethylene CVDs*, *supra* note 109, ¶¶ 5.109 -5.127.

<sup>157</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.98.

<sup>158</sup> *Id.*

form of government revenue foregone that is otherwise due, particularly as it relates to duty drawback schemes.”<sup>159</sup> The first aspect sheds light on the comparison described in Article 1.1(a)(1)(ii) concerning the taxation rules applied to subsidy recipients versus non-recipients. Under footnote 1, this comparison is:

the tax treatment of the inputs imported under the duty drawback scheme that are consumed in the production of the goods destined for export, on the one hand, and the “duties or taxes borne by the like” imported input “when destined for domestic consumption,” on the other hand.<sup>160</sup>

The second aspect concerns what is not considered a subsidy, namely, “the exemption’, or remission, of duties or taxes in amounts ‘not in excess of those which have accrued.’”<sup>161</sup> The third aspect concerns a reference that footnote 1 is read “in accordance with” Article XVI of GATT 1994 (Note to Article XVI) and Annexes I through III of the SCM Agreement.<sup>162</sup>

This third aspect was an important point of disagreement between the parties. The EU contended this wording means the referenced GATT Article and Annexes to the SCM Agreement must be considered when determining “that the financial contribution, in the form of government revenue foregone, is limited to the excess amount of the remission.”<sup>163</sup> According to the EU, an investigating authority “may consider the entire amount of the remission to be the financial contribution that may be countervailed” when an exporting Member does not follow all aspects of the guidelines in Annexes II and III to the SCM Agreement.<sup>164</sup> In other words, in that instance, “the investigating authority need not identify the excess amount of the remission as indicated in footnote 1.”<sup>165</sup>

The Appellate Body considered that Annexes II and III provide guidelines on duty drawback schemes and substitution drawback schemes.<sup>166</sup> Annex II(II)(1) and Annex III(II)(1) speak to the importance of a functioning verification system “to ensure there is no excess drawback of import charges on inputs” and when a functional verification exists, “no subsidy should be presumed to exist.”<sup>167</sup> Annex II(II)(2) states that “further examination by the exporting Member” is needed when

<sup>159</sup> *Id.* ¶ 5.99.

<sup>160</sup> *Id.* ¶ 5.100.

<sup>161</sup> *Id.* ¶ 5.101.

<sup>162</sup> See *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.102.

<sup>163</sup> See *id.* ¶ 5.103.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See *id.* ¶ 5.112.

<sup>167</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.118.

no functioning verification system exists. For the Appellate Body, the wording concerning “further investigation” suggests:

In a countervailing duty investigation concerning a duty drawback scheme, if an investigating authority determined – including through carrying out on-the-spot investigations pursuant to Article 12.6 of the SCM Agreement where necessary – that the exporting Member had effectively applied a verification system that was fit for purpose, the duty drawback scheme under investigation would not result in a drawback of import charges “in excess” of those originally levied. Consequently, the investigating authority would need not continue its line of inquiry into whether there was excess drawback of import charges on inputs.<sup>168</sup>

The Appellate Body also assessed the incomplete guidance as to what happens when no functioning verification system exists and the exporting Member fails to conduct a “further examination,” described as “silence” by the EU, in Annexes II and III to the SCM Agreement. According to the Appellate Body, “this perceived ‘silence’ is not one that pertains to the definition of a subsidy and, in particular, to what constitutes the financial contribution element of the subsidy.”<sup>169</sup> The Appellate Body agreed with the Panel that the “silence” does not mean other parts of the SCM Agreement “cease to speak” nor does it permit an investigating authority to “depart from these other disciplines of the SCM Agreement.”<sup>170</sup> The Appellate Body pointed out that Article 12.7 of the SCM Agreement permits an investigating authority

To rely on facts available in the record to replace the missing “necessary information” in its assessment of whether the inputs imported under the drawback scheme were consumed in the production of the finished exported product, as part of the larger inquiry into whether there is “excess drawback of ... imported charges on inputs consumed in the production of the exported product.”<sup>171</sup>

---

<sup>168</sup> *Id.* ¶ 5.119.

<sup>169</sup> *Id.* ¶ 5.131; *see also id.* ¶¶ 5.123 – 5.130.

<sup>170</sup> *Id.* ¶ 5.131.

<sup>171</sup> *Id.* ¶ 5.131.

The Appellate Body also agreed with the Panel that “the entirety of Annex II(II)(2) only operates in the presence of an allegation that a ‘drawback scheme[] conveys a subsidy by reason of over-rebate or excess drawback.”<sup>172</sup>

Regarding the policy argument of the EU, the Appellate Body noted if the exporting Member does not fulfil its role of providing a functioning verification system or further examination as described under Annex II(II)(2) and Annex III(II)(3), the investigating authority still must “conduct a sufficiently diligent ‘investigation’ into, and solicitation of, relevant facts” to base its determination concerning the financial contribution.<sup>173</sup> The Appellate Body noted Article 12.7 of the SCM Agreement is “an essential tool, allowing an investigating authority to complete its inquiry into whether a duty ‘drawback scheme conveys a subsidy by reason of ... excess drawback of ... import charges on inputs consumed in the production of the exported product.”<sup>174</sup>

#### a. Holding and Rationale

The Appellate Body determined that a “harmonious reading” of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT establishes that an export subsidy under a duty drawback scheme is countervailable “only if they result in a remission or drawback of import charges ‘in excess’ of those actually levied on the imported inputs consumed in the production of the exported product.”<sup>175</sup> Under a duty drawback scheme, the financial contribution “is limited to the excess remission or drawback of import charges on inputs” instead of on the “entire amount of the remission or drawback of import charges.”<sup>176</sup> In addition, the perceived “silence” under Annexes II and III to the SCM Agreement “relates to a procedural step in the context of an investigating authority’s inquiry into whether the excess remission or drawback of import charges occurred.”<sup>177</sup> Further, this perceived “silence” does not permit departure from the other disciplines under the SCM Agreement to which Members are bound.<sup>178</sup>

Thus, the Appellate Body upheld the Panel’s finding that the Commission violated Article 1.1(a)(1)(ii) of the SCM Agreement because it did not provide a “reasoned and adequate explanation for why the entire amount of remitted duties was ‘in excess of those which have accrued’ within the meaning of footnote 1 of

---

<sup>172</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.126.

