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WTO CASE LAW IN 2013

edited by GIORGIO SACERDOTI*

with EMILY LYDGATE, GUENDALINA CATTI DE GASPERI, REGIS YANN SIMO and CARLO DE STEFANO

1. INTRODUCTION

The Italian Yearbook here presents a short but analytical survey of the WTO case law for 2013. This survey is carried out within the framework of the PhD program in International Law and Economics of the PhD school of Bocconi University in Milan. Professor Giorgio Sacerdoti of Bocconi University and the Board of Editors, a former member of the WTO Appellate Body (2001-2009), has coordinated the individual reviews of WTO case law. They have been contributed by current PhD candidates and other young scholars associated with the PhD program in International Law and Economics; their names are listed above and at the end of each review.

It was a slow year for WTO case law in the sense that the only Appellate Body decisions to appear were the “twin reports” *Canada – Renewable Energy* and *Canada – Feed-In Tariffs*, which focus on the same renewable energy measures in the Canadian province of Ontario. In addition, two unappealed Panel Reports on antidumping measures, *China – X-Ray Equipment* and *China – Broiler Products* were adopted by the Dispute Settlement Body (DSB) in 2013.

Despite few Reports, 2013 was in several respects a landmark year. In particular, the disputes against Canada marked the first time the Appellate Body addressed the WTO-compatibility of renewable energy regulations, currently a contentious trade issue. The US and China have filed complaints against India and the EU respectively for the use of similar measures. The outcomes thus provided an important precedent. While making clear that local content requirements for generation equipment are not compatible with WTO obligations, the decisions leave open questions about what types of green subsidies are permissible.

The rest of the dispute activity for the year focused on China, specifically two Panel decisions mentioned above and reviewed here after, concluding that it had misused trade remedies against alleged anti-competitive practices. Furthermore, in 2013, another antidumping dispute, concluded in 2012, *China – GOES*, which focused on similar claims, went to arbitration under Article 21.3 to determine a reasonable period of time for implementation; a review of the award is also included here.

A number of disputes were set in motion, with 17 requests for consultation initiated. This is a return to average after 2012, an outlier year which saw the initiation of 27 new disputes. Russia marked its first full year of WTO Membership with a high level of dispute activity. Russia filed its first complaint over EU anti-dumping measures. Its recycling fees for motor vehicles also became the target of complaints from Japan and the EU.

It was also an active year for arbitration and compliance Panels. Besides the *China – GOES* arbitration, the Appellate Body reports from the 2012 in the disputes against the US under the TBT Agreement failed to be implemented to the satisfaction of complaining governments. Compliance panels have been composed to evaluate whether the US has implemented the Appellate Body decisions in *US – Tuna II* and *US – COOL*. In *US – Clove Cigarettes*, Indonesia proceeded directly to a request to impose trade remedies under Article 22.6 without first seeking a decision about whether the measures were in compliance under Article 21.5. This is the first time this has happened since *EC – Bananas*. Finally, the two compliance panels in *EC – Large Civil Aircraft* and *US – Large Civil Aircraft* (both composed in late 2012) have been unable to complete their work in 2013, and continued working on their reports into 2014.

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2. APPELLATE BODY REPORTS, CANADA – CERTAIN MEASURES AFFECTING THE RENEWABLE ENERGY SECTOR (“CANADA – RENEWABLE ENERGY”)¹ and CANADA – MEASURES RELATING TO THE FEED-IN TARIFF PROGRAM (“CANADA – FEED-IN TARIFF PROGRAM”)²

2.1 Introduction: Renewable energy policy and WTO law

Bolstered by government investment and incentive schemes, renewable energy has progressed from fringe sector to key market player.³ As the public sector is playing a significant role in providing competitive opportunities for particular energy suppliers at the expense of others, it is not surprising that these policies have become subject to controversy. From a WTO perspective, the concern is that government support for renewable energy should not be a means for favouring domestic producers to the detriment of importers. In these disputes, the WTO Appellate Body considered for the first time whether public sector measures encouraging the use of renewable energy complied with WTO trade liberalization commitments.

More specifically, this dispute focused on a Feed-in Tariff (“FIT”) programme in the electricity market of the Canadian province of Ontario, which provided preferential rates and terms of service to renewable energy producers. At issue was the FIT’s local content requirement (“LCR”), which stipulated that some of the electricity generation equipment had to be purchased domestically. Electricity market FITs are the most widely utilized strategy worldwide for increasing renewable energy use. They have been adopted by more than 71 countries and 28 states and provinces.⁴ LCRs are a common add-on to such programmes.⁵ Indeed, following on from this dispute there are further WTO complaints, and retaliatory action, directed at similar programmes.⁶

Thus, the precedents established by this dispute were significant. One of the Appellate Body’s findings was unsurprising: LCRs are expressly prohibited under WTO national treatment and investment obligations. This is a clear signal for all countries with LCRs. On the other major legal question in the dispute, whether FITs are compatible with WTO subsidy laws, the Appellate Body concluded that it could not complete the analysis. Thus the dispute did not provide a clear precedent – nor even resolve the issue in the specific instance. However, in its legal reasoning, the Appellate Body introduced an innovative and widely-criticized approach. In preventing the FIT from meeting the threshold requirement of being defined as a subsidy, it also enabled a large degree of discretion for governments to support infant industries without repercussions under WTO subsidy laws.⁷ These issues are discussed further in the comments section below.

2.2 Facts of the Disputes

¹ Appellate Body Report issued on 6 May 2013 (WT/DS412/AB/R), modifying Panel Report issued on 19 December 2012, (WT/DS412/R), adopted 24 May 2013.

² Appellate Body Report issued on 6 May 2013 (WT/DS426/AB/R), modifying Panel Report issued on 19 December 2012, (WT/DS426/R), adopted 24 May 2013.

³ As of early 2013, 138 countries had set policy targets for increased renewable energy use. The latest available aggregate data, from 2011, suggests that renewable energy accounted for 19 per cent of the total energy market worldwide. Renewable Energy Policy Network for the 21st Century (REN 21), *Renewables 2013 – Global Status Report*, Paris, 2013, pp.13, 65. Available at : http://www.ren21.net/portals/0/documents/resources/gsr/2013/gsr2013_lowres.pdf (visited 17 March 2014).

⁴ *Ibid.*, pp. 65-68.

⁵ HUFBAUER, et al., “Local Content Requirements : A Global Problem”, Washington, DC, Peterson Institute for International Economics, 2013.

⁶ MEYER, ‘Energy Subsidies and the World Trade Organization’, 17(22) *Insights*, American Society of International Law, 10 September 2013: <http://www.asil.org/insights/volume/17/issue/22/energy-subsidies-and-world-trade-organization> (accessed 27 February 2014).

⁷ PAL, “Has the Appellate Body’s Decision in Canada – Renewable Energy/ Canada – Feed-in Tariff Programme Opened the Door for Production Subsidies?” 17(1) *JIEL*, 2014, pp. 125-137.

When Japan initiated a complaint focusing on the local content requirement of the FIT programme in the Canadian province of Ontario, the EU followed closely with a similar complaint. As the complaints had large areas of overlap (and following the request of the Parties), the WTO Panel and Appellate Body both issued their two Reports in the form of a single document. There were a large number of third parties: Australia, Brazil, China, El Salvador, the EU, Honduras, India, Saudi Arabia, Korea, Mexico, Norway, Chinese Taipei, and the United States. This demonstrates the widespread interest in the issue among WTO Members.

The FIT legislation, introduced in Ontario's Green Energy and Green Economy Act of 2009, was designed to stimulate the province's renewable energy sector.⁸ Through the FIT programme, the Ontario Power Authority ("OPA") purchased electricity from renewable sources at a premium rate, with contracts lasting from 20-40 years. At issue in the dispute was one of the eligibility requirements: a local content requirement ("LCR"), stipulating that the generation equipment contain a minimum level of domestic content. The LCR varied based upon the scale of the project and type of energy generated.

The complaints focused on two claims. The first was that the LCR was discriminatory under the Agreement on Trade-Related Investment Measures ("TRIMs Agreement" or "TRIMs") and by extension the national treatment obligation of Article III(4) of the GATT 1994 ("Article III(4)"). The second was that the LCR provided subsidy contingent on the use of domestic over imported generation equipment, thus contravening the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The complaint focused specifically on contracts awarded for wind and solar photovoltaic ("PV") power.

The Panel determined that the LCR did not comply with the TRIMs Agreement and GATT Article III(4). However, it dismissed the complainants' allegations under the SCM Agreement on the grounds that they had failed to establish that the measure conferred a benefit, a key component to defining a subsidy. The Appellate Body upheld the Panel's finding that the LCR was not in compliance with Article 2.1 TRIMs and Article III(4). It also confirmed that it was not possible to establish the existence of a subsidy. However, while the Panel concluded that the measure did not confer a benefit, the Appellate Body determined that it could not complete the benefit analysis.

Canada informed the dispute settlement body that it intends to implement the decision and Canada, Japan and the EU established that 10 months was a reasonable time to do so. This time period ended on 24 March 2014. On 14 February 2014, Canada informed the WTO Dispute Settlement Body that it had taken steps toward implementing the decision: Ontario had replaced its LCR with a competitive process for large procurements, and lowered significantly the LCR for procurement of wind and solar electricity; in December 2013, the Government of Ontario had also tabled legislation to remove LCRs from its FIT programme. Canada stated that it will continue to work to implement the recommendations and rulings by the end of the reasonable period of time.⁹

2.3 *Decision of the Panel and Arguments on Appeal*

In its Reports, circulated on 19 December 2012, the WTO Panel concluded that the FIT was a TRIMs measure, and the LCR was inconsistent with Article III(4), and thereby also Article 2.1 of the TRIMs Agreement. The TRIMs Agreement prohibits trade-related investment measures that violate the national treatment principle, under GATT Article III, and requires the elimination of quantitative restrictions, under GATT Article XI. It also contains an illustrative list that specifies some types of measures which are prohibited,

⁸ Green Energy and Green Economy Act of 2009, *Service Ontario 2009*, Chapter 12.

