SZIER RSDIE

Schweizerische Zeitschrift
für internationales
und europäisches Recht

Revue suisse
de droit international
et européen

25. Jahrgang 2/2015 25e année

Swiss Review
of International
and European Law

Schulthess §

Rivista svizzera
di diritto internazionale
e europeo

SZIER – Schweizerische Zeitschrift für internationales und europäisches Recht
RSDIE – Revue suisse de droit international et européen
RSDIE – Rivista svizzera di diritto internazionale e europeo
SRIEL – Swiss Review of International and European Law

www.szier.ch / www.rsdie.ch

Herausgegeben von / Édité par:
Schweizerische Vereinigung für internationales Recht (SVIR)
Website / Kontakt: www.svir-ssdi.ch
Société suisse de droit international (SSDI)
site / contact: www.svir-ssdi.ch

Publiziert mit Unterstützung der Schweizerischen Akademie für Geisteswissenschaften
Publié avec le soutien de l'Académie suisse des sciences humaines et sociales

Adresse der Redaktion / Adresse de la rédaction:
Lorenz Langer, Kirchweg 41, CH-8966 Oberwil-Lieli, Switzerland
Tel.: +41 (0)56 534 48 46, Lorenz.Langer@szier.ch

Manuskripte bitte an oben stehende Adresse senden oder per Mail übermitteln. Die Richtlinien für Autorinnen und Autoren sind unter www.szier.ch abrufbar.

Les manuscrits doivent être envoyés à l'adresse ci-dessus par courrier ou par mail. Les directives à l'intention des auteurs sont disponibles à l'adresse www.rsdie.ch.

Verlag und Abonnementsverwaltung / Edition et administration
Schulthess Juristische Medien AG, Zwingliplatz 2
Postfach, 8022 Zürich, Telefon: 044 200 29 19
Fax: 044 200 29 08
E-Mail: zs.verlag@schulthess.com
Internet: http://www.schulthess.com
Erscheint 4mal jährlich / Paraît 4 fois par an

Abonnementspreis / Prix de l'abonnement: CHF 250.–
Mitgliederabonnement: CHF 225.00
Einzelnummer / Prix du numéro: CHF 71.–

ISSN 1019-0406

PrintPlu§

Mit dem PrintPlu§-Abonnement haben Sie die Möglichkeit, Ihre Zeitschrift digital zu lesen. Zeitgleich mit der Printausgabe haben Sie Zugang zu den Beiträgen in digitaler Form. Detaillierte Informationen finden Sie unter www.schulthess.com/printplus

L'abonnement PrintPlu§ vous permet de télécharger votre revue en version numérique. Cette version est la reproduction exacte de l'édition papier et vous permet donc de lire votre revue sur le support – papier ou/et numérique – de votre choix. Vous trouverez davantage d'informations en suivant ce lien : www.schulthess.com/printplus

Jahresabonnement: CHF 286.00
Mitgliederabonnement: CHF 258.00

Anzeigenverkauf / Annonces publicitaires
Zürichsee Werbe AG
Herr Pietro Stuck, Seestrasse 86, 8712 Stäfa
pietro.stuck@zs-werbeag.ch, +41 (0)44 928 56 17

Inhaltsübersicht / Table des matières

The Jurisprudence of the World Trade Organization in 2014

by **Thomas Cottier, Ilaria Espa, Rachel Liechti-McKee & Tetyana Payosova**[1]

Table of Contents

I. Introduction

In 2014, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) adopted seven panel reports and six Appellate Body rulings.[2] Two of the cases relate to anti-dumping measures. Three cases, comprising five complaints,

[1] Director and (Senior) Research Fellows of the Institute for European and International Economic Law and the World Trade Institute, University of Bern.

[2] *See* Dispute Settlement Body Annual Report (2014), 26 November 2014, WT/DSB/64.

are of particular interest and these are summarized and discussed below. *China – Rare Earths* further refines the relationship between protocols of accession and the general provisions of WTO agreements, in particular the exceptions of Article XX GATT. Recourse to that provision is no longer excluded but depends on a careful case-by-case analysis. While China failed to comply with the conditions for export restrictions, the case reiterates the problem of insufficiently developed disciplines on export restrictions on strategic minerals and other commodities in WTO law. *EC – Seals Products* is a landmark case for two reasons. Firstly, it limits the application of the Agreement on Technical Barriers to Trade (TBT Agreement) resulting henceforth in a narrow reading of technical regulations. Normative rules prescribing conditions for importation are to be dealt with under the rules of the General Agreement on Tariffs and Trade (GATT) instead. Secondly, the ruling permits recourse to public morals in justifying import restrictions essentially on the basis of process and production methods (PPMs). Meanwhile, the more detailed implications for extraterritorial application of such rules and for the concept of PPMs remain open as these key issues were not raised by the parties to the case. *Peru – Agricultural Products* adds to the interpretation of the Agreement on Agriculture (AoA), but most importantly, it confirms the existing segregation of WTO law and the law of free trade agreements. The case is of particular importance for Switzerland in its relations with the European Union (EU). The case raises, but does not fully answer, the question whether in a bilateral agreement, Switzerland or the EU can, as a matter of WTO law, lawfully waive their right of lodging complaints against each other under WTO law within the scope of their bilateral agreement, for example the Agreement on Agriculture where such a clause exists.

II. Export Restrictions on Mineral Raw Materials in China: *China – Rare Earths*

A. Introduction and Facts

China – Rare Earths is the second WTO dispute to have arisen with respect to China's export regime on industrial (and, in particular, mineral) raw materials. In the first dispute, *China – Raw Materials,* the United States, the EU and Mexico had challenged the consistency of China's use of certain restraints imposed on the exportation of various forms of bauxite, coke, fluorspar, magnesium, man-

ganese, silicon carbide, silicon metal, yellow phosphorus and zinc.[3] In *China – Rare Earths,* the EU, the United States and Japan challenged China's export duties and quotas applied to various forms of rare earths, tungsten and molybdenum, as well as the consistency of certain restrictions imposed in connection with the administration and allocation of some of its export quotas. More than 30 Chinese measures affecting more than 200 eight-digit Chinese Customs Commodity Codes were cumulatively referred to in the complainants' requests for consultations.[4] Following the failure of the consultation stage, a single panel was established by the Dispute Settlement Body (DSB) on 23 July 2012, and its Report was circulated on 26 March 2014.[5]

One issue raised before the panel concerned China's use of export duties on rare earths, tungsten and molybdenum. The complainants contended that such measures were in breach of China's "WTO-plus" obligations on the use of export duties[6] assumed under Paragraph 11.3 of its Accession Protocol,[7] and contested China's defence under Article XX (b) GATT.[8] In particular, they claimed that Paragraph 11.3 was not subject to the general exceptions in Article XX GATT (Panel Report, para. 7.3.1). As the same legal issue had already been decided in *China – Raw Materials,* China claimed it brought "novel" legal arguments regarding the relationship between such provisions and Article XX GATT (Panel Report, paras. 7.54 and 7.62–7.114). In China's view, Article XX would apply to violations of para. 11.3 of China's Accession Protocol regardless

3 *See* Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials,* adopted 22 February 2012, WT/DS394/R/WT/DS395/R/WT/DS398/R/Add.1 & Corr.1, as modified by Appellate Body Reports WT/DS394/AB/R/WT/DS395/AB/R/WT/DS398/AB/R.

