The Bed Linen Case and its Aftermath. Some Comments on the European Community's "World Trade Organization Enabling Regulation"

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I. Introduction

It is not the objective of this article to discuss the substantive and more technical issues of the Bed Linen case but rather to focus on the legislative measures adopted by the European Community (EC) to comply with the Panel and Appellate reports in Bed Linen, with special attention for the so-called “World Trade Organization Enabling Regulation” adopted by the EC.1 The WTO Enabling Regulation and the proposal leading to its adoption contain some statements made by the European Commission and the Council of the European Union that are disputable and which give food for thought. These thoughts will be further developed in this article.

II. Factual Background

On 12 March 2001, the WTO Dispute Settlement Body (DSB) adopted the Appellate Body report2 and the Panel report,3 as modified by the Appellate Body, in European Communities—Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India (EC—Bed Linen). These reports concluded that the imposition by the EC of definitive anti-dumping duties on imports of cotton-type bed linen from India was inconsistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 (the “Anti-dumping Agreement”). Pursuant to the recommendations of these reports, the DSB requested the EC to bring its measure into conformity with its obligations under the Anti-dumping Agreement (ADA). In accordance with Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the EC and India agreed on a reasonable period of five months and two days to implement the recommendations and rulings adopted by the DSB.4

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3 WT/DS141/10 of 1 March 2001.

4 WT/DS141/R of 30 October 2000.

5 WT/DS141/10 of 1 May 2001.
In order to provide the EC with the necessary legal framework to implement these recommendations and rulings, the Council adopted a regulation “on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters” (i.e., the so-called WTO Enabling Regulation). On 7 August 2001, in application of Regulation 1515/2001, the EC adopted Regulation 1644/2001 amending the original definitive anti-dumping duties on bed linen from India, purporting to comply with the DSB’s recommendations and rulings, while simultaneously suspending its application.

India disagreed that this re-determination complied with the Panel and Appellate Body rulings. The re-determination was amended by Council Regulation 160/2002 terminating the proceeding against Pakistan. On 13 February 2002, the EC initiated a so-called “partial interim review” against India and on 14 March 2002 the EC terminated the anti-dumping proceeding with respect to Egypt. On 22 April 2002, the Council adopted Regulation 696/2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation 2398/97, as amended and suspended by Regulation 1644/2001. In May 2002, the EC announced that it would review, on request, all of the anti-dumping measures based on methodologies found to be incompatible with WTO rules in the Bed Linen case. The Commission argued that the EC had fully implemented the rulings and recommendations of the Panel and Appellate Body and that these reviews were an additional implementation step, to conform WTO compliance of all other existing anti-dumping measures.

India argues that the re-determination, as amended, as well as the further actions, failed to bring the EC into compliance with the recommendations and rulings adopted by the DSB and is inconsistent with WTO law. It is of the opinion that the re-determination is inconsistent with Articles 2, 3, and 15 of the ADA, as was the original

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7. WT/DS141/11, para. 4.


13. See Press Release IP/02/685 of 8 May 2002: “European Commission to review anti-dumping measures to confirm compliance with WTO recommendations”.

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measure, and that the re-determination and the further actions have also introduced further inconsistencies with the Anti-dumping Agreement.

On 8 March 2002, India initiated procedures under DSU Article 21.5 by requesting the EC to enter into consultations.\textsuperscript{14} Consultations were held in Geneva on 25 and 26 March 2002. These consultations have allowed a better understanding of the respective positions but have failed to settle the dispute. Accordingly, “there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB between India and EC within the terms of DSU Article 21.5. Pursuant to DSU Articles 6 and 21.5, Anti-dumping Agreement Article 17, and GATT 1994 Article XXIII, and as envisaged in the Agreement of 13 September 2001 on the “Agreed Procedures between India and the European Communities under Articles 21 and 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes in the follow-up to the dispute EC—Bed Linen, India requested the establishment of a Panel. A Panel was established on 2 July 2002.\textsuperscript{15}

III. THE WTO ENABLING REGULATION—SOME FURTHER REFLECTIONS

Regulation 1515/2001 was adopted to enable the EC, whenever a need was created by an unfavourable WTO ruling, to digress from the rigid framework of the anti-dumping and anti-subsidy regulations, in order to remedy the adverse WTO ruling. The WTO Enabling Regulation empowers the EC to take whatever steps it sees fit to amend existing anti-dumping or anti-subsidy measures on account of future unspecified WTO rulings. The reason for adopting the WTO Enabling Regulation was that the basic regulations, as they stood,\textsuperscript{16} did not allow for special types of reviews of existing measures such as in Bed Linen.\textsuperscript{17}