⁹ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector; Canada – Measures Relating to the Feed-in Tariff Program*, Status Report by Canada, 14 February 2014, WT/DS412/17; WT/DS426/17.

on the basis that they violate Article III(4). This list includes local content requirements. The Panel's decision rested on the fact that LCRs are explicitly prohibited under the TRIMs Agreement.

Canada had argued that the FIT fell under GATT Article III(8)a ("Article III(8)a"), which exempts government procurement measures from Article III. The Panel disagreed. While it found that Article III(8)a was applicable (Panel Report, para. 7.121), and that the measure did constitute government procurement, it concluded that this procurement took place 'with a view to commercial resale' and therefore could not be exempted (para. 7.152).

On the other hand, it concluded that no subsidy existed. Part 1 of the SCM Agreement provides a definition of subsidy which states that it must provide a *financial contribution* by a government or any public body in the territory of the Member State which confers a *benefit*. The Panel confirmed the existence of a financial contribution but determined that the complainants had failed to establish that the FIT conferred a benefit. This finding was based on its inability to find a satisfactory comparison between rates generators received and the rates they could have received in the open marketplace. The Panel noted that a competitive wholesale marketplace standard would fail to reflect the reality of the Ontario market, which relied upon government intervention. (para. 7.320). One Panel member dissented, stating that the measure *did* confer a benefit, as most of the contested generators would not, in fact, be able to conduct operations without the FIT (paras. 9.18, 9.23).

On appeal, Japan argued that the Panel should have commenced by considering the SCM Agreement, rather than the TRIMs Agreement, as the former dealt specifically with the claims of the dispute (Appellate Body Report, para. 2.59). The EU appealed the Panel's finding that Article III(8)a was applicable to TRIMs 2.2 (para. 2.119). Japan and the EU also argued that the Panel erred in considering the FIT to be a governmental purchase for purposes of Article III(8)a (paras. 2.86-2.89), while Canada challenged the Panel's finding under Article III(8)a that its measures took place with a view to commercial resale (para. 2.6). Under the SCM Agreement, Japan and the EU also critiqued aspects of the Panel's methodology in determining whether the measure could be defined as a subsidy, particularly whether the challenges measures were "purchases of goods", and whether they conferred a benefit.

2.4 Findings of the Appellate Body

In its Reports, circulated on 6 May 2013, the WTO Appellate Body arrived at a similar set of conclusions to the Panel, though its legal reasoning differed. These findings are explicated below.

2.4.1 The Order in which the Panel Dealt with the Claims Under the SPS and TRIMs Agreement and the GATT 1994

The Appellate Body declined Japan's request to commence the analysis with an examination of the measure's consistency with the SCM Agreement. It concluded that the Panel had not erred in the order of its analysis: not only was this decision within the Panel's discretion, the Appellate Body did not see why changing the order would have been more logical or appropriate to the substantive issues of the dispute (paras. 5.1-5.8).

2.4.2 Findings Regarding the Applicability of GATT Article III(8)

Article III(8) contains two exceptions to Article III: while subparagraph a) applies to government procurement, b) applies to subsidies paid to domestic producers. At issue in this dispute was whether the measures fell under the former, Article III(8)a. As Article III(8) lays out exceptions, a finding that the measure

constituted government procurement would have reversed the Panel's finding of non-conformity with Article III. This was also significant as subparagraph a (unlike b) had never been previously applied by Parties in a WTO dispute, and thus interpreted by the Appellate Body.¹⁰

Government procurement was a contentious issue during Uruguay Round negotiations leading to the establishment of the WTO, with some countries arguing that it should be subject to National Treatment obligations and others disagreeing.¹¹ Article III(8)a demonstrates that countries were finally unable to agree that government procurement should be fully liberalized: it excepts such procurement from GATT Article III if it meets certain conditions. Specifically, it excepts laws, regulations and requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial scale.

i) *Applicability of Article III(8)a of the GATT to the TRIMs Agreement Article 2.2*

The first substantive issue of appeal facing the Appellate Body had to do with the relationship between TRIMs Article 2 and GATT Article III. The requirement that no country should apply a TRIMs measure that is inconsistent with GATT Articles III (and Article XI, though the latter is not relevant here) is stated in TRIMs Article 2.1. The explicit prohibition of local content requirements that formed the basis of the Panel's finding of non-compliance is stated in TRIMs Article 2.2. Specifically, TRIMs Article 2.2 references an Annex which provides an illustrative list of measures inconsistent with Article III(4); paragraph 1(a) of the Illustrative List prohibits Member States from requiring that products be purchased domestically.

The European Union argued that Article III(8)a was in principle not applicable to TRIMs Article 2.2 and paragraph 1(a). It reasoned that as TRIMs Article 2.2 solely cross-referenced Article III(4) (rather than Article III as a whole), Article III(8)a was not applicable. However, the Appellate Body agreed with the Panel that Article 2.2 simply clarified to which TRIMs the general obligation of Article 2.1 applied, rather than delimiting the scope of measures to which Article III was applicable. It noted that the European Union's interpretation would have resulted in a situation whereby there were different obligations for those TRIMs included in the illustrative list and those that were not. Instead, Article 2.2 simply provided further specification of the type of measures inconsistent with Article 2.1 (para. 5.26). Further, it did not think that TRIMs provisions (in this case Article 2.2) should override rights provided by the GATT (in this case Article III(8)a) (para. 5.32). It therefore upheld the Panel's finding that Article III(8) was applicable to TRIMs Article 2.2 (para. 5.33).

ii) *Whether the FIT constitutes government procurement as defined under GATT Article III(8)*

After establishing the applicability of Article III(8)a in principle, the Appellate Body turned to the interpretation of the provision. It emphasized its linkages with Article III as a whole; following Article III obligations, "the product of foreign origin must be in a competitive relationship with the product purchased" (para. 5.74). The Appellate Body recalled that the product subject to the LCR was electricity-generation equipment. On the other hand, the product that the government ultimately procured was the electricity itself, rather than the equipment used to generate it. The Panel had determined that because the equipment was being used to generate electricity, and because of the "close relationship" between the two, Article III(8) applied. The Appellate Body disagreed. Because there was no competitive relationship, Article III(8) was not applicable. The Appellate Body thus reversed the Panel's finding that the LCR was a law, regulation or requirement governing

¹⁰ Article III(8)a was, however, addressed in the pre-WTO GATT Panel ruling in *Belgium – Family Allowances*, BISD 1S/59, para. 4.

¹¹ WOLFRUM, STOLL, HESTERMEYER (eds.) *WTO: Trade in Goods*, Max Planck Institute for Comparative Public Law and International Law, Leiden: Martinus Nijhoff, 2011, pp. 158-159.

the procurement by governmental agencies of electricity (para. 5.79). It determined that any further elements of the appeal on this issue were rendered moot (para. 5.82).

Canada had not appealed the Panel's finding that the FIT was inconsistent with TRIMs Article 2.1 and Article III(4). Thus the Appellate Body confirmed the Panel's decision that the LCR requirement was prohibited in this context.

2.4.3 *Claims under the SCM Agreement*

The Appellate Body then turned to the question of whether the LCR was in conformity with the SCM Agreement. The appeal focused on whether the measure constituted a *financial contribution* which confers a *benefit*.

i) *SCM Agreement Article 1.1(a) – Financial Contribution*

SCM Agreement Article 1.1(a) states that a subsidy must provide a financial contribution by a government, and provides subparagraphs stipulating further conditions. The Panel found that the measure fell under subparagraph (iii), government "purchases of goods". Japan argued that the measures should *also* fall under subparagraph (i) and be characterized as a "direct transfer of funds". Japan appealed the Panel's assertion that the subparagraphs are mutually exclusive.

The Appellate Body repealed the Panel's conclusion that the subparagraphs were mutually exclusive (paras. 5.119-5.120). However, it agreed with the Panel that the measures could be characterized as 'government purchases of goods' under Article 1.1(a)(1)(iii) (para. 5.128), and rejected Japan's appeal that the FIT constituted a 'direct transfer of funds' within the meaning of Article 1.1(a)(1)(i).

Japan further argued that the Panel should have additionally characterized the measure as 'income or price support' under Article 1.1(a)(2) and that its neglect to do so constituted false judicial economy, thereby it did not make an objective assessment under the DSU Article 11. The Appellate Body rejected this appeal on the grounds that it was not necessary for the Panel to consider this issue in order to fully resolve the dispute (paras. 5.136-5.139).

ii) *SCM Agreement Article 1.1(b) – Benefit*

Both of the complaining Parties requested that the Appellate Body reverse the Panel's finding and conclude that the measure conferred a benefit under SCM Agreement Article 1.1(b). The Panel's finding that there was no benefit was based upon a comparison between the remuneration generators received under the FIT and what they would otherwise receive in the relevant market for electricity in Ontario. In so doing, it took into account SCM Agreement Article 14(d), which stipulates that 'the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.' Though Japan argued that the Panel should have adopted a broader interpretive approach, the Appellate Body affirmed that the Panel did not commit an error in this respect (paras. 5.162-5.166).