4 Request for Consultations by the European Union, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS432/1, G/L/983, 15 March 2012; Request for Consultations by the United States, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS433/1, G/L/984, 15 March 2012; Request for Consultations by the United States, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, 15 March 2012, WT/DS433/1, G/L/984.

5 Panel report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, adopted 26 March 2014, WT/DS431/R, WT/DS432/R, WT/DS433/R.

6 *See*, e.g., Steve Charnovitz, *Mapping the Law of the WTO Accession,* in: Merit E. Janow, Victoria Donaldson & Alan Yanovich (eds.), The WTO: Governance, Dispute Settlement and Developing Countries, Huntington NY 2008; J. Ya Qin, *"WTO-plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol*, 37 Journal of World Trade (2003), p. 483.

7 Accession of the People's Republic of China, Protocol on the Accession of the People's Republic of China, 23 November 2001, WT/L/432.

8 General Agreement on Tariffs and Trade (1994), Multilateral Agreements on Trade in Goods, Annex 1A of the Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 187, entered into force 1 January 1995 [hereafter GATT].

of the absence therein of an explicit textual link for the following reasons: (i) the textual silence of para. 11.3 could not be interpreted as excluding the possibility that it was subject to Article XX GATT; (ii) there existed an "intrinsic relationship" between para. 11.3 of China's Accession Protocol and the GATT as per para. 1.2 of China's Accession Protocol and Article XII of the Marrakesh Agreement;[9] (iii) the terms "nothing in this Agreement" contained in the chapeau of Article XX GATT did not mean that Article XX GATT was unavailable to defend export duties that were inconsistent with para. 11.3; (iv) the applicability of Article XX to violations of para. 11.3 derived from attaching appropriate interpretative value to the WTO's fundamental objectives of public health and environmental protection in accordance with the requirement to interpret treaties in a holistic manner and in light of their object and purpose (Panel Report, paras. 7.62–7.114).

Another core issue raised by the complainants concerned China's use of export quotas on rare earths, tungsten and molybdenum in breach of Article XI:1 GATT (Panel Report, paras. 7.197–7.199). China argued that such measures were justified under Article XX (g) GATT, as measures "related to the conservation of exhaustible natural resources … made effective in conjunction with restrictions on domestic production or consumption" (Panel Report, para. 7.200). According to China, the international law principles of sovereignty over natural resources and sustainable development informed the reading of the term "conservation" so as to sustain the right of WTO Members to manage and use their natural resources "in line with a Member's sustainable economic development" (Panel Report, para. 7.252).

Finally, the complainants challenged certain restrictions on the right of enterprises to export rare earths and molybdenum (i.e. export performance requirements, prior export experience requirements and minimum capital requirements) subject to a quota under para. 5.1 of China's Accession Protocol and paras. 83 and 84 of China's Working Party Report.[10]

After the circulation of the panel reports on 26 March 2014, China appealed to the WTO Appellate Body in relation to certain issues of law and legal interpretations. The major issues in China's appeal concerned the relationship between the provisions of China's Accession Protocol, on the one hand, and the Marrakesh Agreement and WTO Multilateral Trade Agreements such as the GATT 1994, on the other hand (Appellate Body Report, para. 2.3.1), and the panel's interpretation and application of the legal standard for the terms "relat-

[9] Marrakesh Agreement Establishing the World Trade Organization (GATT 1994), 1 Jan. 1995, 1867 U.N.T.S. 154.

[10] Report of the Working Party on the Accession of China, 1 October 2001, WT/ACC/CHN/49.

ing to" and "made effective in conjunction with" under Article XX (g) GATT (Appellate Body Report, paras. 2.28–68).

B. Findings

The panel first examined whether China's use of export duties on rare earths, tungsten and molybdenum was inconsistent with para. 11.3 of China's Accession Protocol. Under this provision, China agreed to eliminate all export duties unless specifically provided for in Annex 6 of China's Accession Protocol (or applied in conformity with Article VIII GATT). Inasmuch as rare earth elements, tungsten and molybdenum were not listed under Annex 6 of China's Accession Protocol, China was considered not to be entitled to have recourse to export duties on such products (Panel Report, paras. 7.35–7.48).

The panel then considered whether the export duties at issue could be subject to the general exceptions under Article XX GATT (Panel Report, paras. 7.115–7.116). Accordingly, it examined China's allegedly "novel" legal arguments on the relationship between para. 11.3 of China's Accession Protocol and the GATT 1994 to determine whether they had already been presented to, and rejected by, the panel and the Appellate Body in the *China – Raw Materials* ruling. In other words, the panel did not conduct a *de novo* determination, but rather explored China's claims with a view to ascertaining whether they presented cogent reasons for departing from the prior ruling of the Appellate Body in *China – Raw Materials* on the same question of law[11] and concluded that this was not the case (Panel Report, paras. 7.57–7.60).[12] The panel stressed the narrow scope of its finding, specifically concerned with the question of the availability of Article XX GATT to the obligation assumed under para. 11.3 of China's Accession Protocol (Panel Report, para. 7.116). Moreover, the panel found that, even ad-

[11] In adopting such a "high threshold" for according deference to the *China – Raw Materials* finding, the panel was guided by existing WTO case law, which extensively referred to other international tribunals' case law (e.g. International Centre for Settlement of Investment Disputes (ICSID), European Court of Human Rights (ECtHR), and the International Criminal Tribunal for the Former Yugoslavia (ITCY)) and recognized the importance of consistency and stability of jurisprudence in dispute settlement as a means to achieve security and predictability (Panel Report, paras. 7.55–7.56).

[12] It should be noted that one of the panellists, in a dissenting opinion, elaborated on the relationship between para. 11.3 of China's Accession Protocol and the GATT 1994, concluding in favour of the availability of Art. XX GATT (Panel Report, paras. 7.121–7.137). According to the dissenting panellist, in light of the object and purpose of the WTO as embodied in the Preamble of the Marrakesh Agreement, "a proper interpretation on the availability of Art. XX of the GATT 1994 to Paragraph 11.3 of China's Accession Protocol should take into account the fact that Paragraph 11.3 must be read cumulatively and simultaneously with related GATT Arts. II and XI and as an integral part of the GATT system of rights and obligations" (Panel Report, para. 7.138).

mitting that Article XX GATT was available to export duties inconsistent with para. 11.3, China could not demonstrate that the export duties on rare earths, tungsten and molybdenum were "necessary to protect human health, animal or plant life or health" in accordance with Article XX (b) GATT (Panel Report, paras. 7.149–7.196).