<sup>173</sup> *Id.* ¶ 5.133.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* ¶ 5.138.

<sup>176</sup> *Id.*

<sup>177</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.139.

<sup>178</sup> *Id.*

the SCM Agreement.”<sup>179</sup> Further, the Appellate Body upheld the Panel finding that the Commission violated Article 3.1(a) of the SCM Agreement “by improperly finding the existence of a ‘subsidy’ that was contingent upon export performance.”<sup>180</sup>

#### 4. Issue 2: Causation and *SCM Agreement* Article 15:5

Before the Panel, Pakistan argued that the Commission’s use of the “break the causal link” approach “precluded the Commission from satisfying the non-attribution requirements” of Article 15.5 of the SCM Agreement.<sup>181</sup> The Panel disagreed, and Pakistan appealed.<sup>182</sup>

Before the Panel, Pakistan asserted “the Commission’s approach had ‘prejudged’ the non-attribution analysis,” which resulted in the disregard of the correct legal standard.<sup>183</sup> Further, the “causal link” the Commission first found between the Pakistani imports and the injury led the Commission to later “dismiss the significance of the non-attribution factors the Commission purported to analyze.”<sup>184</sup> Thus, Pakistan asked the Appellate Body to declare the use of “the ‘break the causal link’ approach inconsistent with Article 15.5 of the SCM Agreement” and also complete the legal analysis.<sup>185</sup> First, the Appellate Body examined whether the Commission’s consideration of a “causal link” violated Article 15.5.<sup>186</sup> Second, the Appellate Body determined whether the Commission’s approach led to the application of an incorrect causation standard.<sup>187</sup>

According to the Panel, the legal standard in “Article 15.5 requires [the] investigating authority to demonstrate the existence of a causal link’ between the subsidized imports and the injury to the domestic industry.”<sup>188</sup> This link, said the Panel, must have “a ‘genuine and substantial relationship of cause and effect’ between the subsidized imports and the injury.”<sup>189</sup> In addition, the Panel stated

---

<sup>179</sup> *Id.* ¶ 5.143.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* ¶ 5.144. Note, before the Panel but not at issue on appeal, Pakistan argued the Commission did not “conduct a proper non-attribution analysis” regarding four factors, specifically: (1) Korean imports; (2) the 2008 economic downturn; (3) competition from non-cooperating EU producers; and (4) oil prices. *See id.* ¶ 5.156.

<sup>182</sup> *See Pakistan Polyethylene CVDs, supra* note 109, ¶ 4.1.

<sup>183</sup> *Id.* ¶ 5.157.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* ¶ 5.144.

<sup>186</sup> *See id.* ¶ 5.157.

<sup>187</sup> *See Pakistan Polyethylene CVDs, supra* note 109, ¶¶ 5.156-5.157.

<sup>188</sup> *Id.* ¶ 5.158.

<sup>189</sup> *Id.*

Article 15.5 requires investigators to distinguish injury caused by factors other than the subsidized imports via a “satisfactory explanation of the nature and extent of the injurious effects of other known factors, as distinguished from the injurious effects of the subsidized imports.”<sup>190</sup> When applying the legal standard, the Panel found the Commission’s analysis of two other factors were inconsistent with Article 15.5.<sup>191</sup> However, the Panel also determined that the Commission’s use of the “break the causal link” approach was not the culprit for the violation and Pakistan’s arguments failed to show the Commission’s causation approach violated Article 15.5 of the SCM Agreement.<sup>192</sup>

The Appellate Body reviewed the text of Article 15.5 of the SCM Agreement itself as well as relevant previous holdings by the Appellate Body to interpret the legal standard within the provision at issue. The Appellate Body determined Article 15.5 requires an investigating authority to determine whether, in light of the injurious effects of other known factors, the subsidized imports could be considered a “genuine and substantial” cause of the injury suffered by the domestic industry.<sup>193</sup> More specifically, the first two sentences of Article 15.5 and footnote 47 require an investigating authority to analyze the “effects” of the subsidized imports in order to demonstrate a causal relationship between the subsidized imports and the injury. The second two sentences of Article 15.5 require a “non-attribution” analysis by the investigating authority “to ensure that the injury it ascribes to the subsidized imports is actually caused by those imports, rather than by other factors.”<sup>194</sup>

The Appellate Body stated that under Article 15.5, the investigating authority must separate “the injurious effects of other known factors” from “the injurious effects of the subsidized imports.”<sup>195</sup> This separation of factors must occur before it concludes a “causal relationship” exists between the subsidized imports and the injury.<sup>196</sup> However, in doing so, any methodology or approach is permitted, “provided that an investigating authority does not attribute the injuries caused by other known factors to the subsidized imports.”<sup>197</sup> Thus, it is permissible to undertake a two-step approach whereby an analysis as to the “causal link” between the subsidized imports and injury occurs before a non-attribution analysis is conducted.<sup>198</sup> The Appellate Body also noted that to find a “causal relationship” between the subsidized imports and the injury, the subsidized imports need only be

---

<sup>190</sup> *Id.* ¶ 5.158.

<sup>191</sup> *Id.* ¶ 5.158.

<sup>192</sup> See *Pakistan Polyethylene CVDs*, *supra* note 109, ¶¶ 5.160-5.161.

<sup>193</sup> *Id.* ¶ 5.169.

<sup>194</sup> *Id.* ¶ 5.171.

<sup>195</sup> *Id.* ¶ 5.172.

<sup>196</sup> *Id.*

<sup>197</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.172.

<sup>198</sup> See *id.* ¶ 5.174.