However, the Appellate Body saw problems with the Panel's analysis of the relevant market. First, it stated that the Panel should have started, rather than concluded, its benefit analysis with a definition of the relevant market, due to the central importance of this criterion (para. 5.169). Second, the Panel had mistakenly focused only on the demand-side (whether consumers consider the products substitutable) rather than the supply-side (whether a producer can easily switch its production from one product to another). The Appellate Body stated

that if it had focused on the supply-side, “the significance of government intervention...would have become evident.” The implication is that, rather than defining the relevant market as a competitive wholesale electricity market as a whole, it should have looked to “competitive markets for wind- and solar PV-generated electricity, which are created by the government definition of the energy supply-mix.” (para. 5.178).

It stated that, under the terms of Article 1.1(b), it was not possible to utilize the justification that the benefit was being conferred to support policy objectives; in other words, the fact that the FIT promoted environmental goals. However, it clarified that Article 1.1(b) does not prevent governments from creating markets. In this case, Ontario had acted in order to ensure the reliability and long-term sustainability of its electricity market. The Appellate Body emphasized the need to distinguish between government interventions that create markets and those that support existing markets, stating that ‘where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it.’ It also took account of externalities: positive from renewable energy, and negative from conventional energy. It argued that such externalities frequently underlie a government’s decision to start a new market, and that there should be scope for this in the context of commercial considerations (paras. 5.185-5.189).

Having clarified that the proper benchmark was windpower and solar PV rather than conventional electricity markets, and that simply by determining the supply-mix the government was not conferring a subsidy (para. 5.190), the Appellate Body turned to an analysis of benchmark markets. In this respect, it concluded that the relevant question was “whether the windpower and solar PV electricity suppliers would have entered the wind- and solar PV-generated electricity markets absent the FIT Programme, not whether they would have entered the blended wholesale electricity market.” (para. 5.199) On this basis, the Appellate Body rejected the benefit benchmarks proposed by the Complainants on appeal (para. 5.211). It also rejected Japan and the EU’s argument that participation in the scheme conferred an “advantage”, clarifying that under the terms of Article 1.1(b), it was conceivable that the measure could confer an advantage without conferring a benefit (para. 5.210).

The Appellate Body critiqued the Panel for not thinking independently enough in interpreting the facts presented by the parties, particularly in basing its benchmark analysis on the conventional electricity market. It concluded that the Panel had erred in doing so, and thus reversed the panel’s finding that Japan and the EU failed to establish that the challenged measures confer a benefit under Article 1.1(b) (para. 5.219).

The Appellate Body finally concluded that “...there are no undisputed facts on the record or factual findings by the Panel that would allow us to assess whether the methodology the OPA used to establish the FIT prices resulted in...more than adequate remuneration (para. 5.234).” On this basis, it was unable to complete the analysis and determine whether the challenged measures confer a benefit within the meaning of Article 1.1(b) and thus constitute prohibited subsidies inconsistent with the SCM Agreement (para. 5.246).

2.5 Comments

The outcome of this dispute was significant both politically and legally. As documented above, FITs are the most common form of government support for renewable energy, and the Canadian disputes have led to several more WTO complaints and the imposition of trade remedies on LCRs in FIT programmes. The retaliatory nature of these clashes underlines the pervasiveness of the policies. For example, when, in 2012, the EU began an investigation of China’s solar panel subsidies, China responded by requesting consultations on LCRs in the EU’s renewable energy sector. Similarly, when the US complained of a LCR in a solar PV programme in India under the same WTO provisions in early 2013, India responded by pointing out several US programmes that seemed to

contravene the same WTO provisions.¹² Indeed, FIT programmes are even in place in Japan and the EU, the parties who complained about Ontario's measures.¹³ This raises the question of why those in glass houses wished to throw the first stone.¹⁴

In general, it is not surprising that the windfall of market opportunities for renewable energy has led special interests to increase pressure on governments to take WTO action where their interests are not served, thus bringing to the fore latent trade tensions. As for Japan, it has been speculated that it might have been motivated by Ontario's awarding of a US \$7 billion contract for generating equipment to a Korean competitor, Samsung.¹⁵

Also, a clear motivation for the dispute was to single out the LCR. The EU has forbidden its Member States from utilizing LCRs (though local municipalities have not always obeyed).¹⁶ A number of countries, in particular developing countries, are facing pressure to remove LCRs in the energy and other sectors. This dispute outcome will further discourage LCRs by creating an atmosphere of legal uncertainty for investors.

From a trade perspective, there is an important distinction to be made between a FIT supporting the expansion of the renewable energy market versus a LCR blatantly discriminating against imported products. From a policy perspective, while a LCR might increase the political attractiveness of a FIT, the two have distinct goals: FITs support renewable energy, LCRs stimulate local economies and create local jobs. Thus this ruling functionally cleaved the LCR from the FIT.

Despite the likelihood that the Appellate Body would rule against LCR, Canada hoped for an exception on the basis that the FIT constituted government procurement under Article III(8)a. The general applicability of the Appellate Body's reasoning here is uncertain, as it dismissed Article III(8)a on a somewhat technical basis that the product being procured by the government (electricity) was not 'like' the imported product in dispute (electricity-generating equipment).

Though the Panel easily found that the FIT's LCR was prohibited under the TRIMs Agreement and GATT Article III (and the matter was not appealed), there was an additional, more difficult question of whether it was also prohibited under the SCM Agreement. In this respect, a notable feature of both the Panel and the Appellate Body decisions was the shielding of the renewable energy market from comparisons with open conditions of competition. Instead, it was subjected only to a comparative standard of other renewable energy markets which are likely to be similarly protected. As both the Panel and the Appellate Body acknowledged, electricity markets are heavily regulated, which makes determining the presence of a "benefit" a complex undertaking. Given that many renewable energy measures rely upon subsidies, it is not surprising that they spent so long examining the nature of the market and how that shaped the applicability of the SCM Agreement.

The Appellate Body and Panel decisions were functionally similar in that both recognized the need to shelter the FIT programme from the finding that it constituted 'a benefit' due to the special characteristics of the market. While the Panel focused its reasoning specifically on the anomalous artificially-constructed nature of electricity markets, the Appellate Body took a broader and more theoretical approach by changing the way that the relevant market was defined.

The Appellate Body's innovations included defining the relevant market in the context of the benefit analysis. In past disputes the market was defined only after a measure had already been established as a subsidy,

¹² MEYER, *supra* note 6.

¹³ REN 21, *supra* note 3, pp. 68, 116.

¹⁴ What has been described as the "glasshouse effect", RUBINI, "What does the recent WTO litigation on renewable energy subsidies tell us about methodology in legal analysis? The good, the bad and the ugly", Robert Schuman Centre for Advanced European University Institute, Working Paper RSCAS 2014/05, p. 3.

¹⁵ 'Japan Challenges Canadian Renewable Energy Incentives at WTO,' 14(29) *Bridges Weekly Trade News Digest*, ICTSD, 15 September 2010.

¹⁶ PESZKO and KETTERER, "Local Content Requirements for Renewable Energy: An Unnecessary Evil," EBRD Blog, European Bank for Reconstruction and Development, 23 November 2012. Available at : <http://www.ebrdblog.com/wordpress/2012/11/local-content-requirements-for-renewable-energy-an-unnecessary-evil/> (accessed 19/3/14).

when establishing whether it had caused serious prejudice.¹⁷ By narrowing which markets could be compared as a benchmark, the Appellate Body made it more difficult to determine the existence of a benefit. Another innovation was to establish a distinction between creating a market (by definition not a subsidy), and providing a benefit to an existing market (a subsidy), and exempt the FIT on the grounds that it constituted the former.

This interpretation of the SCM Agreement has attracted criticism on a number of grounds. Under the expected, traditional approach, the Appellate Body would have utilized as a benchmark a comparable market that did not have the government measure in dispute, to pinpoint the market distortion. Instead, the Appellate Body reinforced that Ontario's artificial creation of a market was itself an essential component of the comparative assessment, and narrowed the applicable comparative markets. The precedent created by this somewhat circular reasoning may be abused. For example, a government could subsidize a local product that is produced more efficiently abroad and sell it at a competitive price. It could then argue that this is not a subsidy as the inefficient local product is part of the supply mix and constitutes a new market.¹⁸

The introduction of this concept of a new market also raises a number of questions. For example, must the creation of new markets be justified, and if so, what are the criteria? Is the category applicable to all products? If not, what is special about renewable energy? Also, how does one identify a new market? How far can a government go in creating a new market before it becomes an existing market?

The Appellate Body's reasoning about how to define a benefit under the SCM Agreement was the most provocative, and puzzling, dispute outcome. However, when evaluating its approach, it is important to keep in mind that, if it had followed the more traditional approach of the dissenting Panel member, and found that a benefit was conferred and thus the FIT was a subsidy, it would likely be seen as prohibited, as Article 3.1(b) prevents subsidies contingent on the use of domestic over imported products. This helps to explain the desire to make it more difficult for FITs to pass the SCM Agreement's threshold test, and what has been described as an 'ends justifies the means' approach.¹⁹

In its analysis, the Appellate Body utilized strictly economic reasoning. Indeed, it rejected the incorporation of policy-based objectives as a justification for conferring a benefit. Instead, it emphasized the long-term sustainability of the market and the need to prevent negative environmental externalities. This opened the door for renewable energy support to be justified on an economic rather than a policy basis in the context of the SCM Agreement. The Appellate Body's progressive approach of incorporating environmental externalities into a conventional economic analysis should be recognized as an extraordinary development. Perhaps the downside of its approach was the establishment of a complex and ambiguous precedent. Instead of stretching the interpretation of how a market is defined in general to accommodate this specific result, it would have been more straightforward if the Appellate Body could have simply stated that the subsidy was justified in principle because of its policy rationale.