The "systemic" relationship between China's Accession Protocol provisions and the Marrakesh Agreement and/or WTO covered agreements such as the GATT 1994 was, however, addressed by the Appellate Body. China had appealed one of the panel's intermediate findings according to which para. 1.2 of China's Accession Protocol and Article XII of the Marrakesh Agreement could not be interpreted to mean that an individual provision of China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the WTO multilateral trade agreements to which it intrinsically relates (Appellate Body Report, para. 5.73). In the view of the Appellate Body, on the one hand, Article XII of the Marrakesh Agreement simply extended the principle of the single undertaking to newly acceded WTO Members (Appellate Body Report, paras. 5.29–33), without considering the question of whether there is a substantive relationship, "intrinsic"' or otherwise, between specific provisions of China's Accession Protocols and provisions of WTO covered agreements (Appellate Body Report, para.5.34). On the other hand, para. 1.2 of China's Accession Protocol, second sentence, did "build a bridge between the package of protocol provisions and the existing package of WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements". Yet, in the opinion of the Appellate body, the existence of such a bridge "d[id] not in itself answer the question as to *how individual provisions* in China's Accession Protocol are related or linked to individual provisions of the other WTO agreements" (Appellate Body Report, para. 5.50). Whether an individual provision of China's Accession Protocol has an "objective link" to the specific obligations under the Marrakesh Agreement or one of the multilateral trade agreements, and whether the exceptions under those agreements may be invoked to justify a violation of an accession protocol commitment had to be determined on a case-by-case basis based on the customary rules of treaty interpretation and the specific circumstances of a dispute (Appellate Body Report, paras. 5.62, 5.74).

As to China's use of Articleexport quotas on rare earths, tungsten and molybdenum inconsistent with Article XI:1 GATT, the panel examined whether such measures could be justified under Article XX (g) GATT as China contended. In so doing, it interpreted and applied the legal standards provided therein, thus clarifying the scope of the conservation exception. In the panel's view, the term 'conservation' under Article XX (g) GATT was to be interpreted in light of the international law principles of sovereignty over natural resources and sustainable development as relevant rules of international law applicable

between the parties in accordance with Article 31 (3) of the Vienna Convention on the Law of Treaties (VCLT)[13] (Panel Report, paras. 7.261–7.270). Accordingly, measures that manage the supply and use of exhaustible resources in accordance with a Member's sustainable economic development needs could fall within the remit of Article XX (g) GATT (Panel Report, para. 7.451). In contrast, a Member's sustainable economic development could not constitute a goal in and of itself to be pursued under Article XX (g) GATT, and therefore measures aimed at promoting economic development could not be understood to be measures "relating to" conservation but rather measures of industrial policy (Panel Report, para. 7.460). In this regard, the challenged export quotas, albeit forming part of China's comprehensive conservation policy, lacked the requisite close and genuine connection with the conservation goal inasmuch as they burdened foreign consumers while reserving a supply of low-price raw materials to domestic downstream industries, thus sending "perverse" signals to the latter (Panel Reports, paras. 7.419–7.488). China appealed this conclusion, contending that the panel erred in considering uniquely the design and the structure of the export quotas at issue as a way of ascertaining whether such a connection with the conservation objective existed (Appellate Body Report, paras. 5.102–118). In China's view, the panel based its finding on the "theoretical" consideration that, as a matter of design and structure, export quotas can send perverse signals to domestic consumers without paying due regard to the actual effects of the quotas in the marketplace (Appellate Body Report, paras, 5.143–162). The Appellate Body affirmed that the design and structure of the export quotas at issue were correctly given primacy as an "objective methodology … diminishing the uncertainty that would arise in basing such assessment on actual effects or the occurrence of subsequent events" (Appellate Body Report, para. 5.96 and paras. 5.111–14). However, it clarified that evidence relating to "the actual operation or the impact of a measure at issue" may also be considered although Article XX (g) GATT does not prescribe an empirical or actual effects test (paras. 5.113–14).

The second prong of Article XX (g) GATT was also interpreted and applied to the specific facts of the case by the panel and the Appellate Body. The Appellate Body, in particular, clarified the legal standard for the term "made effective in conjunction with". Reversing the panel's interpretation, the Appellate Body affirmed that such a benchmark embodied the notion of "even-handedness" in the imposition of domestic and international trade restrictions (Appellate Body Report, paras. 5.123–7). Such a notion required that "a Member must impose 'real' restrictions on domestic production or consumption that reinforce

[13] Vienna Convention on the Law of Treaties, 23 May 1969 (VCLT), 1155 U.N.T.S. 331.

and complement the restrictions on international trade, and particularly so in circumstances where domestic consumption accounts for a major part of the exhaustible natural resource to be conserved", but did not constitute a separate condition demanding that the burden of conservation be "evenly distributed between foreign producers, on the one hand, and domestic producers or consumers, on the other hand" (Appellate Body Report, paras. 5.132–6) as the panel had stated (Panel Report, paras. 7.332–3).[14] Here again, the focus should be on the design and structure of domestic and export restrictions, while the market effects of such restrictions may also be taken into account (Appellate Body Report, para. 5.140). In this regard, the panel did not err in considering that the design and structure of China's export quotas system were not even-handed in the sense required by Article XX (g) GATT (Panel Report, paras. 7.558–7.593), as the extraction, production and export quotas were applied "at different dates, on different products, and denominated in different values without any apparent coordination among them" (Panel Report, para. 7.611), and domestic caps were set at levels which were lower than the expected demand for the period during which they were intended to apply (Panel Report, para. 7.550).

In light of the foregoing, China failed to demonstrate that its export quotas on rare earths, tungsten and molybdenum could be provisionally justified under Article XX (g) GATT (Appellate Body Report, para. 5.2.7). The panel also concluded the analysis under the chapeau of Article XX GATT on an *arguendo* basis, and found that China had not satisfactorily proved that its export quotas on rare earths, tungsten and molybdenum were applied in a manner that did not constitute arbitrary or unjustifiable discrimination, or a disguised restriction on international trade (Panel Report, paras. 7.6.3, 7.7.3, and 7.8.2).

Finally, the panel turned to the claims regarding the inconsistency of the eligibility criteria limiting the right of enterprises to export rare earths and molybdenum. It concluded that they amounted to a violation of China's trading right commitments under para. 5.1 of China's Accession Protocol and paras. 83 and 84 of China's Working Party Report (Panel Report, paras. 7.993–7.1014), and that China had failed to prove why its trading rights restrictions were justified under Article XX (g) GATT (Panel Report, paras. 7.1034–7.1046).

[14] The panel had based its interpretative understanding on existing WTO jurisprudence and other sources of international law that referred to the principle of even-handedness, such as the case law of international investment tribunals clarifying the principle of equity (Panel Report, paras. 7.318–7.323).

C. Commentary

China – Rare Earths was the second major dispute concerning the use of export restrictions – duties, quotas and certain restrictions imposed in connection with the administration of quotas – after the *China – Raw Materials* ruling. As the respondent party, China sought to justify its export regime on the basis of the general exceptions contained in Article XX GATT. Inasmuch as the measures at issue were applied to mineral resources in particular, China invoked Article XX (b) and (g) GATT to justify its export duties and export quotas, respectively, claiming that the former responded to fundamental environmental and public health concerns, while the latter aimed at achieving conservation purposes.

With respect to the first claim, the main issue addressed by the panel and the Appellate Body was again the availability of Article XX exceptions for violations of non-GATT provisions, namely individual provisions (in this case, para. 11.3) of China's Accession Protocol. While the panel proved prudent in according deference to the Appellate Body's ultimate finding in *China – Raw Materials,* the Appellate Body clarified the "systemic" relationship between specific accession protocol provisions on the one hand, and the Marrakesh Agreement and WTO multilateral trade agreements, on the other hand. The approach construed by the Appellate Body relied on the existence of an "objective link" to the GATT and/or to Article XX GATT exceptions, to be determined through a case-by-case analysis on the basis that: "[t]he analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements in the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation" (Appellate Body Report, para. 5.74). Evidently, the Appellate Body intended to design an approach that would not simply confirm the *China – Raw Materials* ruling as to the applicability of Article XX GATT to violations of para. 11.3 of China's Accession Protocol, but also provide a general frame of reference with which to ascertain the relationship between individual accession protocol provisions and WTO covered agreements more generally, failing specific criteria for determining the status of accession protocols in the WTO legal system.