“a genuine and substantial’ cause of the injury”. . . “in light of the effects of all . . . other factors” reviewed in the non-attribution analysis.<sup>199</sup> Thus, the Appellate Body found there are many different ways an investigating authority may assess the cause of the injury under Article 15.5.<sup>200</sup>

The Panel stated the Commission examined whether a “causal link” existed between the subsidized imports and the injury to the domestic industry before the Commission undertook a non-attribution analysis. According to the Panel, the determination that the subsidized imports caused injury to the EU industry was not concluded until after the non-attribution analysis was complete.<sup>201</sup> The Panel noted the Commission’s use of the word “consider” at the conclusion of the first part of its analysis and that the Commission used a separate heading in its report titled “Conclusion on causation” to set forth its “overall conclusion regarding causation.”<sup>202</sup> Thus, the Panel found the two-step analysis was permissible under Article 15.5, and the Appellate Body agreed.<sup>203</sup>

According to the Appellate Body, merely considering whether a “causal link” exists between the subsidized imports and the injury to the domestic industry as a first step in the analysis does not violate Article 15.5. The Appellate Body considered this preliminary examination is subsequently verified by the following non-attribution analysis, and only after both analyses are complete is “an overall conclusion on causation . . . reached.”<sup>204</sup>

Second, the Appellate Body determined whether the Panel erred in finding the Commission’s approach did not misapply the correct legal standard for causation.<sup>205</sup> The Panel found the Commission’s approach “had not necessarily precluded the Commission from properly separating and distinguishing the injurious effects of specific other known factors from the injurious effects of the subsidized imports.”<sup>206</sup> In addition, the Panel determined that while the Commission “failed to separate and distinguish properly the effects of some of the other known factors,” this deficiency was not due to the Commission’s “break the causal link” approach.<sup>207</sup>

Before the Appellate Body, Pakistan argued that even if “the Commission’s approach allowed for a proper separation and distinction of the

<sup>199</sup> *Id.* ¶ 5.175.

<sup>200</sup> *See id.* The Appellate Body proceeded to offer several hypothetical ways in which the obligations under Article 15.5 might be met by an investigating authority. *See id.* ¶ 5.176 – 5.177

<sup>201</sup> *See id.* ¶ 5.179.

<sup>202</sup> *Pakistan Polyethylene CVDs, supra* note 109, ¶ 5.181.

<sup>203</sup> *Id.* ¶ 5.180.

<sup>204</sup> *Id.*

<sup>205</sup> *See id.* ¶ 4.1.

<sup>206</sup> *Id.* ¶ 5.183.

<sup>207</sup> *Pakistan Polyethylene CVDs, supra* note 109, ¶ 5.183.



injurious effects of individual other known factors,”<sup>208</sup> the purpose of a causation analysis is determining “whether there is a ‘genuine and substantial relationship of cause and effect’ between the subsidized imports and the injury.”<sup>209</sup> That means, said Pakistan, “an investigating authority must examine whether the effects of other known factors ‘attenuate’ or ‘dilute’ the link between the subsidized imports and the injury.”<sup>210</sup> Because the Commission’s approach “fell short of this standard,” the Panel should not have found it acceptable.<sup>211</sup> In particular, Pakistan asserted four reasons why the Commission’s approach was incorrect.

First, Pakistan asserted it was illogical for a causal link to exist “if factors other than the subsidized imports are capable of breaking the causal link.”<sup>212</sup> The EU asserted Pakistan’s argument was merely about semantics and the meaning of the words “break,” “attenuate,” and “dilute.”<sup>213</sup> The Appellate Body ultimately rejected Pakistan’s first argument. The Appellate Body noted the Commission’s choice of words “‘break the causal link’...was rather unfortunate,” but that the context of the Provisional Determination establishes the Commission’s causation analysis did not violate Article 15.5.<sup>214</sup> Pakistan also asserted the Commission’s approach permitted finding a “causal link” “based on ‘the mere fact that the subject products secure[d] part of the market and somehow contributed to the overall injury.’”<sup>215</sup> The Appellate Body dismissed this handedly, finding there were no facts in the record to support Pakistan’s claim.<sup>216</sup>

Second, Pakistan argued the Commission’s approach assessed whether each of the “other factors” individually could “break the causal link” between the subsidized imports and the EU industry. That was incorrect, according to Pakistan, because it led the Commission to analyze “the effects of each non-attribution factor against the effects of the subsidized imports plus the effects of the remaining non-attribution factors.”<sup>217</sup> The EU disagreed and claimed the facts in the record don’t support such a claim.<sup>218</sup> In its analysis, the Appellate Body stated it is true that “it is inappropriate for an investigating authority to compare the effect of each non-attribution factor against the compounded effects of the subsidized imports plus the effects of the remaining other factors.” However, the Appellate Body agreed with the EU that the facts in this case do not establish that the Commission took this incorrect approach. Instead, the Appellate Body said the facts here show the

---

<sup>208</sup> *Id.* ¶ 5.184.

<sup>209</sup> *Id.* ¶ 5.185.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.189.

<sup>213</sup> *Id.* ¶ 5.187(a).

<sup>214</sup> *Id.* ¶ 5.196.

<sup>215</sup> *Id.* ¶ 5.197.

<sup>216</sup> *See id.* ¶ 5.198.

<sup>217</sup> *See Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.200.

<sup>218</sup> *Id.* ¶ 5.187.

Commission evaluated each of the “other factors” against the “causal link” found between the subsidized imports and injury alone.<sup>219</sup> In the end, the Appellate Body disagreed with Pakistan’s second argument.

Third, Pakistan asserted the Commission’s approach to causation was flawed because it was not “even-handed.”<sup>220</sup> Specifically, Pakistan claimed the Commission “employed ‘a low causation threshold for subsidized imports (a contributing cause) and a high one for the other factors (the cause).’”<sup>221</sup> The EU countered that WTO jurisprudence does not set forth such a concept of “even-handedness.”<sup>222</sup> The Appellate Body determined Pakistan’s argument contradicted the Panel’s findings and evidence in the record, and, accordingly, it rejected Pakistan’s third argument.

Fourth, Pakistan argued the Commission’s approach “precluded it from properly separating and distinguishing the effects of the other known factors found to have contributed to the injury.”<sup>223</sup> The EU asserted Pakistan’s final argument “lacks any valid basis.”<sup>224</sup> The Appellate Body noted “Pakistan’s argument is not entirely clear to us.”<sup>225</sup> The Appellate Body reiterated once more that despite the unfortunate use of the wording “break the causal link,” the Commission properly conducted the non-attribution analysis. In addition, the EU and the Appellate Body both noted Pakistan’s argument merely repeats a previous argument before the Panel in which the Panel disagreed.<sup>226</sup> As Pakistan did not appeal those Panel findings, the Appellate Body stated Pakistan could not put forward the same argument on appeal in this case. Thus, the Appellate Body rejected the fourth and final argument put forth by Pakistan.