It is clear, as the Appellate Body concluded, that there is no room for a policy-based approach within the meaning of Article 1.1(b). However, the need to enable governments to support renewable energy markets seems to be a goal throughout the ruling. In other words, as FITs are a widespread measure among WTO Members aimed at a public good, the Appellate Body seemed to want to avoid a precedent whereby they were seen as prohibited under the SCM Agreement.

In short, it is possible that this ruling conflated market-based and policy-based justifications. However, the Appellate Body's hands were tied by the fact that the SCM Agreement as it stands offers no means of

¹⁷ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (“*EC and certain member States – Large Civil Aircraft*”), WT/DS316/AB/R, adopted on 1 June 2011, para. 1121.

¹⁸ See further hypothetical examples in PAL, *supra* note 7, pp. 10-12; this argument is also developed in COSBEY and MAVROIDIS, “A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO” 17 (1) JIEL, 2014, p. 27.

¹⁹ RUBINI, *supra* note 17.

recognizing the rationale of a subsidy and thus allowing for green subsidies in a principled way. The dispute has thus made clear the limitations of the current WTO subsidy laws and has led to calls that the SCM Agreement should be re-negotiated.²⁰ Barring re-negotiation, this outcome should perhaps reinvigorate the pressure on Member States to re-establish the category of non-actionable subsidies (expired in 2000). (Alternatively, the GATT Article XX General Exception could be relevant here; its applicability to the SCM Agreement is a perennially unanswered question.) It seems inevitable that WTO Member States will continue to use incentive schemes to encourage renewable energy production, with controversial results. If the level of current activity is any indication, the Appellate Body may again face the difficult task of interpreting a legal provision not fit to purpose.

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²⁰ COSBEY and MAVROIDIS, *supra* note 21.

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3. PANEL REPORT, CHINA – *DEFINITIVE ANTI-DUMPING DUTIES ON X-RAY SECURITY INSPECTION EQUIPMENT FROM THE EUROPEAN UNION* (“*CHINA – X-RAY EQUIPMENT*”)²¹

3.1. *Facts of the Dispute and Procedural History*

The *China – X-Ray Equipment* case is the first of the two²² disputes brought to the WTO dispute settlement system in 2011 and decided in 2013, arising out of complaints lodged against China with respect to anti-dumping measures adopted by the Ministry of Commerce of the People's Republic of China (“MOFCOM”) under the assumed compelling need to protect Chinese national interests against alleged WTO-inconsistent practices of other Members.

In the final report issued in connection with the foregoing dispute (“Report”), the WTO Panel both reviewed past precedent concerning unjustifiably protectionist anti-dumping duties – including a recent analogous dispute likewise involving China as a respondent²³ – and further developed on it, by providing and recommending some ‘new’ grounds of assessment for an investigating authority to opt for. Indeed, the Panel seems to suggest an extension of the notion of “logical progression of inquiry” and its consequences, provided by the Appellate Body in *China – GOES* with respect to the various provisions under Article 3 of the Agreement on Implementation of Article VI of the GATT 1994 (“AD Agreement” or “AD”),²⁴ outside the scope of the above mentioned article, so as to include other related provisions of the AD Agreement.

The dispute (“Dispute”) between the European Union and China (“Parties”) originates from the imposition by MOFCOM – as of 23 January 2011 – of additional AD duties – ranging from 33.5% to 71.8% – on imports into China of a wide array of x-ray security scanners from the EU (“AD duties” or “Measure”).²⁵ More precisely, the Measure was adopted as a result of the anti-dumping investigation conducted by MOFCOM at the instigation of the Chinese producer Nuctech Company Limited (“Nuctech”), which filed an application with MOFCOM to that effect in 2009.

As the Parties failed to reach a mutually agreed solution during the consultations process launched on the initiative of the EU,²⁶ a panel to adjudicate the Dispute was established on 20 January 2012 upon the request of the EU,²⁷ by the Dispute Settlement Body (“DSB”).²⁸ Chile, India, Japan, Norway, Thailand and the United

²¹ Panel Report issued on 26 February 2013 and adopted on 24 April 2013, WT/DS425/R and WT/DS425/R/Add.1.

²² The second dispute has been adjudicated pursuant to Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* (“*China – Broiler Products*”), WT/DS427/R, adopted on 25 September 2013.

²³ Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* (“*China – GOES*”), WT/DS414/AB/R, adopted on 16 November 2012.

²⁴ Appellate Body Report, *China – GOES*, *cit.*, para. 128.

²⁵ Ministry of Commerce of the People's Republic of China, Notice No. 1 (2011), including its annex, which contains MOFCOM’s final determination of dumping and injury (“Final Determination”). More precisely, the Final Determination provide for the imposition of the 33.5% rate on imports of x-ray scanners produced by Smiths Heimann GmbH (“Smiths”) – the only company that participated with the European Commission as respondent in MOFCOM’s investigation – and the 71.8% residual rate on imports of x-ray scanners from other sources in the European Union. The Measure was meant to have a five year term and, according to EU estimations, the trade flow affected by the Measure would have been approximately € 70 million per year.

²⁶ Request for Consultations by the European Union of 25 July 2011, WT/DS425/1, filed pursuant to Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (“GATT”), AD Article 17.3 and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).

²⁷ Request for the Establishment of a Panel by the European Union of 8 December 2011, WT/DS425/2, filed pursuant to DSU Article 6 and AD Article 17.4.

States reserved their third-party rights with respect to the Panel proceeding thus instituted.

In its written submissions, the EU claimed that the AD duties and the underlying anti-dumping investigation and determination were inconsistent with several provisions of the AD Agreement, both substantive and procedural in character. While the major substantive claims concerned, in general, China's obligations under AD Article 3, in connection with GATT Articles VI:1 and VI:6 and AD Articles 2.4 and 2.6, the procedural claims regarded a number of provisions under AD Articles 6 and 12. Given that all the challenged aspects of MOFCOM's investigation were deemed to be crucial for its anti-dumping determination, the EU was essentially asking the Panel to rule in favour of the repeal of the relevant trade defence instrument.

The Report, which extensively addresses all the EU claims, was issued to the Parties on 18 January 2013, circulated to WTO Members on 26 February 2013, and adopted by the DSB at its meeting held on 24 April 2013. In substantially invalidating crucial aspects of MOFCOM's assessment, thus upholding most of the major allegations of violation brought by the EU,²⁹ the Panel generally condemned the Measure as inconsistent with the respondent's obligations under the AD Agreement and recommended China to bring the Measure into conformity with such obligations.

Given its decision not to file a notice of appeal against the Report, at the DSB meeting of 24 May 2013 China confirmed its intention to comply with the aforesaid recommendation within a reasonable period of time, which was agreed between the Parties to expire on 19 February 2014. In accordance with the foregoing, MOFCOM published two successive notices announcing, respectively, its decision to re-investigate the relevant matter³⁰ and the termination of the Measure as of 19 February 2014.³¹ The DSB was informed by China about the abovementioned at its meeting of 26 February 2014.

3.2. *Major Legal Issues before the Panel*

3.2.1. *Substantive Claims raised by the EU*

In its written submissions to the Panel, the EU claimed that the strict substantive conditions to be satisfied under the AD Agreement for an affirmative dumping and injury determination to be legitimately made and definitive anti-dumping duties to be lawfully imposed had not been fulfilled in the matter under discussion.

More precisely, the EU challenged certain acts performed by MOFCOM in the context of its investigation, namely (i) the price effect analysis and the methodology used thereunder to assess the price effects of dumped imports, lacking, in the opinion of the EU, the price comparability character provided under AD Articles 3.1 and 3.2; (ii) the injury analysis, deemed to be flawed – and, in some respect, wholly deficient – in the evaluation of the relevant positive and negative economic factors and indices having a bearing on the state of the domestic industry; such alleged flaws impairing MOFCOM findings on the impact of dumped imports on Chinese industry and rendering the overall assessment inconsistent with AD Articles 3.1 and 3.4; (iii) the causation analysis, the consistency of which with requirements under AD Articles 3.1 and 3.5 was deemed to be jeopardised by certain fallacies in connection with (a) the price effects analysis, as described under item (i) above, (b) the volume effect analysis, *i.e.* the analysis of the effect of the volume of subject imports on the Chinese industry, (c) the so-called non-attribution analysis, to the extent that the actual causes of the alleged

²⁸ Note by the Secretariat providing the Constitution of the Panel Established at the Request of the European Union of 13 March 2012, WT/DS425/2.

²⁹ The Panel rejection of a limited number of EU claims and the fact that it exercised judicial economy regarding other claims does not change the clearly generally positive outcome of the case for the EU.

³⁰ MOFCOM Announcement No.1 of 10 January 2014 on *WTO Ruling for China-EU Dispute of X-Ray Inspection Equipment*.

³¹ MOFCOM Announcement No. 9 of 19 February 2014 on *Ceasing Anti-dumping Taxes Against Imports of X-ray Security Inspection Equipment Originated in the EU*.

negative condition of the domestic industry were disregarded, as a result of the failure to properly examine the evidence on the record regarding factors other than dumped imports which, in the opinion of the EU, were injuring the domestic industry.

The Panel findings on the foregoing EU substantive claims will be analysed in depth in the following paragraphs.

3.2.2. *Procedural Claims raised by the EU and Major Findings with respect thereto*

With respect to the procedural issues, the EU claimed that China had failed to comply with the ‘due process’ and transparency requirements provided under AD Articles 6 and 12.

Indeed, the EU challenged, first of all, MOFCOM’s treatment of alleged confidential information, which it regarded as inconsistent with AD Articles 6.5.1, 6.4 and 6.2, as a result of a failure to ensure that (a) the information submitted by Nucotech in the form of non-confidential summaries were sufficiently detailed to be understandable in its substance, and (b) the conditions for the application of the ‘exceptional circumstances mechanism’ were met with respect to the information to be provided by the Chinese Public Security Bureau of Civil Aviation Administration.