With respect to the claims under Article XX (g) GATT, China fundamentally attempted to solicit a broader interpretation of the conservation exception by referring to the international law principles of sovereignty over natural re-

sources and sustainable development. In so doing, China invoked the panel ruling in *China – Raw Materials,* which left WTO Members with some "policy space" to adopt comprehensive conservation policies comprising a full range of policy considerations and goals, including economic and sustainable development interests. In China's view, this was enough to allow Members to "adopt measures, including export quotas, that foster the sustainable development of their domestic economies" (Panel Report, para. 7.457). However, the panel clarified the contours of the conservation exception by positing that "resource-endowed Members may take their sustainable economic development needs into account in designing a conservation policy that 'manages the supply and use' of exhaustible resources in a way that 'take[s] into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development'" (Panel Report, para. 7.451, citing *China – Raw Materials*). In the panel's view, measures adopted for the purpose of economic development could not be considered to have a substantial link to the goal of conservation within the meaning of Article XX (g) GATT (Panel Report, para. 7.460). In particular, the panel considered that measures such as the export quotas concerned, which send a "perverse" signal to domestic consumers but increase the price for foreign consumers, were "difficult to reconcile with the goal of conservation" (Panel Report, para. 7.541) and, rather than being conservation measures, they constituted industrial policy instruments (Panel Report, paras. 7.460–464). The same rigorous approach was adopted in the interpretation and application of the second prong of Article XX (g) GATT. Although the Appellate Body "relaxed" the panel's interpretation of the even-handedness requirement, it still applied it in such a way as to require that a Member impose "real" restrictions on domestic production or consumption that would reinforce and complement the restrictions on international trade (Appellate Body Report, paras. 5.132–6). This rigorous interpretation and application of the legal standards under Article XX (g) GATT was aimed at discouraging any potential abuses of the conservation exception available in the GATT.

III. Public Moral Concerns: *EC–Seal Products, AB/R*

A. Introduction and Facts

Since the EU Seal Regime of 2010,[15] the placing of seal products on the EU market is only allowed "where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence" (IC exception).[16] By way of derogation, the import of seal products is also permitted for the occasional personal use of travellers or their families as long as the nature and quantity of such goods do not indicate commercial use (travellers' exception),[17] and the placing on the market of seal products is also allowed where these result from by-products of hunting for the sole purpose of the sustainable management of marine resources (MRM exception).[18] The Commission was empowered to define the concrete conditions for the placing on the market of these products in an implementing regulation.[19]

The motivation for adopting the EU Seal Regime was that the hunting of seals had led to "expressions of serious concern by members of the public and governments sensitive to animal welfare considerations" due to the suffering the killing caused to the animals. Several Member States had already begun adopting or planning legislation regulating trade in seal products.[20] The EU Seal Regime therefore aims at establishing harmonized rules across the EU and thereby preventing the disturbance of the internal market in the products concerned.[21] Nonetheless, the EU is convinced that the "fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected." As the "hunt is an integral part of the culture and identity" of the Inuit society and recognized by the UN Declaration on the Rights of Indigenous Peoples, these products should be allowed to be placed on the market.[22]

[15] The regime consists of a "basic regulation": Regulation (EC) 1007/2009 of the European Parliament and the Council of 16 September 2009 on trade in seal products, 2009 OJ L 286/26, hereafter EU Basic Regulation, and an "implementing regulation": Regulation 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation 1007/2009 on trade in seal products, 2010 OJ L 216/1.

[16] EU Basic Regulation, *supra* n. 15, Art. 3 para. 1.

[17] *Ibid*, Art. 3 para. 2 (a).

[18] *Ibid*, Art. 3 para. 2 (b).

[19] *Ibid.* Preamble para. 17.

[20] *Ibid,* paras. 4. and 5.

[21] *Ibid,* para. 8 and Art. 1.

[22] *Ibid,* para. 14.

Canada and Norway requested the establishment of a WTO panel to decide on the compatibility of the EU's obligations under the GATT 1994[23] and the TBT Agreement.[24] Firstly, they alleged that the IC and MRM exceptions violated the non-discrimination obligations of most-favoured nation and national treatment under the GATT 1994 and the TBT Agreement by according seal products from Canada and Norway treatment less favourable than that accorded to products from Sweden, Finland and Greenland. Secondly, they argued that the EU Seal Regime was more trade restrictive than necessary and therefore created an unnecessary barrier to trade which is inconsistent with Article 2.2 of the TBT Agreement. Further, they claimed that all of the exceptions impose quantitative restrictions on trade and therefore violate Article XI:1 GATT.[25]

The EU, on the other hand, argued that the EU Seal Regime was fully consistent with its WTO obligations. It claimed that it "is aimed at addressing public moral concerns on the welfare of seals" and that any inconsistencies of the measure under the GATT 1994 should therefore be justified under the general exceptions in Article XX(a) and Article XX(b), "because the measure is necessary to protect public morals (regarding the welfare of seals) and to protect seals' health respectively." It also contended that no other measure can address its moral concerns on seals "at the same level" as the EU Seal Regime.[26] The panel made its decision and circulated its report to Members on 25 November 2013.[27]

B. Findings of the Panel

The first step was for the panel to examine whether the EU Seal Regime qualifies as a technical regulation within the meaning of the TBT Agreement, so as to be able to decide on the order of its analysis. Based on its analysis of the criteria set out in Annex 1.1 of the TBT Agreement, it concluded that the EU Seal Regime is a document that "lays down product characteristics … including the applicable administrative provisions, with which compliance is mandatory"

[23] *supra* n. 8.

[24] Agreement Establishing the World Trade Organization, 1 January 1995, Annex 1A, Agreement on Technical Barriers to Trade, 1867 U.N.T.S. 154.

[25] Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* adopted 18 June 2014, WT/DS400/R/WT/DS401/R /Add. 1, para. 7.2. This contribution only deals with the main substantial claims of discrimination and trade-restrictiveness and not with the procedural claims.

[26] Panel Report, *supra* n. 25, para.7.3.

[27] Panel Report, *supra* n. 25. For a lengthier summary and discussion of the panel decision see Rachel Liechti-McKee, Tobias Naef & Tetyana Payosova, *The Jurisprudence of the World Trade Organization in 2013*, 24 SZIER (2014), pp. 251–256.

and accordingly constitutes a technical regulation in the sense of the TBT Agreement (para. 7.125). Following recent TBT jurisprudence, the panel considered that in this case the analysis under the TBT Agreement would precede any examination under the GATT 1994 (para. 7.66).

1. Analysis under the TBT Agreement

The panel then continued to consider the claims under Article 2.1 TBT − the so-called obligations of most-favoured nation (MFN) and national treatment (NT).[28] It argued that seal products which are prohibited and seal products which are allowed under the EU Seal Regime are like products (para. 7.3.2.1) and that the Regime has a "detrimental impact on the competitive opportunities of Canadian imported products vis-à-vis Greenlandic imported and EU domestic products" (para. 7.170). It went on to say that although the distinction between commercial and IC hunts was justifiable, based on the purpose of the hunt, it was not "designed and applied in an even-handed manner." As the EU had failed to demonstrate that the detrimental impact stemmed exclusively from a legitimate distinction, the IC exception in the Regime was therefore found to be inconsistent with the EU's obligations under Article 2.1 TBT (para. 7.319). The same was found for the MRM exception (para. 7.353).