#### a. Holding and Rationale

The Appellate Body found that under Article 15.5 of the SCM Agreement, a causation analysis entails an investigation into whether a “genuine and substantial relationship of cause and effect” exists between the subsidized import and injury to the domestic industry.<sup>227</sup> To find a “genuine and substantial relationship,” an investigating authority must conduct two analyses.<sup>228</sup> One analysis requires an

---

<sup>219</sup> *Id.* ¶¶ 5.201-5.202.

<sup>220</sup> *Id.* ¶ 5.187.

<sup>221</sup> *Id.* ¶ 5.212.

<sup>222</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.187(c).

<sup>223</sup> *Id.* ¶ 5.220.

<sup>224</sup> *Id.* ¶ 5.187.

<sup>225</sup> *Id.* ¶ 5.221.

<sup>226</sup> *Id.* ¶ 5.235.

<sup>227</sup> *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.226.

<sup>228</sup> *Id.*

examination of the “effects” of the subsidized imports in order to determine “the existence and extent of the link” between the subsidized imports and the injury to the domestic industry.<sup>229</sup> The other analysis is a non-attribution analysis whereby the investigating authority examines the “injurious effects of other known factors.”<sup>230</sup> According to the Appellate Body, Article 15.5 requires an investigating authority to “determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a ‘genuine and substantial’ cause of the injury suffered by the domestic industry.”<sup>231</sup> The methodology for conducting a causation analysis is not prescribed under Article 15.5, and an investigating authority may conduct the causation analysis in two separate steps.<sup>232</sup> The Appellate Body stated Article 15.5 merely requires completion of a non-attribution analysis *before* an investigating authority comes to “an overall conclusion as to the existence of a ‘causal relationship.’”<sup>233</sup> The Appellate Body found the Panel correctly interpreted and applied Article 15.5 of the SCM Agreement and that the Commission’s use of the “break the causal link” approach did not preclude it from conducting a non-attribution analysis permissible under Article 15.5.<sup>234</sup> Thus, the Appellate Body upheld the “Panel’s finding that Pakistan failed to establish the Commission’s approach to causation in this case was inconsistent with Article 15.5 of the SCM Agreement.”<sup>235</sup>

## 5. Commentary

The Appellate Body emphasized the flexibility for members to carry out investigations under the disciplines of the SCM Agreement and its Annexes. The Appellate Body repeatedly pointed out that there is no prescribed methodology for an investigative authority to carry out a causation determination and that Article 12.7 of the SCM Agreement can be used as an “essential tool” for investigative authorities where “positive evidence” is lacking. Yet despite these flexibilities, there are clear requirements under the SCM Agreement to which investigative authorities must adhere closely.<sup>236</sup> For example, the Appellate Body noted the requirement for a causation determination to include a proper non-attribution analysis.<sup>237</sup> The Appellate Body also emphasized the need for a “reasoned and

---

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> See *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.227.

<sup>233</sup> *Id.*

<sup>234</sup> See *id.* ¶ 5.228.

<sup>235</sup> *Id.* ¶ 5.230.

<sup>236</sup> See *id.* ¶ 5.226.

<sup>237</sup> See *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 5.226.

adequate explanation” for their finding of a financial contribution and causation determination.<sup>238</sup> Thus, while the findings likely will not surprise trade practitioners, the case did highlight the broad authority that Members have to apply WTO disciplines in practice.

The role and impact of the WTO has spurred many conversations about its future around the world.<sup>239</sup> These discussions seem to have increased in recent years, but, in reality, they have been ongoing since its inception.<sup>240</sup> One additional small, but in some ways remarkable, point can be raised here. The painful partition of British India into the states of India and Pakistan occurred in 1947.<sup>241</sup> On January 1, 1948 the GATT entered into force, and that year both India and Pakistan signed the GATT.<sup>242</sup> Fast forward to this dispute, and it is notable Pakistan’s complaint was heard by an Appellate Body that included Ujal Singh Bhatia of India.<sup>243</sup> The peace-through-trade theory suggests that increased trade ultimately leads to peace among trading partners.<sup>244</sup> Under the theory, the positive benefits accrued from trade, including enhanced economic diplomacy, positively impact the existing relationship among trade partners.<sup>245</sup> This can be particularly true under the umbrella of the WTO, which seeks to level the playing field among its members to engage in trade, albeit with varying degrees of success.<sup>246</sup> Trade benefits are

---

<sup>238</sup> *Id.* ¶ 5.143.

<sup>239</sup> See, e.g., Associated Press, *China-US Trade Dispute: What Role Can the World Trade Organisation Play?*, SOUTH CHINA MORNING POST (Jul 17, 2018), <https://www.scmp.com/news/china/diplomacy-defence/article/2155640/china-us-trade-dispute-what-role-can-world-trade>; see also, Matthew Oxenford, *Rethink the WTO’s Role in a Digital, Divided World*, CHATHAM HOUSE THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (Jun 12, 2019), <https://www.chathamhouse.org/expert/comment/rethink-wto-s-role-digital-divided-world>.

<sup>240</sup> See, e.g., William H. Lash III, *The Limited but Important Role of the WTO*, 19 CATO JOURNAL 371, 371-377 (Winter 2000), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.531.2905&rep=rep1&type=pdf>.

<sup>241</sup> *Partition of India*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Partition\\_of\\_India](https://en.wikipedia.org/wiki/Partition_of_India) (last visited Jul. 17, 2019).

<sup>242</sup> See *India and the WTO*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/countries\\_e/india\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/india_e.htm) (last visited Jul. 17, 2019); *Pakistan and the WTO*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/countries\\_e/pakistan\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/pakistan_e.htm), (last visited Jul. 17, 2019).

<sup>243</sup> See *Pakistan Polyethylene CVDs*, *supra* note 109, ¶ 6.16.