As for the second claim under the procedural provisions of the AD Agreement, the EU contended that China had not complied with its obligations under AD Articles 6.9, 6.2 and 6.4 to provide interested parties with information about certain facts that were deemed to be ‘essential’ in its dumping determination.³²

Finally, the EU challenged MOFCOM’s public notice of affirmative determination providing for the imposition of the AD duties, alleging that it had been drafted in breach of AD Articles 12.2.1 and 12.2.2, in particular for it failing to comply with the content requirements provided thereunder in connection with relevant information regarding certain aspects of the investigation³³ and the reasons for rejecting certain arguments raised by the cooperating EU producer.³⁴

With respect to the foregoing procedural claims, the Panel findings are overtly against China, but for the rejection of a limited number of EU allegations and the fact that judicial economy was exercised with respect to the dependent claims under AD Articles 6.2 and 6.4.

3.3. *Major Findings of the Panel on the Substantive Claims*

3.3.1. *AD Articles 3.1 and 3.2: the price effects analysis*

As a threshold matter, before addressing the substantive claims, the Panel surveyed the current state of the WTO case-law on the general standard of review under AD article 3.1, to the extent that the AD provisions relevant to the Dispute are to be construed and applied based upon the overarching principles of “positive evidence” and “objective examination” established thereunder.³⁵

³² The information regards, *inter alia*, underlying data for price data used to analyse the price effects of dumped imports, the price and adjustment data underlying its determination of the EU producer's margin of dumping and essential facts forming the basis for determination of the level of the residual duty.

³³ The information pertains to MOFCOM’s price effects analysis and its determination of the residual rate.

³⁴ Such arguments relates to, *inter alia*, the treatment of domestic sales to affiliated distributors

³⁵ Importantly, the Panel restated that the notions of “positive evidence” and “objective examination” have to be interpreted as to requiring the rationale behind an injury determination to be well reasoned and adequate in substance, hence based on an examination of affirmative, objective, verifiable and credible evidence to be conducted in an unbiased and even-handed manner, according to the principles of good faith and fundamental fairness. See with that respect, *inter alia*, Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China (“U.S. – Tyres (China)”)*, WT/DS399/AB/R, adopted on 5 October 2011, para. 280, Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (“US – Hot Rolled Steel”)*, WT/DS184/AB/R, adopted on 23 August 2001, paras. 192, 193, 196, and Appellate Body Report,

The Panel then turned to examine the claim concerning the alleged inconsistency of MOFCOM's price effects analysis with AD Articles 3.1 and 3.2, which, given its key role with respect to the following claims brought by the complainant, has proved to be the most controversial and heatedly debated.

By upholding the EU claim to this effect, the Panel stated that MOFCOM had used a flawed price comparison methodology in investigating the effects of EU dumped exports on domestic products' prices, failing to comply with the requirement to enter into an "objective examination of positive evidence", instrumental for an investigating authority's assessment to pass the WTO-consistency test. Indeed, while the bases for comparison employed by MOFCOM in its price undercutting assessment were the annual weighted average unit prices of all subject imports and of all domestic products, the comparison of domestic 'like' products' average unit prices over time was made under the price suppression exercise, as an intermediate step of analysis leading to the consequential comparison between changes in domestic prices and changes in domestic costs over the Period of Investigation ("POI").³⁶ Therefore, in making its price undercutting and price suppression findings, MOFCOM relied on the result of price effects calculations that were affected by its preliminary determination on the range of products to be covered by the investigation; such range being found to be too widely construed to ensure the prescribed comparability among prices in a price effect analysis and not properly adjusted to take into account the considerable differences among the products being compared. This finding runs overtly against Chinese allegation that the preliminary evaluation of alleged products' differences provided within the definition of the product scope of investigation does, *per se*, suffice to ensure the comparability of subject imports' prices with the prices of the domestic "like" products.³⁷ With that respect, although no precedent positively ruled against the use of average prices, it had been clarified on a number of occasions that the mere circumstance that two broad basket of goods are deemed "alike" according to AD Article 2.6 for the purpose of the product scope definition does not necessarily imply that each of the goods included in the domestic products' basket is "like" each of the goods included in the subject imports' basket.³⁸

With regard to the price comparability requirement, the Panel restated its case law that compliance must be ensured under AD Articles 3.1 and 3.2 for an "objective examination of positive evidence" to be secured and that this obligation limits investigating authorities' discretion in choosing the price analysis methodology to be applied in any given case.³⁹ Indeed, although there is no explicit requirement to that effect in the wording of the relevant AD provisions, the need to enter into an appropriate comparison among prices first of all arises out of a

Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice 2005 ("Mexico – Anti-Dumping Measures on Rice"), WT/DS295/AB/R, adopted on 20 December 2005, paras. 164-165.

³⁶ The comparison of domestic "like" products prices over time as an intermediate step of analysis in the price suppression analysis led to an intermediate finding of domestic price decrease over the course of the POI, such a finding being relied upon by MOFCOM in its subsequent comparison between changes in domestic prices and changes in domestic goods over the Period of Investigation.

³⁷ China's first written submission, paras. 305-309.

³⁸ E.g., Panel report, *EC – Salmon (Norway)*, paras. 7.13-7.76.

³⁹ E.g., Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("EC – Bed Linen (Article 21.5 - India)"), WT/DS141/AB/RW, adopted on 24 April 2003, para. 113; Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* ("EC – Fasteners (China)"), WT/DS397/R and Corr.1, adopted on 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, para. 7.328; Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States* ("China – GOES"), WT/DS414/R, adopted on 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, para. 7.530; Appellate Body Report, *China – GOES, cit.*, paras. 130, 131, 136, 200. More precisely, in *China – GOES*, the Appellate Body stated that "Article 3.2 [...] expressly establish[es] a link between the price of subject products and that of like domestic products, by requiring a comparison be made between the two. [...] [W]e do not see how a failure to ensure price comparability could be consistent with the requirement under Article 3.1. [...] We therefore see no reason to disagree with the Panel when it stated that '[a]s soon as price comparisons are made, price comparability necessarily arises as an issue'" (emphasis added) (paras. 136, 200).

proper interpretation of the words “consider” and “compared” under AD Article 3.2.⁴⁰ But, more importantly, it can be easily inferred from the abovementioned notion of “logical progression of inquiry” set forth in *China – GOES*, as further elaborated by the Panel to conclude that the importance of satisfying the price comparability requirement in the price undercutting analysis clearly originates from the ‘means to an end’ relationship between such analysis and the causation analysis under Article 3.5.⁴¹ Indeed, to the extent that the outcomes of the price effects analyses under AD Article 3.2 substantially impact on the assessment as to whether subject imports injure the domestic industry, if the products are not comparable it is hard to justify a causation finding against such imports.

The same considerations set forth above with respect to the price undercutting exercise hold true when comparing domestic prices over time in the price suppression analysis.⁴²

But the Panel went even further by seeking to fill the regulatory gap with respect to appropriate methodologies available for use by investigating authorities in fulfilling the price comparability requirement under AD Article 3 assessment when the covered products are heterogeneous and multi-model. Indeed, the Panel provided three different options. As for the first option, it drew inspiration from the panel finding in *EC – Fasteners (China)*,⁴³ holding that carefully defined product categories for the collection of price information may be useful means to account for relevant differences among products.⁴⁴ As suggested by the EU in the Dispute, a comparison between subject imports’ actual sales prices and bid prices offered by the domestic producers in the same tendering procedure might be an alternative approach.⁴⁵ As a final – apparently preferable – option, the Panel proposed that investigating authorities should make relevant adjustments by drawing inspiration from the methodology provided under AD Article 2.4 as regards the comparison between normal value and export price under the dumping determination analysis. Without going as far as to contend that AD Article 3.2 shall be interpreted extensively so as to implicitly incorporate the assessment’s requirements provided under AD Article 2.4, interestingly enough the Panel maintained that “in many instances relevant adjustments will effectively

⁴⁰ The Appellate Body articulated on that in *China – GOES, cit.*, asserting that “[t]he notion of the word ‘consider’, when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in reaching its decision. [...] [T]he fact that no definitive determination is required does not diminish the rigour that is required of the inquiry under Articles 3.2” (para. 130).

⁴¹ According to the Panel, “[i]f two products being analysed in an undercutting analysis are not comparable, for example in the sense that they do not compete with each other,” or “are compared at different levels of trade, without adjustment, *the outcome of this comparison would not lead to an objective, unbiased analysis under Article 3.5* regarding the injury arising due to the difference in the prices of the products” (emphasis added). See, with that respect, Panel Report, *China – X-Ray Equipment, cit.*, paras. 7.49 - 7.50, further elaborating on the previous Appellate Body finding in *China – GOES, cit.*, that “if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices” (para. 128).

⁴² The Panel reaffirmed the investigation authorities’ obligation to comply with the price comparability requirement also when comparing the price of a basket of goods over time in the intermediate analysis of domestic price decreases – as part of the price suppression exercise – by “taking into account, any changes in the proportion of the product types making up the basket each year. *Without ensuring comparability* in this context, *it is possible that an observed decline in the average unit prices may actually be the result of a change in the product mix [...] rather than due to a genuine change in domestic prices*” (emphasis added) (para. 7.57). For a practical description of how this may occur see the European Union first written submission, para. 215. Moreover, the Panel highlighted that, since MOFCOM relied on its price undercutting finding in concluding that prices were suppressed due to the dumped imports, such conclusion is substantially affected by the undercutting assessment’s shortcomings in terms of price comparability.