According to Article 2.2 TBT "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create." Based on its examination of the EU Seal Regime, its history, and the alternative less restrictive measures proposed by Canada and Norway, the panel concluded that the Regime is not more trade-restrictive than necessary within the meaning of Article 2.2 TBT.

It confirmed a certain degree of the Regime's actual contribution to its objective and found that the alternative measure – allowing market access for seal products only under the condition of compliance with animal welfare standards and with certification and labelling requirements (para. 7.468) – is not reasonably available to the EU, taking into account the risks that non-fulfilment would create (para. 7.505).

[28] For a detailed analysis of these two principles in WTO law, see Thomas Cottier & Matthias Oesch, International Trade Regulation. Law and Policy in the WTO, the European Union and Switzerland, Bern 2005, pp. 346–427.

2. Analysis under the GATT 1994

The panel also observed a violation of the EU's MFN and NT obligations under the GATT 1994[29] – for the same reasons as under the TBT Agreement – by the less favourable treatment accorded to imported products from Canada and Norway (paras. 7.4.2 and 7.4.3). Article XX GATT provides for general exceptions – or legitimate policy goals – which deviate from these basic principles.[30] Measures which are necessary to protect public morals (a) or animal health (b) – amongst others – are allowed to be adopted and enforced by Members, as long as they are not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" (chapeau).

Building on its argumentation under the TBT Agreement, the panel found that the EU Seal Regime was able to be "provisionally deemed necessary within the meaning of Article XX(a)" (paras. 7.630–7.639), before examining its consistency with the so-called chapeau. Here again, it referred to its analysis under the TBT Agreement and reiterated that due to the lack of even-handedness in the design and the application of the IC and the MRM exceptions, these were not consistent with the requirements of the chapeau in Article XX (paras. 7.630–7.639). It additionally found that the EU had failed to establish a *prima facie* case under Article XX(b) (para. 7.640).

In January 2014, Canada, Norway and the EU notified the WTO dispute settlement body of their decisions to appeal certain issues to the Appellate Body.[31]

C. Findings of the Appellate Body

1. Analysis under the TBT Agreement

In the appeal of the panel report, the Appellate Body reversed the panel's finding that the EU Seal Regime constitutes a technical regulation in the meaning of the TBT Agreement, in particular because it does not lay down any characteristics pertaining to the products themselves.[32] It did not consider it appropriate to complete the legal analysis on whether the measure lays down related

[29] In Arts. I:1 and III:4 GATT 1994.

[30] For a detailed analysis of these general exceptions, or rather legitimate policy goals, in WTO law, see: Cottier & Oesch, *supra* n. 28. pp. 428–512.

[31] For the current status of the dispute *see* <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm> (accessed 5 March 2015).

[32] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* adopted 18 June 2014, WT/DS400/AB/R/WT/DS401/AB/R, para. 5.1.3.3.4.

PPMs which fall within the scope of the TBT Agreement, as the panel had made no findings on this question and more argumentation and exploration in questioning would have been necessary (para. 5.1.3.4). It therefore declared "moot and of no legal effect" the panel's findings under the TBT Agreement (para. 5.1.4).

2. Analysis under the GATT 1994

The Appellate Body upheld the panel's finding that the EU Seal Regime is inconsistent with the obligation of MFN treatment in Article I:1 GATT because it does not "immediately and unconditionally" accord treatment as favourable to seal products from Canada and Norway as it does to those from Greenland (para. 5.130).

In assessing whether this violation was able to be justified under Article XX GATT 1994, the Appellate Body confirmed and specified the panel's finding that "the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC and other interests so as to mitigate the impact of the measure on those interests" (para. 5.167). It came to the conclusion that the "Panel had correctly focussed its analysis on the question whether the prohibitive and permissive components of the EU Seal Regime are necessary to protect public moral concerns" within the meaning of Article XX(a) GATT 1994. The Appellate Body found that the panel had not erred in evaluating the importance of the objective of addressing EU public moral concerns regarding seal welfare, the trade-restrictiveness of the measure, the actual contribution of the measure to the objective and whether the alternative measure suggested by Canada and Norway was reasonably available. It upheld the panel's findings regarding Article XX(a) and did not find itself called upon to address Article XX(b) (para. 5.3.2.6).

Concerning the chapeau of Article XX GATT 1994, the Appellate Body clarified that "there are significant differences between the analysis under Article 2.1. of the TBT Agreement and the chapeau of Article XX of GATT 1994." Whereas under Article 2.1 TBT an examination of whether the detrimental impact a measure has on imported products stems exclusively from a legitimate regulatory distinction, under the chapeau of Article XX GATT 1994, "the question is whether a measure is applied in a manner that would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail" (para. 5.311). As the panel had not done so, the Appellate Body itself completed the analysis under the chapeau and found that the EU had not demonstrated that the conditions prevailing in Canada and Norway were relevantly different from those in Greenland (para. 5.317). It also identified various features of the EU Seal Regime, in particular with respect to the IC exception, "that indicate that the regime is applied in a manner that constitutes a

means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." First, it found that the EU had not shown that the manner in which the IC exception treated seals derived from IC hunts as compared to seals derived from "commercial" hunts could "be reconciled with the objective of addressing public moral concerns regarding seal welfare." Second, it found that under the IC exception there was a danger that seal products derived from "commercial" hunts could potentially enter the EU market. Finally, it found that the EU had not made "comparable efforts" to facilitate the access of Canadian Inuit to the IC exception as it had done with respect to the Greenlandic Inuit (para. 5.338). It therefore, as had the panel, came to the conclusion that the EU had not demonstrated that the EU Seal Regime was designed and applied in a manner that was justified by the chapeau (para. 5.339). The Appellate Body Report was adopted on 18 June 2014.[33]

D. Follow-up by the EU

After the EU, Canada and Norway had agreed that a reasonable date for implementing the dispute settlement bodies' recommendations would be 18 October 2015, the European Commission began drafting a proposal for the amendment of the EU Seal Regime. The proposal was adopted on 6 February 2015 and needs to be adopted by the European Parliament and Council by October 2015.[34]

Concerns that the difference between the sale of products derived from seals hunted for the sustainable management of marine resources (MRM exception) and those derived from commercial hunts is not large enough to justify special treatment are addressed by removing the exception from the Basic Regulation altogether.[35]

Concerns relating to the design and application of the IC exception are met by some modifications thereof. The proposal links the exception to the main objective of addressing public moral concerns regarding seal welfare by stating that products from IC hunts are only allowed to be placed on the EU market, if "the hunt is conducted in a manner which reduces pain, distress, fear or other forms of suffering of the animals hunted to the extent possible taking into consideration the traditional way of life and the subsistence needs of the community" (Article 3 para. 1(c)). In addition, the hunt has to be traditionally conducted by the indigenous community (Article 3 para. 1(a)) and it has to contribute to "the subsistence of the community and is not conducted primarily

[33] *See* the WTO homepage, *supra* n. 31 for current details.

[34] For the wording of the proposal *see* <http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/proposal.pdf> (accessed 5 March 2015) (hereafter: Proposal).