<sup>244</sup> See, e.g., Amir M. Kamel, *The Trade-Peace Theory*, in *THE POLITICAL ECONOMY OF EU TIES WITH IRAQ AND IRAN* 19, 19-33 (2015).

<sup>245</sup> See, e.g., Nicholas Gorham, *Peace Through Trade?*, GRAPHITE PUBLICATIONS, May 8, 2017, <https://graphitepublications.com/peace-through-trade/> (last visited Jul. 17, 2019).

<sup>246</sup> See, e.g., *Levelling the Playing Field*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/trade/topics/levelling-the-playing-field/> (last visited Jul. 17, 2019).

thought to have a spillover effect into other, non-economic areas of the relationship between countries and result in increased peace among trading partners.<sup>247</sup> In reality, economic relationships, including trade, are just one piece of the peace puzzle.

## **D. Trade Remedies –Safeguards and Specific Duties**

### 1. Citation

WTO Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R (complaint by Chinese Taipei), WT/DS496/AB/R (complaint by Vietnam) (issued Aug. 15, 2018, adopted Aug. 28, 2018) (“*Indonesia Iron Safeguard*”)<sup>248</sup>

### 2. Facts

On July 22, 2014, the Republic of Indonesia implemented a purported safeguard measure known as Regulation No. 137.1/PMK.011/2014 (“Regulation 137”).<sup>249</sup> Regulation 137 set a specific duty on imports of flat-rolled iron or non-alloy steel called galvalume—a material commonly used to make metal panels or roofing.<sup>250</sup> Indonesia imposed the specific duty after conducting an investigation under its domestic safeguard legislation.<sup>251</sup> It also provided notice of the measure to the WTO Committee on Safeguards.<sup>252</sup>

The specific duty was scheduled to escalate over a period of three years, on top of Indonesia’s unbound Most Favored Nation (“MFN”) rate of 12.5%.<sup>253</sup> Consistent with Article 9.1 of the Agreement on Safeguards, Indonesia excluded 120 countries it identified as “developing” from the measure’s application.<sup>254</sup> Prior

---

<sup>247</sup> See, e.g., Gorham, *supra* note 245.

<sup>248</sup> Panel Report *Indonesia – Safeguard on Certain Iron or Steel Products*, WTO Doc. WT/DS490/R, WT/DS496/R (adopted Aug. 2017) [hereinafter *Indonesia Iron or Steel Safeguards*].

At the Appellate stage, there were ten Third-Party participants: Australia, Chile, China, the European Union, India, Japan, Korea, the Russian Federation, Ukraine, and the United States. Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, ¶ 5.15, WT/DS490/AB/R; WT/DS496/AB/R (Aug. 15, 2018) [hereinafter Appellate Body Report, *Indonesia Iron or Steel Safeguards*].

<sup>249</sup> *Id.* ¶ 2.2.

<sup>250</sup> *Id.* ¶ 2.1.

<sup>251</sup> *Id.* ¶ 2.2.

<sup>252</sup> *Id.*

<sup>253</sup> *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 2.3.

<sup>254</sup> *Id.* ¶ 2.2.

to Regulation 137, Indonesia also maintained preferential tariff levels on galvalume imports pursuant to four separate RTAs, in accordance with GATT Article XXIV.<sup>255</sup> Chinese Taipei and Vietnam challenged the specific duty, arguing the measure did not comply with the Safeguards Agreement or, in the alternative, violated Indonesia's MFN obligations under GATT Article I:1.<sup>256</sup>

The case arrived at the Appellate Body in an unusual procedural posture. While Indonesia and the complainants agreed the specific duty at issue was a safeguard measure, the Panel determined that, as a matter of law, it was not.<sup>257</sup> In addition, Indonesia challenged the Panel's finding that the specific duty violated GATT Article I:1 on the grounds that the issue was not raised by the complainants and was thus outside the scope of the Panel's "terms of reference."<sup>258</sup>

### 3. Issue 1: GATT Article XIX and SCM Agreement Article 1

Indonesia, Chinese Taipei, and Vietnam all argued that the Panel erred in finding that Indonesia's specific duty on imports of galvalume was not a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, albeit for different reasons.<sup>259</sup> Despite the parties' agreement that the specific duty was a safeguard measure, the Panel determined it was required under Article 11 of the DSU to provide an "objective assessment of the matter."<sup>260</sup>

Article 1 of the Agreement on Safeguards defines "safeguard measures" as "those measures provided for in Article XIX of GATT 1994."<sup>261</sup> GATT Article XIX: (1)(a), in turn, states:

If, as a result of unforeseen developments and *of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions*, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, *the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to*

---

<sup>255</sup> *Id.* ¶ 2.3.

<sup>256</sup> *Id.* ¶ 3.1.

<sup>257</sup> *Id.* ¶¶ 8.1-8.2.

<sup>258</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 4.1.

<sup>259</sup> *Id.* ¶ 5.15.

<sup>260</sup> *Id.* ¶ 5.18.

<sup>261</sup> Agreement on Safeguards, Article 1, 1869 U.N.T.S. 154.

*suspend the obligation in whole or in part or to withdraw or modify the concession.*<sup>262</sup>

The Panel interpreted this to mean that a safeguard measure “can be deemed to exist only if the suspension or withdrawal relates to a GATT obligation or concession that a Member ‘finds it must be temporarily released from in order to pursue a course of action necessary to prevent or remedy serious injury.’”<sup>263</sup>

Indonesia made three primary arguments as to why the Panel erred in finding the specific duty did not qualify as a safeguard measure under Article XIX: 1(a). First, Indonesia argued that the Panel disregarded the stated “nature and objective” of the specific duty.<sup>264</sup> Second, Indonesia argued that the Panel failed to consider whether Indonesia’s discriminatory application of the specific duty in accord with Article 9.1 of the Agreement on Safeguards was a suspension of its MFN obligations under Article I:1 of GATT.<sup>265</sup> Third, Indonesia argued that GATT Article XIX: 1(a) grants a party the *discretion* to suspend or modify an obligation. In its appeal, Indonesia abandoned a (creative, if strained) argument it made at the Panel stage.<sup>266</sup> That argument claimed the increased tariffs were in conflict with Indonesia’s RTA concessions on galvalume, thus requiring a “suspension” of the GATT Article XXIV exception allowing the RTAs to be effective in the first place.<sup>267</sup> While the Appellate Body recognized the argument was made, it did not adjudicate its merits.<sup>268</sup>