The Commission proposal\textsuperscript{18} and the final Regulation as adopted by the Council, contain two particular statements that are quite controversial. The Commission argues that “although WTO rules do not oblige the Community to implement a report adopted by the DSB, in certain circumstances the Community might find it appropriate to amend anti-dumping or anti-subsidy regulations to bring them in line with such reports”.\textsuperscript{19} In addition, both the proposal and the WTO Enabling Regulation provide that “recommendations in reports adopted by the DSB only have prospective effect”.\textsuperscript{20} Both statements will be further examined below.

\textsuperscript{14} WT/DS141/12 of 14 March 2002.
\textsuperscript{15} WT/DS141/14 of 2 July 2002.
\textsuperscript{16} Only the traditional newcomer, interim and sunset review options were available, all of which require new investigation periods and new calculations, rather than revisiting old investigation periods and re-calculating by way of different methods.
\textsuperscript{17} See Branton, as note 5, above, at 65.
\textsuperscript{19} Para. 2 of the explanatory memorandum to the Commission proposal.
\textsuperscript{20} Para. 6 of the explanatory memorandum to the Commission proposal and para. 6 of the preamble to the WTO Enabling Regulation.
IV. THE BINDING NATURE OF REPORTS ADOPTED BY THE DSB

In its proposal, the Commission entered into the sensitive debate on the interpretation of the nature of the legal obligations of WTO Members under the WTO dispute settlement mechanism. The Commission seems to have taken the approach that full implementation is not an absolute obligation. The question of whether Panel and Appellate Body reports, as adopted by the DSB, are binding upon WTO Members has been the object of a fierce debate in legal doctrine.21

In an attempt to respond to “some claims that faceless, unelected, unaccountable bureaucrats in Geneva have usurped US sovereignty by writing rules for Americans that should be determined only by Americans”, Bello emphasized that:

“Like the GATT rules that preceded them, the WTO rules are simply not binding in the traditional sense. … Rather, the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promote compliance with its trade rules through incentives.”

She subsequently argued that if its law or measure is successfully challenged, a WTO Member has three options: first, it may (and preferably would) come into compliance with the ruling; second, it may maintain the offending measure but provide compensatory benefits instead; or third, it may choose to make no change in its law and decline to provide compensation, and, instead, suffer from retaliation against its exports. Bello thus argues that a WTO Member is not required to comply with an adverse WTO dispute settlement ruling, but instead may choose to comply, to compensate or to stonewall and suffer retaliation against its exports. In addition, the opinion of Bello is based on an assumption that “the only truly binding WTO obligation is to maintain the balance of concessions negotiated among Members”.

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Jackson has, rightly, argued that this conception constitutes “a misunderstanding of the nature of legal obligation”. He argues that the “adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes”. In his view compensation or subsequent suspension of concessions are only “a fallback in the event of non-compliance”. To support his views, he emphasized that, already under GATT 1947, contracting parties were treating the results of an adopted panel report as legally binding. He then relied on textual arguments, describing 11 clauses of the DSU which, read together, “strongly suggest” that the legal effect of an adopted Panel report is the international law obligation to perform the recommendation of the Panel report.

The view taken by Jackson seems to be correct for a number of reasons. First, also under traditional international law the objective of countermeasures is to induce compliance of the state that has committed an internationally wrongful act. It is clear from the text of the ILC’s Final Draft Rules on State Responsibility that, as under WTO law, countermeasures do not constitute an alternative means of reparation for the injured party. Article 19.1 of the DSU seems to confirm this understanding since it provides that “[W]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement”. The DSU thus seems to indicate that withdrawal or modification of the measure concerned includes both “cessation” and “reparation”. There is no possibility of *restitutio in integrum* in WTO law and no financial compensation is available. It is fundamental therefore to understand that there is only one real remedy available that Panels and the Appellate Body can provide and this is the recommendation to bring the measure into conformity, i.e. withdrawal or modification of the contested measure(s) and the possible suggestion of how this can be done. Consequently, there is no “choice” available to the parties. Compensation and suspension of concessions are merely potential default remedies that could be requested only if recommendations are not being implemented.

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22 See Jackson, as note 21, above.