⁴³ Panel Report, *EC – Fasteners (China), cit.*, para. 7.328.

⁴⁴ EU and US Investigating Authorities, for instance, already determine the margin of dumping on a product control number (PCN) basis and, thus, they already have the appropriate software to differentiate among product categories when collecting price information for the purpose of performing price suppression and price undercutting analysis.

⁴⁵ Indeed, the strict product specifications provided in call for bids guarantee a certain degree of homogeneity among the covered products. Thus, the EU adopted this approach in its own investigation of x-ray scanners. See the European Union’s response to Panel question 21, para. 126.

ensure price comparability under Article 3.2” (para. 7.51), thus potentially opening a Pandora’s box with far-reaching consequences.

Turning to the substance of the claim, the Panel found that, by comparing weighted average unit values of the entire range of scanners under investigation without taking into account the considerable products’ differences in terms of consumers’ preferences, uses, physical characteristics, production costs and thus prices, MOFCOM entered into a kind of ‘apples-to-orange’ comparison held to be inconsistent with AD Articles 3.1 and 3.2 price comparability requirement. Indeed, there was substantial evidence on the record before MOFCOM indicating that, while in the POI EU exports exclusively comprised cheaper low-energy models, the covered domestic products consisted also of very expensive high-energy models.⁴⁶ The same holds true with respect to the differences between products within the domestic industry, to be taken in due account in the price suppression analysis. Nor could MOFCOM’s attitude towards the issue be justified by the alleged cooperating EU exporter’s failure to provide the data necessary to conduct a model-to-model or transaction specific comparison, as such data were to be compared with Nuctech’s equivalent data, never requested by MOFCOM.

3.3.2. AD Articles 3.1 and 3.4: the injury analysis

In addressing the second substantive claim concerning MOFCOM’s assessment on the state of domestic industry as part of its injury analysis, the Panel tackled the manifold issues raised by the EU. While upholding most of the EU allegations and generally finding MOFCOM’s overall evaluation in breach of AD Articles 3.1 and 3.4, the Panel dismissed some of the EU arguments,⁴⁷ exercised judicial economy with respect to others already addressed under the previous claim⁴⁸ and deferred the examination of some new issues deemed to fit better with the following causation claim’s assessment.⁴⁹

Turning to the main EU arguments covered under the Panel assessment at this stage of its analysis and supporting the overall adverse ruling against China, they pertain to the significant deficiencies identified in MOFCOM’s examination of individual factors and indices having a bearing on the state of domestic industry according to AD Article 3.4 and of the development and interaction among them.

In upholding the EU claim with respect to MOFCOM’s failure to examine all the factors listed in AD Article 3.4, with particular reference to the “magnitude of the margin of dumping”, the Panel reiterated the WTO case-law mandating a proper evaluation of all the mentioned factors for the purpose of determining the status of domestic industry and stating that also those found to lack relevance or significance in the injury analysis should, nonetheless, be covered by the investigating authority’s assessment, at least by providing an explanation for the

⁴⁶ While Smith’s scanner were used mainly for luggage inspection, Nuctech’s scanners were also used for inspecting, *inter alia*, rail carriages, trucks or marine cargo containers. For a detailed examination of the covered products’ characteristics and differences, see Nuctech’s Application, Exhibit EU-3, pp. 132 and 138, Smiths’ Questionnaire Response regarding energy levels of low-energy scanners not exceeding 300 KeV, Exhibit EU-42, Smiths’ Injury Brief, Exhibit EU-11, p. 4, and Nuctech’s website description of “high-energy” scanners, Exhibit EU-21.

⁴⁷ After a preliminary finding that the way the EU framed the issue blurred the difference between the substantive “positive evidence” requirement under AD Article 3.1 and the procedural disclosure obligation under AD Articles 6 and 12, the Panel ruled in favour of China with respect to the EU allegation of MOFCOM’s failure to rely on positive evidence, given the inconsistencies between the data cited in the Final Determination and the data provided by Nuctech and available in public record. Indeed, the Panel stated that the EU had not made out its case that in this regard China acted inconsistently with AD Articles 3.1 and 3.4, since it did not establish a *prima facie* case that MOFCOM did not adjust the aggregate data at issue and did not rely on positive evidence in doing so.

⁴⁸ The Panel held that there was a considerable overlap between the EU claim under AD Articles 3.1 and 3.4 relative to the improper use of aggregate data in MOFCOM’s price effect analysis and the previously addressed claim under AD Articles 3.1 and 3.2 having the same subject. Thus, the Panel found it redundant to rule again under AD Article 3.4 on the inconsistency of MOFCOM’s price analysis methodology.

⁴⁹ This holds true with reference to EU allegation of MOFCOM’s failure to (i) evaluate all the evidence on the record relating to the state of Chinese industry, and (ii) explain how could domestic prices decrease notwithstanding the increase of import prices.

above stated conclusion.⁵⁰ Therefore, the Panel did not accept China's allegation that the 'non *de minimis*' appraisal of the margin of dumping could be directly inferred from the determination to impose AD duties – such appraisal being a prerequisite of the determination – and that this suffices, *per se*, to satisfy the aforesaid evaluation requirement.⁵¹ Indeed, according to well-established case law, the evaluation of all listed factors must be apparent in the authorities' conclusions. Moreover, the Panel has cautiously stated that to accept the abovementioned Chinese argument is tantamount to rendering redundant, in practice, the inclusion of the factor under discussion in AD Article 3.4 list, an outcome not at all acceptable.

Having said the foregoing, the Panel shifted its focus on the second part of the EU claim under AD Articles 3.1 and 3.4, hence turning to analyse MOFCOM's assessment of the development and interaction among the aforementioned listed injury factors. As a primary issue in that respect, it first of all examined all the relevant economic factors and indices, ruling that MOFCOM's determination was not based on an objective, reasoned and adequate examination of the evidence before it.⁵² Generally speaking, the analysis of the state of domestic industry was found to be flawed because MOFCOM failed to provide an assessment of the fluctuations over the POI in certain specified factors, acknowledge the positive trends exhibited by others and properly explain the basis of its assertion that domestic profits were below 'expected' levels. According to the Panel, MOFCOM's faulty approach in that respect had consequently prejudiced its examination of the interaction among positive and negative injury factors and impaired the required balancing process thereof, in turn affecting MOFCOM's overall determination on the impact of dumped imports on Chinese industry.⁵³

3.3.3. AD Articles 3.1 and 3.5: the causation analysis

The Panel finally turned to address the EU claim concerning the last part of the "logical progression of inquiry" under AD Article 3, the definitive causation analysis governed by AD Article 3.5, which reflects the obligation to attribute to dumped imports the injury suffered by the domestic industry. The Panel found all of the manifold issues raised by the EU with respect to this final substantive claim to be pertinent given the language of the relevant provision, both explicitly tying up the assessment under AD Article 3.5 to the foregoing findings under the previous paragraphs⁵⁴ and establishing the non-attribution methodology to be applied when the prerequisites are satisfied for such an assessment to become the mandatory last step of analysis.

⁵⁰ Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H-Beams"), WT/DS122/AB/R, adopted on 5 April 2001, para. 125, and Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("EC – Bed Linen (Article 21.5 – India)"), WT/DS141/RW, adopted on 24 2003, as modified by Appellate Body Report WT/DS141/AB/RW, para. 6.162.

⁵¹ China's first written submission, para. 358. According to the Panel, "the simple listing of the margins in the 'Final Conclusion' and 'Dumping' sections of the determination is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry" (para. 7.183).

⁵² The Panel also highlighted MOFCOM's failure to address the developments in certain listed factors as the capacity utilization, the productivity and the wages.

⁵³ The Panel found it difficult to explain how an affirmative injury determination could originate from the finding that 9 of 16 indicia were positive, as agreed upon also by MOFCOM.

⁵⁴ With that respect it is worth recalling that the panel in the *Egypt – Steel Rebar* report both confirmed the role of Article 3.1 also with respect to the causation analysis – for it provides an "overarching general guidance as to the nature of the injury investigation and analysis that must be conducted by an investigating authority" – and explained the relationship between paragraph 5 and paragraphs 2 and 4 of AD Article 3: indeed it emphasised that "*Article 3.5 makes clear, through its cross-references, that Articles 3.2 and 3.4 are the provisions containing the specific guidance of the AD Agreement on the examination of the volume and price effects of the dumped imports, and of the consequent impact of the imports on the domestic industry, respectively [...]*" (emphasis added) (Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("Egypt – Steel Rebar"), WT/DS211/R, adopted on 1 October 2002, para. 7.102).

On such line of argument, the Panel found that China violated AD Article 3.5, first and foremost as a consequence of MOFCOM's reliance upon the above described flawed price effects analysis in the causation assessment. Indeed, given the aforesaid 'means to an end' relationship between those steps of analysis, the investigation authority's failure to comply with the price comparability requirement under AD Article 3.2 undermined also its causation findings. The same holds true with respect to MOFCOM's failure to meet the 'reasoned and adequate explanation' standard when attributing to subject imports the responsibility of the price suppression phenomenon observed in the Chinese industry in 2008, in circumstances where import prices were higher than domestic ones. Indeed, no persuasive justification was provided as to why, given the alleged absence of other causes of injury apart from subject imports, domestic producers were deemed unable to rise the prices of their scanners at least at the level of those of dumped scanners.