Chinese Taipei argued GATT Article XIX: 1(a) does not define what a “safeguard measure” is and, as such, the Panel should have interpreted the term broadly to encompass “all measures taken against serious injury arising from increased imports without any limitation to the particular type of measure.”<sup>269</sup> On this basis, Chinese Taipei claims the Panel erred in applying GATT Article XIX: 1(a)’s “to the extent and for such time as may be necessary” language to the definition of what constitutes a “safeguard measure.”<sup>270</sup> In Chinese Taipei’s view, this “necessary” requirement should only apply to determine whether the safeguard itself is legal under the Agreement.<sup>271</sup>

---

<sup>262</sup> General Agreement on Tariffs and Trade 1994 art. XIX(1)(a) Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994] (emphasis added).

<sup>263</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.19.

<sup>264</sup> *Id.* ¶ 5.40.

<sup>265</sup> *Id.* ¶5.41.

<sup>266</sup> *Id.* ¶ 5.42.

<sup>267</sup> Panel Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶¶ 7.18–7.20.

<sup>268</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶¶ 5.21–5.23.

<sup>269</sup> *Id.* ¶ 5.43.

<sup>270</sup> *Id.* ¶ 5.44.

<sup>271</sup> *Id.*

On a surface level, Vietnam agreed with Chinese Taipei and Indonesia that the Panel got the safeguard measure determination wrong.<sup>272</sup> Below the surface, Vietnam's arguments differed. Vietnam argued the specific duty's procedural history and implementation pursuant to Indonesia's safeguard investigation laws and Article XIX procedures meant the measure should be viewed as a safeguard.<sup>273</sup> Vietnam also expanded on Indonesia's arguments regarding special and differential application of the specific duty. Vietnam's primary quarrel on this point was the Panel's reliance on the General Interpretative Note to Annex 1A of the WTO Agreement, which the Panel used to construe Article 9.1 of the Agreement on Safeguards as superseding the GATT Article I:1 obligation.<sup>274</sup> In Vietnam's view, the two articles are not in "conflict," but rather operate in a rule-exception relationship where the General Interpretive Note does not apply.<sup>275</sup>

#### a. Holding and Rationale

The Appellate Body first addressed whether increasing the tariff on galvalume, on its own, constituted a safeguard.<sup>276</sup> The Appellate Body upheld the Panel's determination that it did not.<sup>277</sup> The report stated that "a plain reading of Article XIX: 1(a) suggests that 'the measures provided for' in that provision are measures that *suspend a GATT obligation and/or withdraw or modify a GATT concession.*"<sup>278</sup> "Absent such a suspension, withdrawal, or modification," the import restriction could not be classified as a safeguard measure.<sup>279</sup> Indonesia made no concessions (outside of its RTAs) to a duty level on galvalume.<sup>280</sup> Where there were no tariff concessions to suspend, Indonesia was free to impose whatever duty on galvalume imports it wished.<sup>281</sup> Hence, the specific duty could not withdraw or modify a tariff concession, because none existed in the first place.<sup>282</sup> In this respect, the specific duty failed to qualify as a safeguard measure under Article XIX: 1(a).<sup>283</sup>

Of course, countries have other obligations and make concessions beyond tariff commitments upon entry into the WTO. Article XIX: 1(a) does not specify what these obligations and concessions must be.<sup>284</sup> Previous Appellate Body

---

<sup>272</sup> *Id.* ¶ 5.45.

<sup>273</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.45.

<sup>274</sup> *Id.* ¶ 5.47.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* ¶ 5.52.

<sup>277</sup> *Id.* ¶ 5.49.

<sup>278</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.45.

<sup>279</sup> *Id.* ¶ 5.55.

<sup>280</sup> *Id.* ¶ 5.65.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.70–5.71.

<sup>284</sup> *Id.* ¶ 5.58.



decisions held Articles II:1 (regarding tariff commitments) and XI:1 (prohibition on quantitative restrictions) as examples.<sup>285</sup> In this case, the Appellate Body left the door open for other types of suspensions, modifications, or withdrawals of obligations and concessions to qualify under its Article XIX: 1(a) analysis.<sup>286</sup>

However, the analysis does not end there. To qualify as a safeguard measure, the suspension or modification must also “have a demonstrable link to the prevention or remediation of a serious injury.”<sup>287</sup> A suspended obligation or withdrawn/modified concession will not qualify as a safeguard measure if that action is not “designed to pursue a specific *objective*, namely preventing or remedying serious injury to the Member’s domestic industry.”<sup>288</sup> The Appellate Body left little to say on this qualification other than to note that each determination must be made on a “case-by-case basis,” and that a reviewing panel must consider the design, structure, and operation of the measure as a whole—taking into account the review given by the imposing country.<sup>289</sup>

The Appellate Body noted, albeit somewhat unclearly, that requiring the measure be “necessary” to prevent or remedy an injury is distinct from the measure *operating* “to the extent and for such time as may be *necessary* to prevent or remedy . . . injury.”<sup>290</sup> The latter requirement, relating to the operation of the measure, has to do with whether a safeguard measure is *implemented* “in conformity” with procedural and substantive requirements of the Agreement on Safeguards.<sup>291</sup> On this point, the Appellate Body noted its disagreement with the Panel’s interpretation. The Panel held that a safeguard measure’s manner of operation was a substantive element in deciding if the measure qualified under the Safeguard Agreement.<sup>292</sup> The Appellate Body said that this holding “conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards.”<sup>293</sup> As such, looking at the operation of the measure does not affect the initial determination of whether the measure itself is really a safeguard.

After clarifying what effect the operation of the safeguard measure has on the measure’s conformity with WTO law, the Appellate Body moved on to consider the argument that Indonesia’s 120-country exemption allowed the measure to be defined substantively as a safeguard.<sup>294</sup> The Appellate Body found that exempting 120 developing countries from the specific duty’s application was not necessary to

---

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.56.

<sup>289</sup> *Id.* ¶¶ 5.57, 5.60.