23 See Article 49 of the ILC’s Final Draft Rules on State Responsibility. The Final draft articles were adopted in August 2001. See ILC Report on the work of its 53rd session (23 April–1 June 2001, and 2 July–10 August 2001), General Assembly, Official Records, 55th Session, Supplement No. 10 (A/56/10). The draft Articles are on pp. 43–59, at <http://www.un.org/law/ilc/reports/2001/2001report.htm>. Article 49(1) provides that “[A]n injured State may only take countermeasures against a State which is responsible for an international wrongful act in order to induce that State to comply with its obligations …”.

24 Pauwelyn, however, argues that the “WTO enforcement regime lacks the remedy of reparation—at least in the traditional sense of compensation for damages in the past”. He concludes that “[I]n this sense, the WTO offers less than the ICJ”. See Pauwelyn, as note 21, above, at 359. One could also argue that, under WTO law, cessation and reparation are “compressed” in the withdrawal or the modification of the measure in question.

25 However, in December 2001 the US agreed to pay the EC $3 million in compensation in the context of settling US—Section 110(5) of the US Copyright Act (WT/DS160). The statute at issue in the case allows the broadcasting of music in certain US restaurants and bars without paying EC rights holders. This has been estimated to cost the EC roughly $1 million per year in lost royalties. The settlement reached envisages an anticipated US payment of more than $3 million over three years into a fund for European musicians while the legislation remains in effect. See European Commission Press Release IP/01/1860 of 19 December 2001, “EU and US agree on temporary compensation in copyright dispute”.
Second, the text of the DSU supports the view taken by Jackson. There are at least eleven separate passages in the DSU that seem to indicate that there is an obligation to comply with Panel or Appellate Body rulings, as adopted by the DSB.\(^\text{26}\)

It is not necessary to analyse all of these provisions in detail. A closer look at DSU Article 3.7 leaves little doubt as to the hierarchy and the character of measures that should be taken following the adoption of a Panel or Appellate Body report.\(^\text{27}\)

DSU Article 3.7 provides that:

“In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis \textit{vis-à-vis} the other Member, subject to authorization by the DSB of such measures.”

This article reveals that the withdrawal of a WTO inconsistent measure is the primary objective of the WTO dispute settlement mechanism. Some scholars have questioned the importance of this provision. Sykes, for example, argued that if the objective of the system is “usually” to secure the withdrawal of the measure, it is impliedly not always the objective.\(^\text{28}\)

This interpretation is only correct to the extent that it confirms that the word “usually” refers to the discretion of Panels and the Appellate Body in drafting their recommendations and suggestions and in applying the most efficient solutions to resolve a dispute (without obliging them to withdrawal where a mere modification would be sufficient). It does not imply that compensation is seen as an equal alternative for withdrawal.\(^\text{29}\)

On the contrary, the use of compensation is subject to two basic conditions: (a) compensation may be used only if immediate withdrawal is impracticable and (b) compensation is temporary. The first condition excludes compensation as an alternative to performance whereas the second condition emphasizes the strictly temporary character of compensation.\(^\text{30}\)

Third, it is important to understand that the remedy provided by DSU Article 19.1, i.e., the recommendation that the Member concerned—the party to the dispute to whom the Panel or Appellate Body recommendations are addressed—bring the measure into conformity with the relevant agreement(s), is by itself very flexible. It has been clearly established that even though DSU Article 19.1 provides that a Panel or the

\(^{26}\) See Jackson, as note 21, above, at 63.

\(^{27}\) See Pierros and Maciejewski, as note 21, above, at 168; and Zonnekeyn, as note 5, above, at 99.

\(^{28}\) Sykes, as note 21, above, at 349.

\(^{29}\) See Pierros and Maciejewski, as note 21, above, at 168; and Zonnekeyn, as note 5, above, at 99.

\(^{30}\) Timmermans admits that compensation is seen as only a temporary solution but that it cannot in any way be excluded that compensation may ultimately be a \textit{provisoire qui dure}, see C.W.A. Timmermans, “The Implementation of the Uruguay Round by the EC”, in J.H.J. Bourgeois et al. (eds), \textit{The Uruguay Round Results: A European Lawyers’ Perspective} (Brussels: European Interuniversity Press, 1995), pp. 501–509, at p. 504.
Appellate Body may suggest ways in which it believes the Member could appropriately implement that recommendation, the modalities of implementation of a Panel or Appellate Body recommendation are for the Member concerned to determine. This means that there is a clear distinction between the recommendations of a Panel and of the Appellate Body and the means by which that recommendation is to be implemented. “The former is governed by Article 19.1 and is limited to a particular form. The latter may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned.” A recommendation under Article 19.1 to bring the measure into conformity with the relevant agreement(s) should thus be interpreted “as referring to whatever actions the Member in question should undertake to ensure that it does fulfil its obligations”. Obviously, it is possible that the prevailing Member is not satisfied with the implementation. Then, the DSU provides for recourse to the dispute settlement procedure—and not to any other means—to resolve any such a disagreement. In the meantime, if the responding party decides to follow the suggestion(s) of the Panel or the Appellate Body, it would be logical to assume that the implementing measure conforms to these suggestions.