[35] *See* the Explanatory Memorandum at the beginning of the Proposal, *supra* n. 34.

for commercial reasons" (Article 3 para. 1(b)). According to the proposal, the Commission should be empowered to adopt delegated acts in accordance with a new Article 4a in order to lay down detailed rules on the IC exception (Article 3 para. (4)). It should also be enabled to limit the quantity of seal products placed on the EU market under the IC exception, if necessary to ensure that the exception is limited to hunts that are not primarily conducted for commercial purposes (Article 3 para. (5)).[36]

In order to facilitate the access of Canadian Inuit to the IC exception, experts from the EU Commission and from Canada are also working together on establishing the necessary attestation system for Canadian Inuit to be able to benefit from the IC exception as favourably as Greenlandic Inuit.[37]

E. Commentary

For the first time in history a WTO panel and the Appellate Body have deemed a measure "necessary" to protect public moral concerns under Article XX(a) GATT 1994, although the exception had been invoked twice before in earlier cases, once under GATT 1994 and once under the General Agreement on Trade in Services (GATS).[38] The case raises complex and interesting questions concerning the balancing of the objective of the EU Seal Regime to address public moral concerns regarding seal welfare against the competing aim of accommodating Inuit and other indigenous communities so as to mitigate the impact of the measure on their subsistence.

On the one hand, the examination of the necessity test includes weighting the importance of the policy objective in relation to the trade-restrictive impact of the measure at stake. On the other hand, the Appellate Body has so far not definitely decided when the public morals exception can serve to justify measures which pursue "extraterritorial" objectives, such as the welfare of animals in another Member State. By upholding and specifying the panel's finding that

[36] *See* preamble (3) of the Proposal, *supra* n. 34.

[37] *See* Joint Statement by Canada and the European Union on access to the European Union of seal products from indigenous communities of Canada to the Commission Decision on the Joint Statement by Canada and the European Union on access to the European Union of seal products from indigenous communities of Canada, Brussels, 18 August 2014 C (2014) 5881.

[38] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* adopted 19 January 2010, WT/DS363/AB/R and Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* adopted 20 April 2005, WT/DS285/AB/R. For an in-depth analysis of the exception *see* Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole,* 11 Journal of International Economic Law (2008), pp. 43–74.

the main objective of the EU Seal Regime is to address public moral concern for animal welfare, whilst at the same time accommodating the interests of Inuit traditional hunters, the Appellate Body demonstrated that extraterritorial objectives were not at the core of the EU Seal Regime. The trade-restrictive impact was therefore found to be necessary and provisionally justified under Article XX(a) GATT.[39]

Once the trade-restrictiveness of the EU Seal Regime was found necessary to achieve the legitimate policy goal, the question arose under the chapeau of Article XX GATT of whether it was designed and applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination. This demonstrates that the Appellate Body accepts that a trade-restrictive measure which has been provisionally justified under Article XX(a) GATT can lawfully discriminate − between seal products, by according Inuit hunters more favourable treatment than commercial hunters − as long as the discrimination is designed and applied in an even-handed and therefore not protectionist manner.[40] This would mean, however, that the IC exception has to be made not only *de facto* available to Greenland, but also to Canada, which is what the Appellate Body recommends the EU to adapt before October 2015.

Unlike the EU, Switzerland enforced an obligation of declaration of fur and fur products in 2013.[41] Since then furs and fur products sold in Switzerland must be labelled to provide consumers with information about the species of the animal, its country of origin, whether the skin was hunted or trapped and whether the product consists of only one or more furs. The information must be declared on a label or price tag on the product itself in at least one official Swiss language and be clearly visible to consumers. Should this obligation be found to actually make a contribution to the objective of addressing public moral concerns regarding the welfare of animals, by reducing the global demand for seal fur products and by exposing Swiss consumers to fewer seal fur products produced in a cruel or inhumane manner on the domestic market, then the Swiss system would need to be considered as a less trade-restrictive alternative measure, which is reasonably available and therefore renders a ban not necessary. It is therefore debatable whether a panel would find a ban on seal fur

[39] *See* Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values,* 37 Yale Journal of International Law (2012), pp. 367–428 on the justification of noninstrumental moral values in this connection.

[40] For an analysis of the chapeau *see* Lorand Bartels, *The Chapeau of Article XX GATT: A New Interpretation,* Legal Studies Research Paper Series, Paper No. 40/2014, Cambridge.

[41] Federal Ordinance on the declaration of fur and fur products of 7 December 2012, SR 944.022.

products in Switzerland "necessary", taking into account the reasoning of the WTO dispute settlement bodies on the EU Seal Regime.

IV. Balancing between WTO and FTAs in *Peru – Agricultural Products*

A. Introduction and Facts

Since 2001 Peru has applied an additional import duty, which was introduced by the Supreme Decree No. 115–2001-EF, on four agricultural products (milk, maize, rice and sugar).[42] This import duty was imposed in addition to the ordinary customs duty and was based on the "Price Range System" (PRS) consisting of (i) a range between the floor price and a ceiling price reflecting the international price over the last 60 months for the above-mentioned products, and (ii) the cost, insurance and freight (c.i.f.) reference price, which is published bi-weekly and reflects the average international market price for the products at issue.

According to the Ministry of Economy and Finance of Peru, the PRS was intended to stabilize the costs of importing the products included in the system by ensuring effective prices both for the producer, through the application of the floor price, and for the consumer, through a ceiling price and by applying variable additional duties or tariff rebates on the c.i.f. value.

Guatemala[43] requested the establishment of a WTO panel in June 2013 to examine the compatibility of the Peruvian system of additional duties on agricultural products with the obligations of Peru under the Agreement on Agriculture (AoA), the GATT 1994[44] and, alternatively, under the Customs Valuation Agreement. Firstly, Guatemala claimed that the additional import duties constituted variable import levies or measures similar to variable import levies, and that they also constituted minimum import prices or similar measures thereto

[42] The measure at issue consisted of several Supreme Decrees, amending the original Decree of 2001, the semi-annual Supreme Decrees with customs tables for determining the floor and ceiling prices, the Vice-Ministerial Resolutions published bi-weekly on the cost, insurance and freight (c.i.f.) reference prices and any other regulations, instructions, administrative or judicial practice that amended or supplemented the above-mentioned regulatory instruments. For the full list of the relevant Peruvian legislation *see* Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products,* appealed 25 March 2015, WT/DS457/R/Add. 1, para. 2.3.

[43] Notably, a number of other WTO Members joined the dispute as third parties, including Argentina, Brazil, China, Colombia, Ecuador, El Salvador, the European Union, Honduras, India, the Republic of Korea and the United States.

[44] *supra* n. 8.

and thus were in violation of Article 4.2 AoA. Secondly, it put forward that these duties did not comply with the second sentence of Article II:1(b) GATT. Thirdly, Guatemala alleged that the Peruvian measure lacked transparency and was administered in an unreasonable manner and thus was not consistent with Articles. X:1 and X:3(a) GATT. Finally, Guatemala claimed the violation of several provisions of the Customs Valuation Agreement, were the Panel to find that the import duties constituted ordinary customs duties.