<sup>290</sup> *Id.* ¶ 5.62 (emphasis added).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* ¶ 7.18.

<sup>293</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.62.

<sup>294</sup> *Id.* ¶¶ 5.72–5.73.

prevent or remedy serious injury to Indonesia’s industry.<sup>295</sup> Thus, the exemption did not constitute a safeguard measure—even if it sought to suspend Indonesia’s Article I:1 MFN obligation to “‘immediately and unconditionally’ accord ‘any advantage, favour, privilege or immunity’ to ‘like products’ originating in all WTO Members.”<sup>296</sup> Indonesia had even conceded before the Panel that the exemption was neither “intended nor designed” to prevent or remedy a serious injury.<sup>297</sup>

The Appellate Body found that Indonesia accorded special and differential treatment to these countries in order to comply with Article 9.1 of the Agreement on Safeguards.<sup>298</sup> Article 9.1 allows S&D treatment to be afforded to developing countries with imports below a *de minimis* level so that a safeguard measure may be applied consistent with WTO obligations.<sup>299</sup> Moreover, because Indonesia’s exclusion of these 120 countries allowed for *more* galvalume to be imported into Indonesia’s territory from these countries, the exclusion could not be designed to protect Indonesia’s own industry from outside injury.<sup>300</sup>

In sum, while the imposition of the specific duty might be considered “necessary to prevent or remedy serious injury to Indonesia’s industry,” it did not suspend any obligation.<sup>301</sup> Conversely, Indonesia’s exemption of 120 countries from the scope of the specific duty did suspend Indonesia’s Article I:1 MFN obligations, but the exemption was not designed to prevent or remedy a serious injury.<sup>302</sup> Thus, neither aspect of the duty’s design or application allowed it to qualify as a safeguard measure.

#### 4. Issue 2: GATT Article I:1 MFN Rule, Specific Duty, and Terms of Reference

The Panel considered whether the implementation of the Specific Duty as a standalone measure, irrespective of its characterization as a safeguard, violated Indonesia’s GATT Article I:1 MFN obligations.<sup>303</sup> On appeal, Indonesia argued the Panel lacked jurisdiction to make any findings on this question, as this characterization of the specific duty was not within the Panel’s “terms of reference.”<sup>304</sup> Indonesia did not challenge the Panel’s substantive analysis or

---

<sup>295</sup> *Id.* ¶ 5.70.

<sup>296</sup> *Id.* ¶ 5.66.

<sup>297</sup> *Id.*

<sup>298</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.68.

<sup>299</sup> *Id.* ¶ 5.70.

<sup>300</sup> *Id.* ¶ 5.68.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶¶ 5.72–5.75.

<sup>304</sup> *Id.* ¶ 5.82.

findings under GATT Article I:1 (which determined that the specific duty violated Article I:1's MFN rule).<sup>305</sup>

The panel's terms of reference emanate from the initial panel request as set forth under Article 6.2 of the DSU.<sup>306</sup> The "measure(s) and the legal basis of the complaint—i.e. the claim(s)—constitute the 'matter referred to the DSB', which forms the basis of the panel's terms of reference."<sup>307</sup> Indonesia argued that Chinese Taipei and Vietnam's panel requests did not raise the issue of the specific duty being a "standalone" violation of Article I:1.<sup>308</sup> Thus, the issue was not within the Panel's jurisdiction to consider, nor could it later be brought into the Panel's jurisdiction by the complainants.<sup>309</sup> As a result, Indonesia claimed the panel erred in finding that the measure stood alone and inconsistent with Article I:1.<sup>310</sup>

Chinese Taipei and Vietnam's complaints were against "the *specific duty* imposed as a safeguard measure."<sup>311</sup> Both countries argued that reference to the duty as a "safeguard measure" only described the measure as it was implemented by Indonesia.<sup>312</sup> Because the term was descriptive, it did not condition how the Panel could characterize their Article I:1 claim.<sup>313</sup> The Appellate Body summed up the issues thus:

The question raised in this appeal is whether a claim of inconsistency with Article I:1 of the GATT 1994 with respect to Indonesia's specific duty on imports of galvalume "as a stand-alone measure" (i.e. not as a safeguard measure) is within the scope of the Panel's terms of reference. In order to assess this question, we examine whether the complainants' panel requests properly articulated a claim that the specific duty as a stand-alone measure (i.e. not as a safeguard measure) is inconsistent with Article I:1 of the GATT 1994, in light of the requirements under Article 6.2 of the DSU.<sup>314</sup>

#### a. Holding and Rationale

The Appellate Body held that the Panel did not err in viewing the specific duty as a standalone measure in conflict with Article I:1, as the issue was

---

<sup>305</sup> *Id.* ¶ 5.97.

<sup>306</sup> *Id.* ¶ 5.92.

<sup>307</sup> *Id.* ¶ 5.78.

<sup>308</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.82.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* ¶ 5.83 (emphasis added).

<sup>312</sup> *Id.*

<sup>313</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248 ¶ 5.83.

<sup>314</sup> *Id.* ¶ 5.85.

identifiable in the complainants' panel requests.<sup>315</sup> To reach this conclusion, the Appellate Body looked to the two requirements a panel request must contain as set forth by Article 6.2.<sup>316</sup> Article 6.2 requires "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly."<sup>317</sup>

With respect to prong (i), the Appellate Body stated that the panel requests "clearly singled out" the "measure at issue" as "the specific duty."<sup>318</sup> While the duty was described as "the specific duty imposed as a safeguard measure," the Appellate Body interpreted the term "safeguard measure" as referring to the duty's legal characterization.<sup>319</sup> The legal characterization of the duty did not alter the fact that Chinese Taipei and Vietnam took issue with Indonesia's specific duty on imports galvalume.<sup>320</sup>

The Appellate Body next turned to whether the panel requests set out "the legal basis of the complaint under Article I:1 of the GATT 1994 in a manner sufficient to present the problem clearly."<sup>321</sup> Each panel request described the claim as:

The specific duty imposed by Indonesia is inconsistent with Article I:1 of the GATT 1994 in that it applies to products originating only in certain countries, and this constitutes an advantage that has not been accorded immediately and unconditionally to the like products originating in all WTO Members.<sup>322</sup>

The Appellate Body found that "the legal basis for a finding of inconsistency with Article I:1 of the GATT 1994 is that the specific duty imposed by Indonesia . . . applies to products originating only in certain countries" in violation of Indonesia's MFN obligations.<sup>323</sup> The panel requests "plainly" linked the specific duty to a discriminatory application of that duty in violation of Article I:1's MFN requirements without "any reference to the characterization of the measure or to legal arguments further substantiating the claim."<sup>324</sup> As such, an Article I:1 claim could be construed without regard to the specific duty's qualification as a safeguard measure.