In the light of the foregoing, the Panel did not considered necessary to address separately and additionally the EU claim regarding MOFCOM's flawed volume effects analysis and turned to evaluate the complainant's allegations with respect to China's failure to fulfil its obligations under the third and forth sentences of AD Article 3.5 in conducting the non-attribution assessment. Therefore, after recalling the test restated by the Appellate Body in *EC – Tube or Pipe Fittings* as to the conditions triggering the investigating authorities' non-attribution obligation when performing a causation analysis,⁵⁵ the Panel went to examine in turn each of the "known factors" raised by the interested parties,⁵⁶ that the EU contended MOFCOM failed to address despite their clear negative impact on the state of Chinese industry during the POI. On the basis of its findings with respect to each of the factors under discussion, the Panel ruled that the respondent acted inconsistently with its obligations under AD Articles 3.1 and 3.5, as a result of its failure to examine objectively the evidence on the record regarding four out of the seven factors identified by the claimant and, thus, to ensure that injuries caused to the domestic industry by those factors were not attributed to the dumped imports.⁵⁷

3.4. Comment

Although, at first glance, the ruling in *China – X-Ray Equipment* does not appear to offer an innovative or fresh view on the interpretation of relevant provisions of the AD Agreement, a closer look at the Panel findings reveals that it may represent a landmark case, likely to have a profound and long-lasting impact both on political and legal grounds. Indeed, the Report was more than welcomed by the EU and the US, both of which emphasised, at the DSB meeting of 24 April 2013, its "effects beyond the particular investigation" in the Dispute, its great significance for all Members and the fact that it follows the line, although with certain original traits, of the reports previously issued with respect to China's application of trade remedies.⁵⁸

As regards the potential legal impacts, it is worth highlighting that, on the initiative of the EU, the Panel

⁵⁵ More precisely, for the non-attribution language of Article 3.5 to play a role in the causation analysis, the factors at issue must "(a) be 'known' to the investigating authority; (b) be [...] factor[s] 'other than dumped imports'; and (c) be injuring the domestic industry at the same time as the dumped imports" (Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* ("EC – Tube or Pipe Fittings"), WT/DS219/AB/R, adopted on 18 August 2003, para. 175). See also the previous Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted on 23 August 2001, paras. 222-223.

⁵⁶ China never contended that the factors at issue were not "known" by MOFCOM. However, it argued that there was no relevant evidence before it that such factors were causing injury to the domestic industry. See, in that respect, China's response to Panel question 55, paras. 70 ff.

⁵⁷ The four factors being Nucotech's "alleged aggressive business expansion" and "aggressive pricing strategy", the alleged "product quality and technology" differences between Nucotech's and Smiths' scanners, the alleged "fair competition" from the United States and European products.

⁵⁸ See Dispute Settlement Body, *Minutes of the Meeting held in the Centre William Rappard on 24 April 2013*, WT/DSB/M/331, 8 July 2013, paras. 6.2. and 6.4.

provided new grounds for indirectly addressing the issues arising when the product scope of investigation is deemed to be too widely construed under the determination of dumping analysis for it to ensure the required comparability between imported “product under consideration” and domestic “like product”. Indeed, to the extent that the panels have always proved unsympathetic to the broad claims frequently raised under AD Article 2 in past disputes as to the lack of homogeneity in the range of products found to be covered by the investigation, in the interim of an in-depth analysis of the matter by the Appellate Body, the Panel has provided the WTO Members with an interesting device. Leveraging on the narrower but related issue raised by the EU in relation to the price effects analysis, the Panel actually opened a new route for incidentally and implicitly tackling the “like product” issue in the context of AD Article 3 claims. More precisely, under the pretence that price effect calculations might be affected by an excessively wide definition of the product scope of investigation – the foregoing resulting in a failure to ensure the prescribed comparability among prices – the Panel proposed to shift the focus from the treatment of the strongly disputed like product issue as a general matter to the abovementioned side effects, to be addressed under the AD Article 3 consistency assessment. Indeed, with respect to such effects, consensus exists on the fact that they are not at all acceptable, to the extent that they are in contrast with well-established requirements for an affirmative injury determination to be WTO-consistent.

The overall result of the foregoing is more than welcome because it would better serve the purpose of guaranteeing the overall coherence of the WTO system than the stubborn hostility of previous panels.

Moreover, to the extent that, for taking into account the considerable differences among the products being compared in the price effect analysis, relevant adjustments are needed, the shifted approach of the Panel with regard to the above addressed preliminary matter might pave the way for the WTO to embrace the evolutionary approach advocated by the Panel with respect to the implementation of such adjustments in the context of the price effects analysis whenever heterogeneous goods are concerned. More precisely, the interpretative innovation advocated in the Report lies in drawing inspiration from the methodology under AD Article 2.4 for identifying the assessment requirements to be adopted under the price effects analysis. Although such an approach was first mentioned in other reports, panels – on the basis of the presumed “stark contrast in the text, context, legal nature and rationale” of the two provisions – had always unequivocally ruled out that requirements alike to those employed under AD Article 2.4 might be applied under AD Article 3.2.⁵⁹ Instead, without going as far as to contend that AD Article 3.2 shall implicitly incorporate the assessment requirements provided under AD Article 2.4 – as this would be in sharp contrast with the general rule of interpretation provided under Article 31.1 of the Vienna Convention⁶⁰ –, the Panel seems to adopt a more flexible approach to the matter. Indeed, in equating the comparability purposes of the two provisions, the Panel seems to suggest to bringing – somehow – the AD Article 2.4 standard of analysis in the realm of AD Article 3.

Accordingly, future panels and Appellate Body may develop the Panel findings to redefine the scope and interaction among the relevant AD provisions. Indeed, the Panel appears to assume that AD Article 3.2 can be interpreted and construed also based upon the legal notions and the principles under other related provisions of the AD Agreement, thus attaching new meaning to the wording thereof. However, given the systemic relevance of this approach, there would be scope to object to such development, on grounds that it would undermine the overall coherence of the WTO system by paving the way for blurring the lines also between other WTO provisions.

The fact, nonetheless, remains that, if kept within the perimeter of the foregoing provisions, this approach would have significant impact on how anti-dumping investigations are conducted in the future. Indeed, it serves the purpose of avoiding the recurrent price assessment shortcomings in terms of price comparability, stemming

⁵⁹ *EC – Tube or Pipe Fittings, cit.*, paras 7.292-7.293. See also *EC – Fasteners (China), cit.*, para. 7.328.

⁶⁰ Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331; 8 ILM 679 (1969).

from the investigating authorities' discretion in the conduct of price analyses under AD Article 3 and the regulatory gap with respect to appropriate methodologies available for use in such context. In fact, once the price undercutting margin has been properly determined according to the framework clearly established by the Panel, the only missing piece for legitimately assessing the actual margin of injury is to determine the unsuppressed selling price of the domestic industry,⁶¹ by employing a sound methodology as that under AD Article 2.4.⁶² Once the rules on the determination of the margin of injury are properly established and clear, an appropriate comparison between the margin of dumping previously calculated and the margin of injury properly determined is possible.

This, in turn, would allow some room for the application of the 'lesser duty rule' established under AD Article 9.1,⁶³ still not at all applied by many WTO Members, including China. The foregoing may result in more anti-dumping duties being levied at levels lower than the margin of dumping, which might benefit both trade flows and the importing country, thus leading to a win-win situation.

Turning to the potential political impact, it would be enough to recall that *China – X-Ray Equipment* is, together with *China – Broiler Products* and *China – GOES*, one of the three disputes brought to the WTO dispute settlement system by the EU and the US in the last three years to challenge unjustifiably protectionist countervailing and anti-dumping duties imposed by China. Indeed, since its accession to the WTO, China has been using such trade remedies on a large scale.⁶⁴ With respect to the foregoing, the Report emphasises the recurring shortcomings in trade defence investigations carried out by China as regards both the transparency and the procedural requirements under WTO law; more importantly, the findings in *China – X-Ray Equipment* pierce the veil on a consolidating practice – to which both the US and the EU have repeatedly objected – based upon the exploitation of non-genuine dumping concerns and trade defence investigations to pursue protectionist policies and retaliate against measures adopted by global competitors. Indeed, as a matter of fact, AD duties had been imposed shortly after the EU decision to implement anti-dumping duties on cargo scanners manufactured by Nuctech.⁶⁵

In connection with the foregoing, the Report appears to be a clear and unequivocal indication that the WTO will not tolerate any abusive exercise of the right to use trade defence instruments and will monitor strict compliance thereof with WTO rules. However, importantly enough, although at the DSB meeting of 24 May 2013 China affirmed that it intended to comply with the Panel's recommendations, it also made reference to its previous statements at the DSB meeting of 24 April 2013, which clearly imply a biased reading of the Report, to the extent that China had taken the view that "the Panel supported [its] claims regarding [...]", *inter alia*, certain 'due process' and transparency requirements and, more surprisingly, the "positive-evidence based examination of the state of the industry and [the] non-attribution analysis".⁶⁶ Moreover, China emphasised that it "did not

⁶¹ The unsuppressed selling price is the price at which the product would have been sold in the absence of dumping.

⁶² The unsuppressed selling price is then compared to the import price in order to determine the margin of injury to be compared to the margin of dumping.

⁶³ AD Article 9.1 provides that "[i]t is desirable that [...] the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry".

⁶⁴ According to the 2013 USTR Report, "[C]urrently, China has in place 115 AD Measures [...] and 13 AD investigations in progress" (See Executive Office of the President of the United States, United States Trade Representative, *2013 Report to Congress On China's WTO Compliance*, December 2013, p. 37).

⁶⁵ With respect to the Dispute, the EU Trade Commissioner, Karel De Gucht, said: "I will not accept tit-for-tat retaliation against European companies through the misuse of trade defence instruments. The panel report is very clear, so I expect China to remove the measures immediately".