Apart from rejecting all the claims of Guatemala, Peru claimed that Guatemala had not engaged in the WTO dispute settlement in good faith as required by Article 3.7 and 3.10 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)[45] and thus the panel should dismiss the case. According to Peru this was so because Guatemala and Peru had signed the Peru – Guatemala Free Trade Agreement (FTA) in December 2011, which, although it had not yet entered into force, nevertheless obliges the parties not to undermine the object and purpose of the FTA. In addition, Peru argued that were the panel to find that the measure was inconsistent with WTO law, this would be solved by the fact that inconsistencies were generated by the FTA, which would prevail over WTO law by virtue of being a subsequent agreement, for both countries.

The panel circulated its report to Members on 27 November 2014. Peru appealed the panel report on 25 March 2015. Peru seeks review by the Appellate Body of the Panel's findings both under Articles 3.7 and 3.10 DSU, Article 4.2AoA and Article II:1(b)GATT 1994.

B. Findings of the Panel

The panel started its analysis with a number of preliminary considerations, including the order of the analysis it should apply. The Appellate Body has confirmed on numerous occasions that panels are free to determine the order of analysis they consider appropriate except in cases where there is mandatory sequence of analysis, deviation from which would lead to an error of law or would substantively affect the analysis.[46] In the present case, the panel decided to proceed first with the analysis under Article 4.2 AoA as it specifically applies to agricultural products, whereas GATT 1994 applies to trade in all goods, and thus has a much broader scope (paras. 7.17–7.19).

[45] Agreement Establishing the World Trade Organization, 1 January 1995, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1867 U.N.T.S. 154.

[46] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, adopted 27 September 2004, WT/DS276/R, paras. 126–127.

1. Admissibility of Guatemala's claims in light of the Peru–Guatemala FTA

Taking into consideration Peru's claims under the DSU based on the respective provisions of the Peru – Guatemala FTA,[47] the panel first addressed the procedural claims (para. 7.28). It noted that the FTA was negotiated between the two countries within the broader framework of negotiations between Peru and several other Central American countries and signed on 6 December 2011. The Guatemalan Congress approved the FTA on 4 July 2013 and in February 2014 Guatemala officially informed Peru that it had fulfilled the legal requirements for the entry into force of the FTA. Peru has still not ratified this FTA, and during the dispute confirmed that the fact that Guatemala had initiated proceedings in the WTO had called into question the balance negotiated under the FTA (paras. 7.31–7.33). Indeed, Article 15.3 FTA contained a typical forum selection clause with the right of choice on the side of the Complainant (para. 7.41).

In assessing Peru's claims the panel confirmed a settled position of the WTO adjudicating bodies, that trade relations of the WTO Members are not regulated exclusively by WTO law. Therefore, when the panel had to clarify provisions of the covered agreements it had to do so in a manner that was not "in technical isolation from public international law"[48] (para. 7.67). The panel confirmed that it could rule on the invoked provision of the public international law, where invocation was based on the provisions of the covered WTO agreements invoked by parties to the dispute, i.e. within the terms of reference of a given dispute (para. 7.69). Peru asserted that Guatemala's claim at the WTO was not made in good faith and thus its actions were inconsistent with Articles 3.7 and 3.10 DSU, both of which were within the terms of reference of the panel.

The panel noted that every Member had broad discretion in exercising its judgement as to whether the initiation of a procedure would be fruitful or not and there should be a presumption that Members initiate disputes in good faith (para. 7.75). Such a presumption also applied in the case at hand. However, the panel also noted that the WTO Members had to participate in good faith in the dispute settlement procedures with a view to making an effort to resolve a dispute in line with Article 3.10 DSU. The panel referred to the Appellate Body in

[47] Free Trade Agreement between the Republic of Peru and the Republic of Guatemala, available in Spanish at: http://www.sice.oas.org/Trade/GTM_PER_FTA_s/GTM_PER_ToC_s.asp (accessed 20 March 2015).

[48] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 17.

EC – Bananas III,[49] which confirmed, that "the complainants could be precluded from initiating Article 21.5 proceedings […] only if the parties […] have either explicitly or by necessary implication agreed to waive their right to have recourse to those proceedings" (para. 7.82). According to Peru different ways of engagement in bad faith could exist, for instance where a Member engages in a procedure to cause injury to another Member or with a view to impairing its rights (para. 7.83). The panel, however, could not find any evidence suggesting that Guatemala had engaged in WTO dispute settlement to cause injury or impair the rights of Peru under the covered agreements (para. 7.84).

The panel very prominently noted that the FTA had not entered into force; thus any references to the provisions of the FTA had limited legal effects as the agreement becomes binding for the parties only from the moment of its entry into force. With respect to the arguments of Peru under Article 18 VCLT, which contains an obligation for states to refrain from any acts that would defeat the object and purpose of a treaty that it has signed, even if that treaty is still not in force, the panel simply clarified that it could not assess the object and purpose of the FTA as this would go beyond its terms of reference in the present case (paras. 7.90–7.92). Finally, the panel noted that the elements of the doctrine of abuse of rights as presented by Peru were the same as the elements suggesting that the WTO Member had not engaged in the dispute settlement procedure in good faith that had been already addressed and thus would not require a separate consideration (para. 7.95).

2. Analysis under the Agreement on Agriculture

The panel started its analysis under the AoA by restating the objective of this Agreement, namely, to establish a fair and market-oriented agricultural trading system, and the specific objective of Article 4 of the AoA – to convert a number of border measures that restrict the volume or distort the price of imports of agricultural products into ordinary customs duties (para. 7.274).

According to footnote 1 to the AoA, the illustrative list of border measures that have to be converted into ordinary customs duties includes variable import levies, minimum import prices and similar border measures, all of which were claimed by Guatemala (para. 7.277). The panel reaffirmed that the fact that the

[49] Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador,* adopted 11 December 2008, WT/DS27/AB/RW2/ECU/ Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States,* adopted 22 December 2008, WT/DS27/AB/RW/USA/Corr.1 *(Article 21.5 – US),* para. 217.

application of those measures might result in the payment of duties did not suggest that they should not have been converted into ordinary customs duties (para. 7.280).

First, the panel confirmed that duties resulting from the PRS were variable, or at least were similar to variable duties, and they applied on importation, thus they fell within the meaning of footnote 1 to the AoA and were therefore prohibited. In assessing the variability feature, the panel noted that the PRS regime set by a number of legislative acts varies automatically on the basis of the formula set out therein to calculate the ceiling and floor prices every six months and the reference prices every fortnight. Such an incorporated formula is evidence of the inherent variability (para. 7.320). Moreover, the changes of duties did not require any separate legislative or administrative act, as publications of the customs tables with the ceiling and floor prices and the reference prices were not discretionary administrative acts and constituted a part of the PRS (para. 7.322). The panel also noted that the fortnightly variability imposed by the PRS as a mechanism, was a result of rules and formulas that were a part of the system, which applied continuously and automatically. Thus they were not comparable to the ordinary customs duties, which can change based on specific trade policy decisions or separate decisions (para. 7.324). The panel also analysed the lack of transparency and predictability of the PRS as an additional characteristic to show that the measure undermines the object and purpose of Article 4 AoA following the approach taken by the panels and the Appellate Body in *Chile – Price Band System*[50] (para. 7.328). The panel concluded that in comparison to the ordinary customs duties the measure lacked transparency and predictability regarding the level of duties based on the above-mentioned calculations (para. 7.340).