<sup>315</sup> *Id.* ¶ 5.97.

<sup>316</sup> *Id.* ¶ 5.90.

<sup>317</sup> *Id.* ¶ 5.78.

<sup>318</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.86.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* ¶ 5.87.

<sup>322</sup> *Id.* (quoting Chinese Taipei, and Vietnam's, panel requests).

<sup>323</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.89 (quoting Chinese Taipei, and Vietnam's, panel requests).

<sup>324</sup> *Id.* ¶ 5.90.

While the Appellate Body construed the panel requests in their entirety, the inclusion of factual information describing the measure at issue as a safeguard measure was similarly ruled to be immaterial.<sup>325</sup> The “background” characterization of the specific duty went toward the specific duty’s legal characterization, and not the identification of the offending measure itself.<sup>326</sup> For these reasons, the Appellate Body rejected similar arguments that the claims relied on citations to Article 11.1(a) of the Agreement on Safeguards.<sup>327</sup> According to the Appellate Body, this citation did not limit the claims raised in the request exclusively to those dealing with the challenge of a safeguard measure.<sup>328</sup> The claimants adequately described a problem under Article I:1 relating to the discriminatory application of a specific duty.<sup>329</sup> This was enough for the Panel to assess the specific duty as a standalone measure offending Indonesia’s MFN obligations.<sup>330</sup> The complainants’ subsequent briefs and reports to the Panel only provided confirmation of this finding.<sup>331</sup>

## 5. Commentary

The fact that all three appellants agreed the specific duty was a safeguard measure, and the fact that all three were found to be wrong, demonstrates that function doesn’t always follow form. All parties agreed that Indonesia’s compliance with its own safeguard laws and WTO procedures was strong evidence that the specific duty was a safeguard measure. Even though this formal procedure gave the measure the appearance of a safeguard, its failure to modify or suspend a concession or obligation meant the specific duty did not function as a safeguard. This holding by the Appellate Body shows that, even though a country may consider its measure to be a safeguard (or, perhaps, considers a measure to *not* constitute a safeguard), a WTO panel is the body that has the ultimate authority to determine whether a measure substantively qualifies as a safeguard or not.

The Appellate Body’s decision demonstrates how important it is for a country to consider all the possible ways its measure may be construed by a WTO panel. In particular, each aspect of a safeguard’s design should be considered in isolation to determine whether it is necessary to prevent or remedy an injury to a country’s industry. As a hypothetical, if Indonesia conducted its safeguard investigation and included in its justification that the 120-country exemption was necessary to prevent or remedy an injury, the Panel and Appellate Body may have come out the other way. To use a U.S. common law analogy: if the “legislative

---

<sup>325</sup> *Id.* ¶ 5.92.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* ¶ 5.93.

<sup>328</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.93.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* ¶ 5.95.

history” of a country’s safeguard measure documents why each part of the measure is necessary to protect or reduce injury, the measure will stand a better chance of success upon a WTO challenge.

The Appellate Body’s determination that the specific duty was not a safeguard also meant it did not delve further into assessing the alleged conflict between Article 9.1 of the Agreement on Safeguards and GATT Article I:1. The Panel construed Article 9.1 as taking precedence over GATT Article I:1 in accord with the General Interpretive Note to Annex 1A of the WTO Agreement.<sup>332</sup> Because the Panel found the two were in conflict, application of the General Interpretive Note meant the Panel found Article 9.1’s application “prevails as a matter of law.”<sup>333</sup> As such, the exemption of 120 countries from the specific duty was held to apply without having to suspend the operation of Article I:1—thereby preventing it from being a safeguard.<sup>334</sup>

Vietnam and Indonesia both disagreed with this application, noting that the Agreement on Safeguards and GATT Article I:1 were not in “conflict” with each other.<sup>335</sup> Even if Indonesia and Vietnam were correct such that the exemption was a “suspension” of Indonesia’s Article I:1 obligations under this theory, the exemption still would not be a safeguard as it was not necessary to prevent or remedy an injury. Even still, the Appellate Body could have chosen to shed light on this issue, especially given the unique history of this dispute.

Further, the Appellate Body’s terms of reference discussion shows that a hyper-technical reading of a panel request may create broad jurisdiction for the panel. Even if a country is incorrect in its legal characterization of a measure, if the characterization identifies the specific act or duty that is the measure, the first prong of the Article 6.2 DSU test will be satisfied.

Here, the case is obvious. Chinese Taipei and Vietnam were both confident that the specific duty was in fact a safeguard measure and characterized it as such as in their panel requests. While they were wrong in characterizing the measure as a safeguard, they still correctly identified that the specific duty itself posed a problem for Indonesia’s ability to comply with GATT Article I:1. In the alternative, if Chinese Taipei and Vietnam had only described the measure as “the safeguard measure at issue,” thereby omitting that Indonesia’s “specific duty” itself was problematic, the Appellate Body may have come out differently.

On an historic note, this was Chinese Taipei’s third time participating in a dispute before the Appellate Body, and its first major win under the DSU. Despite losing on the issue of whether the measure was in fact a safeguard, Chinese Taipei walked away with a functional victory given the Appellate Body required Indonesia to bring the duty in compliance with its GATT Article I: 1 MFN obligations.<sup>336</sup>

---

<sup>332</sup> *Id.* ¶ 5.23.

<sup>333</sup> Appellate Body Report, *Indonesia Iron or Steel Safeguards*, *supra* note 248, ¶ 5.23.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* ¶¶ 5.46-5.47.

<sup>336</sup> *Id.* ¶ 6.11.