V. THE REIMBURSEMENT OF ANTI-DUMPING DUTIES

Regulation 1644/2001 does not provide for a reimbursement of anti-dumping duties. This is not surprising since the duties have merely been suspended and not repealed. In addition, Article 3 of the WTO Enabling Regulation explicitly provides that “[A]ny measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for” (my emphasis).

Horovitz has questioned the WTO compatibility of this provision. He argues that the DSU does not provide for any general principle to limit the effect in time, whether prospective or retrospective, of adopted Panel of Appellate Body reports. Article 19.1 DSU only provides that where a measure is found to be incompatible with a covered agreement, the DSB recommendation to the Member concerned would be “to bring the measure into conformity with that agreement”. Accordingly, the DSU would not allow a restriction as provided for by Article 3 of the WTO Enabling Regulation. Horovitz therefore concludes that the EC would be obliged to reimburse the anti-dumping duties paid.

31 For a good example, see India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, report of the Panel of 5 September 1997, WT/DS50/R, at para. 8.2. For a comprehensive study of the non-binding character of the “suggestion” of the adjudicating bodies, see Mavroidis, as note 21, above, at 777–778.
33 Ibid., at para. 7.26.
35 Ibid., at para. 8.3.
36 Ibid., at para. 7.26.
However, Article 3 does leave some scope for manoeuvre since it provides that the measures will enter into force *ex nunc*, “unless otherwise provided for”. It has not been explained what this specifically means.

The thesis defended by Horovitz with regard to the retrospective effect of recommendations and findings adopted by the DSB does not seem to correspond with prior rulings of Panels and the Appellate Body and with the principle that recommendations and findings of the DSB are prospective in nature. As far as the case-law of Panels is concerned, a distinction must be made between GATT practice and WTO practice.

A. GATT PRACTICE

Under the GATT-regime, some Panels had recommended, as Kuyper phrased it, a “specific performance” by ruling that the anti-dumping duties imposed should be revoked and that the anti-dumping duties collected should be reimbursed. In *New Zealand—Imports of Electrical Transformers from Finland*, the Panel proposed to the Council “that it addresses to New Zealand a recommendation to revoke the anti-dumping determination and to reimburse the anti-dumping duty paid”. Especially, the United States was opposed to a reimbursement of the anti-dumping duties and therefore decided not to adopt the report in *United States—Imposition of Anti-dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*. This Panel had recommended “to revoke the anti-dumping duties imposed” and “reimburse the anti-dumping duties paid”. In *United States—Anti-dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, the Panel went further and recommended that “the Committee request the United States to revoke the anti-dumping duty order on gray portland cement and cement clinker from Mexico and to reimburse any anti-dumping duties paid or deposited under this order”. Also the EC was opposed, under the GATT regime, to the reimbursement of anti-dumping duties.

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38 This article will only focus on the case-law with regard to anti-dumping duties. The case-law with regard to anti-subsidy measures will not be dealt with. For an overview also encompassing GATT and WTO practice with regard to anti-subsidy measures, see P. Grane, *Remedies Under WTO Law*, J.I.E.L. (2001), 763–769.


40 *New Zealand—Imports of Electrical Transformers from Finland*, report of the Panel of 18 July 1985, BISD 32S/55, at para. 4.11.


from the European Economic Community, the EC had eventually asked for the reimbursement of the anti-dumping duties but later withdrew its request.43

B. WTO PRACTICE

Where a Panel or the Appellate Body concludes that a measure is incompatible with a covered agreement, it shall recommend that the Member concerned brings the measure into conformity with that agreement.44 Article 19.1 DSU appears to follow GATT practice.45 Panels and the Appellate Body may suggest ways in which the Member concerned could bring its measure into conformity.46 It is not yet clear how far these “suggestions” may reach.

In Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico,47 Mexico requested the Panel to recommend that Guatemala revoke the measure and also “refund those anti-dumping duties already collected”.48 The Panel declined, noting that DSU Article 19.1 confines Panels to recommending that the Member concerned bring the measure into conformity. However, the Panel added that Article 19.1 did permit a Panel to “suggest” ways in which the Member concerned could bring its measure into conformity. In this particular case, the Panel ruled that the revocation of the duties collected was the only appropriate means to implement its recommendation since the entire anti-dumping investigation rested on an insufficient basis and therefore never should have been initiated. The ruling of the Panel was appealed. The Appellate Body overturned the Panel report on other grounds.49 In a follow-up case, the Panel refused to make a specific recommendation of reimbursement of anti-dumping duties.50 It is important to note that the Panel did not rule that a reimbursement of anti-dumping duties is *per se* excluded.

C. EC LAW

If one accepts that the EC was obliged to revoke the anti-dumping duties after the ruling of the Appellate Body in *Bed Linen*, rather than to suspend these duties, the question arises whether these duties ought to be reimbursed on the basis of EC law as

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43 Brazil—Imposition of Provisional and Definitive Anti-dumping Duties on Milk Powder and Certain Types of Milk from the European Economic Community, report of the Panel of 27 December 1993, SCM/179, para. 200.
44 Article 19.1 DSU.
49 Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico, report of the Appellate Body of 2 November 1998, WT/DS60/AB/R.
such. The WTO Enabling Regulation precludes, in principle, a reimbursement of anti-dumping duties. However, if it is established that the legal basis of the anti-dumping duties imposed by the EC is in breach of WTO law, than the regulation imposing these duties should be null and void *ab initio*. Consequently, a reimbursement of the anti-dumping duties collected ought to be considered by the EC. The notice concerning the reimbursement of anti-dumping duties, which was recently adopted by the Commission, could provide a legal basis for such a reimbursement. The aim of the notice is to “allow for the reimbursement of anti-dumping duties which have already been paid where it is shown that the dumping margin on the basis of which duties were paid has been eliminated …”.

The possibility provided by Article 3 of the WTO Enabling Regulation, more in particular the provision that “measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for”, does not appear to exclude such reimbursement.

An obvious question is whether there are any legal remedies available for exporters if the EC would decide not to reimburse the collected anti-dumping duties. One option is the initiation of an action for damages under Article 288(2) EC Treaty. Article 288(2) EC Treaty imposes an obligation upon the EC to “make good any damage caused by its institutions” and this “in accordance with the general principles common to the laws of the Member States”. According to established case-law, in order for the EC to incur non-contractual liability the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage. Moreover, in the case of legislative measures involving choices of economic policy, an action under Article 288(2) EC Treaty will only be successful if the rule of law infringed is intended to confer rights on individuals.

The illegality (i.e., WTO incompatibility) of Regulation 2398/97, imposing anti-dumping duties, was clearly established in *Bed Linen* by a WTO Panel and also by the Appellate Body. It would not be difficult to demonstrate that damages occurred as a result of anti-dumping duties that were unlawfully imposed. In addition, the *nexus* between the regulation imposing the duties and the damages seems obvious. However, the *Bergaderm* test will be more difficult to comply with. It will be very difficult to demonstrate that the WTO rules infringed are intended to confer rights on individuals.

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51 See also Branton, as note 5, above, at 65.
52 Mavroidis reaches a similar conclusion in his comments on Guatemala—Anti-dumping Investigation Regarding Portland Cement from Mexico. See Mavroidis, as note 21, above, at 388.
especially since the Court of First Instance has recently decided that "[T]he purpose of the WTO agreements is to govern relations between States or regional organizations for economic integration and not to protect individuals". 56

VI. CONCLUSION

The analysis of the WTO Enabling Regulation has demonstrated that rulings of the WTO dispute settlement organs have a direct impact on intra-European Community law. The statement that decisions of the DSB are not binding is not correct. One has to take into consideration that such decisions can even be invoked in legal actions before the Court of First Instance or the European Court of Justice. 57 A reimbursement of the unlawfully collected anti-dumping duties cannot a priori be excluded. The case-law of GATT and WTO Panels is not always very clear on this subject, but there is nothing that seems to prevent a reimbursement on the basis of EC law as such. A refusal of the EC to do so, could result in the initiation of legal actions before the European courts in Luxembourg as indicated above. The statements made by the Commission and the Council in the text of the WTO Enabling Regulation are disputable and should give rise to further thought and discussion.