The panel accepted the claim of Guatemala that the PRS system may distort import prices and limit the transmission of the import prices to Peru's domestic market. This was confirmed by the stated objective of the PRS ("to neutralize fluctuations in international prices and to limit the negative effects of falls in such prices"), and inherent to the mechanism of the PRS which in the short term, through the reference price, prevents the transmission of any fall in prices to the domestic market in Peru. In the mid-term, however, it would distort the transmission due to the diluted reflection of changes in international prices in the floor price (paras. 7.343–7.346, 7.349). However, the panel found insufficient evidence in the PRS system to find that they amount to minimum import prices

[50] Appellate Body Report, Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina,* adopted 22 May 2007, WT/DS207/RW/Corr.1, paras. 156, 214–215, 221–222.

or border measures similar to minimum import prices (para. 7.370). Finally, the panel concluded that the measure does not constitute an ordinary customs duty (para. 7.374).

3. Analysis under the GATT 1994

Under the GATT 1994 the panel first undertook an assessment under Article II:1(b), second sentence, which envisages that "imported goods shall be exempt from all other duties of any kind imposed on or in connection with the importation". Earlier jurisprudence has already clarified that other duties and charges refer to duties and charges other than the ordinary customs duties.[51] Clearly, the PRS constituted a border measure, which was different from the ordinary customs duties, as confirmed by the panel following its considerations under the AoA (para. 7.425). The panel took note of the fact that during the Uruguay Round Peru had bound its tariffs at two levels: for most products the bound tariff was at the level of 30% *ad valorem* whereas for rice, sugar, dairy products, maize and wheat, the tariffs were bound at a level of 68% (para. 7.166). However, these numbers refer to the ordinary customs duties. At the same time in Peru's schedule of concessions the column corresponding to "other duties or charges" does not contain any record and thus Peru failed to comply with the requirements of Article II:1 (b) GATT.

In the second step the panel addressed the transparency and good governance claims of Guatemala under Article X GATT. Article X:1 GATT contains an obligation for a WTO Member to publish promptly any legislative and administrative acts affecting trade to enable governments and traders to become acquainted with them. Article X:3 GATT requires that those acts have to be administered in a uniform, impartial and reasonable manner. However, the panel noted that in light of its findings of inconsistency of the PRS system with Article 4.2 AoA and Article II:1(b) GATT it exercised judicial economy with respect to both Article X:1 and Article X:3 GATT 1994 (paras. 7.466–7.467, 7.500–7501). The panel also did not assess the alternative claims under the Customs Valuation Agreement. However, it noted that were these claims to be raised on the appeal, there was sufficient factual information for the Appellate Body to assess them (para. 7.504).

Finally, the panel briefly addressed a possible prevalence of the FTA provisions over WTO provisions. Peru submitted that even if the panel were to find inconsistency of the additional import duties with WTO law, these duties would

[51] Appellate Body Report, *India – Additional and ExtraAdditional Duties on Imports from the United States,* adopted 17 November 2008, WT/DS360/AB/R, para. 151.

still be in line with the Peru – Guatemala FTA. Peru asserted that, in the present case, the FTA would prevail as a subsequent agreement between WTO Members that modified their obligations as between themselves in line with Article 41 VCLT. Indeed, Article 1.3 FTA explicitly reads that the FTA prevails to the extent of the inconsistency with other agreements, including the WTO Agreement (para. 7.38). Both Guatemala and Peru confirmed that within the FTA framework they were negotiating the application of the additional duties under the PRS for products originating from Guatemala. For a number of products (including cheese, food preparations and preparations used in animal feeding) the parties had reached an agreement for a tariff quota free regime. However, with respect to other agricultural products, para. 9 of Annex 2.3 to the FTA explicitly recognized that Peru could maintain its PRS for a number of products listed in Peru's Schedule to the FTA (para. 7.40). The panel referred to its position under the preliminary procedural considerations, namely that the FTA had not entered into force yet and thus had limited legal effects (para. 7.527). Consequently, the panel did not find it necessary to proceed with the analysis of a potential conflict between the FTA and the covered agreements and the possible consequences of this conflict (para. 7.528).

C. Commentary

The present case touched upon two issues that are of systematic importance for the interpretation of the WTO law and the "co-existence" of WTO law with numerous FTAs concluded by WTO Members in recent years.[52] In this light it is also of key importance for Switzerland, which has concluded a number of FTAs since 1994. The question would then be whether the FTA provisions that deviate from the WTO provisions by allowing certain trade-restrictive policies could then be invoked against Switzerland by its FTA partners within the WTO framework.

The first question raised by Peru, and only marginally touched upon by the panel (because the FTA has not entered into force yet), was whether the fact that a party to the FTA neglects an explicit provision in this FTA, which allows

[52] This question has already been raised in the literature on several occasions, *see e.g.* Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements,* 41 Canadian Yearbook of International Law (2003), p. 83–103, Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO,* 1(1) Journal of International Dispute Settlement (2010), pp. 67–95; Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO,* 19 European Journal of International Law (2008), pp. 571–599, William J. Davey & André Sapir, *The Soft Drinks Case: The WTO and Regional Agreements,* 8 World Trade Review, (2009), pp. 5–23.

certain restrictions applicable in bilateral trade between the FTA parties, is still acting in good faith when bringing a claim based on those restrictions to the WTO. This largely refers to the issue of admissibility of claims. The issue of admissibility of claims in the WTO has been raised only on a few occasions. As mentioned above, the Appellate Body has already mentioned that the right of recourse to the DSU can be waived only "explicitly or by necessary implication".

Some academics have also noted that waivers of a right to initiate disputes in a certain forum or on a certain matter are recognized in public international law and reflected in Article 45 of the International Law Commission (ILC) Draft Articles on States Responsibility (which refers to a valid waiver).[53] At the same time it has been suggested that the most secure way would still be to deal with such a waiver within the framework of Article 3.10 DSU.[54] Support for the latter option can be found in the existing WTO jurisprudence, which suggests that there might be legal impediments that preclude a panel from exercising its jurisdiction.[55] It is true though, that in the present case the question of a waiver was somewhat neglected and the panel focused on the analysis of "good faith" and finally avoided a deep analysis because the FTA was not yet in force.

The second question raised by Peru is of substantial nature and goes to the very core of the relationship between the conflicting provisions of the FTAs and the respective WTO covered agreements, which even in the case of a breach of a WTO provision would possibly resolve the situation.[56] However, it remains to be seen whether and to what extent FTAs can serve as a subsequent agreement within the WTO framework, modifying the relationship between FTA parties.

[53] *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10, Ch. IV.E.1; Joost Pauwelyn, *International Economic Law and Policy Blog,* "Waiving WTO Rights in an FTA? Panel report on Peru – Agricultural Products", blog entry by Joost Pauwelyn, 4 December 2014, available at: <http://worldtradelaw.typepad.com/ielpblog/2014/12/waiving-wto-rights-in-an-fta-panel-report-on-peru-agricultural-products.html> (accessed 20 March 2015).

[54] Bregt Natens & Sidonie Descheemaeker, *Say it Loud, Say it Clear – Article 3.10 DSU's Clear Statement Test as a Legal Impediment to Validly Established Jurisdiction,* 49 Journal of World Trade (2015), forthcoming.

[55] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages,* adopted 24 March 2006, WT/DS308/AB/R, paras. 53–54.

[56] Appellate Body Report, *EC – Bananas III* (Article 21.5 – Ecuador II), *supra* n. 49, para. 217.