⁶⁶ Dispute Settlement Body, *Minutes of the Meeting held in the Centre William Rappard on 24 May 2013*, WT/DSB/M/332, 31 July 2013, para. 2.4, and Dispute Settlement Body, *Minutes of the Meeting held in the Centre William Rappard on 24 April 2013*, WT/DSB/M/331, 8 July 2013, para. 6.3.

believe that the Panel report was entirely free from error”, in particular in respect to “[its] approach to price effect analysis and disclosure before final determination”, urging a clarification of such controversial issues.⁶⁷

Which will be the consequences of the Panel findings, from a systemic perspective, is thus hard to predict. Results, in fact, may vary: *China – X-Ray Equipment* might just be another piece in the puzzle falling into place towards pushing China to do more and better to comply with its trading rights commitments in this area of WTO law. Or it might just become the new battle cry of the sceptical front of those questioning the benefits of China’s accession to WTO.

GUENDALINA CATTI DE GASPERI*

⁶⁷ *Ibid.*

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4. CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON BROILER PRODUCTS FROM THE UNITED STATES (“CHINA – BROILER PRODUCTS”)⁶⁸

4.1 *Facts of the dispute*

The WTO Panel report in *China – Broiler Products* is the latest in a series of cases dealing with China’s antidumping and countervailing measures. The dispute concerned China’s measures imposing countervailing duties and antidumping duties on broiler (chicken) products from the United States (“U.S.”). The measures at issue are set forth in the Ministry of Commerce of the People’s Republic of China (MOFCOM) Notice No. 8 [2010]⁶⁹ (Preliminary Anti-Dumping Determination) Notice No. 26 [2010]⁷⁰ (Preliminary Countervailing Duty Determination), Notice No. 51 [2010]⁷¹ (Final Anti-Dumping Determination), and Notice No. 52 [2010]⁷² (Final Countervailing Duty Determination).

Following the filing of a petition by the China Animal Agriculture Association (“CAAA”) on 14 August 2009, MOFCOM initiated investigations on 27 September 2009 and published its first preliminary determination on 5 February 2010 – finding that dumping had occurred with regard to broiler products from the U.S. during the period of investigation and that these products had caused material injury to the domestic industry. In its second preliminary determination published on 28 April 2010, MOFCOM found that imported broiler products from the U.S. were subsidized and had caused material injury to the Chinese domestic broiler industry. Under its final determinations, China proceeded to levy the following antidumping and countervailing duty rates on imports of broiler products from U.S. producers and exporters: Pilgrim’s Pride (antidumping duty, 53.4%, countervailing duty, 5.1%); Tyson (antidumping duty, 50.3%, countervailing duty, 12.5%); Keystone (anti-dumping duty, 50.3%, countervailing duty, 4.0%); Registered, but Non-Investigated Firms (anti-dumping duty, 51.8%, countervailing duty, 7.4%); and “All Others” (anti-dumping duty, 105.4%, countervailing duty, 30.3%).

The U.S. claimed that various aspects of these measures, and the underlying investigation, were inconsistent with provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“AD Agreement”) and the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). In particular the U.S. requested the Panel to find China’s investigations as well as the calculation of antidumping and countervailing duties inconsistent with a number of Articles of the AD and SCM Agreements; and Article VI:3 of the GATT.

Upholding almost all of the U.S. claims, the Panel found China in violation of certain provisions of the AD Agreement as well as those of the SCM Agreement and the GATT.

4.2 *Procedural history*

On 20 September 2011, pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), Article XXIII:1 of the General Agreement on Tariffs and Trade

⁶⁸ Panel Report issued on 2 August 2013 and adopted on 25 September 2013, WT/DS427/R.

⁶⁹ Preliminary Anti-Dumping Determination, Exhibit USA-2.

⁷⁰ Preliminary Countervailing Duty Determination, Exhibit USA-3.

⁷¹ Final Anti-Dumping Determination, Exhibit USA-4.

⁷² Final Countervailing Duty Determination, Exhibit USA-5.

1994 ("GATT 1994"), Article 30 of the SCM Agreement (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the AD Agreement, the U.S. requested consultations with China with respect to the conduct and results of MOFCOM's antidumping and countervailing duty investigations.⁷³ After unsuccessful consultations (held on 28 October 2011), the U.S. requested the establishment of a panel on 8 December 2011 pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement.⁷⁴ The Dispute Settlement Body ("DSB") considered this request at its meeting on 19 December 2011 where China objected to the establishment of a panel.⁷⁵ The U.S. renewed its request for the establishment of a panel at the 20 January 2012 meeting of the DSB, at which time a panel was established in accordance with Article 6 of the DSU.⁷⁶

Pursuant to Article 8.7 of the DSU, the Panel was composed on 24 May 2012 by the Director-General of the WTO at the request of the U.S.⁷⁷ Chile, EU, Japan, Mexico, Norway, Saudi Arabia and Thailand reserved their rights to participate in the Panel proceedings as third parties.

The final panel report was circulated to Members on 2 August 2013 and adopted by the DSB at its 25 September 2013 meeting.⁷⁸ The ruling was not appealed.

4.3 *Key issues before the Panel and its Findings*

4.3.1 *Violation by the investigating authority of the procedural right to meet with adverse parties*

The U.S. argued that MOFCOM acted inconsistently with Article 6.2 of the AD Agreement by "denying a request by the United States Government for a hearing to present its concerns about the investigation and exchange views with parties with adverse interests" (para.7.7). In fact, Article 6.2 states:

Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

That provision sets forth due process obligations on the investigation authority. In evaluating U.S.'s claim, the Panel noted that Article 6.2, second sentence "establishes an obligation for the authorities, on request, to provide opportunities for all interested parties to meet those parties with adverse interests so that opposing views may be presented and rebuttal arguments offered" (para. 7.20). Recalling Appellate Body precedent, notably in *US – Oil Country Tubular Goods Sunset Reviews* where it was held that Article 6.2 "set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews",⁷⁹ the Panel in the case at hand noted that the second sentence of Article 6.2 is informed by the first sentence of that same provision. The Panel also noted with regard to the due process right that the obligation to provide opportunities to meet is not absolute since "the 'opportunities' provided for under this provision must be balanced against other considerations such as the investigating authority's ability to complete the investigation in an expeditious manner"⁸⁰ (para. 7.20).

Since parties do not dispute the fact that the U.S. had requested an opportunity to meet those parties with adverse interests and also that neither the Petitioner nor other interested parties having interests adverse to the

⁷³ Request for Consultations by the United States WT/DS427/1, G/L/960, G/SCM/D88/1, G/ADP/D90/1 (23 September 2011).

⁷⁴ Request for the Establishment of a Panel by the United States, WT/DS427/2 (9 December 2011).

⁷⁵ Panel Report, *China – Broiler Products* (Addendum), WT/DS427/R/Add.1, para. 5. (2 August 2013).

⁷⁶ Dispute Settlement Body, Minutes of Meeting, 20 January 2012, WT/DSB/M/311 (15 March 2012), p. 13.

⁷⁷ Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, WT/DS427/3 (29 May 2012).

⁷⁸ Dispute Settlement Body, Minutes of Meeting, 25 September 2013, WT/DSB/M/337 (14 January 2014).

⁷⁹ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 29 November 2004, para. 241.

⁸⁰ *Ibid.*, paras. 241-242.

U.S. were present at the “opinion presentation meeting” ultimately arranged by MOFCOM, the issue with this provision as the Panel noted is not “whether a meeting took place, but whether MOFCOM provided an opportunity for it to occur”(para. 7.21). China on its part contended that it has satisfied the “opportunity” requirement by informing the Petitioner as well as all other interested parties with interests adverse to the U.S. of the request via telephone and that those parties “indicated no interest in attending the hearing”.

As China has failed to point to any record evidence to substantiate its assertion, such as “contemporaneous memoranda summarising the calls, e-mails, or letters”,⁸¹ the Panel went on to conclude that MOFCOM has not satisfied the requirements of Article 6.2 “due to its failure to provide opportunities for interested parties with adverse interests to meet and present opposing views and offer rebuttal arguments”(paras. 7.22-24). Thus, the Panel found that China acted inconsistently with Article 6.2 of the AD Agreement (para. 7.25).

4.3.2 *Failure by China to require that the Chinese industry concerned provide non-confidential summaries to the U.S.*

The U.S. claimed that MOFCOM “failed to require the Petitioner to provide adequate non-confidential summaries in the anti-dumping and countervailing duty investigations”, contrary to the requirements of Article 6.5.1 of the AD Agreement and Article 12.4.1 of the SCM Agreement (para. 7.26). U.S. limited its claim to the following six specific issues: (i) production and standing, (ii) production capacity, (iii) domestic inventory levels, (iv) cash flow, (v) wages and employment, and (vi) labour productivity (ibid., and para. 7.30).

The Panel considered that the question before it was whether MOFCOM had “required the Petitioner to provide non-confidential summaries of the confidential information redacted from the Petition consistent with the requirements of” Article 6.5.1 AD Agreement and Article 12.4.1 SCM Agreement (para. 7.49). The U.S.’s argument was that, either non-confidential summaries were not provided by the Petitioner, or they did not meet the requirements of those provisions. China on its part argued that the non-confidential version of the Petition contained “summaries in the form of graphs and explanations adjoining the redacted information, permitting a reasonable understanding of that information” (ibid.).

The Panel noted that in *EC – Fasteners (China)*, the Appellate Body clarified the standard for assessing whether a non-confidential summary complies with these provisions stating that “although the sufficiency of the summary will depend on the confidential information at issue, the summary must permit a reasonable understanding of the substance of the information withheld, and allow the other parties to the investigation a meaningful opportunity to respond and defend their interests”⁸² (para. 7.50). Rejecting China’s contention that the non-confidential summaries included in the Petition were “later supplemented by non-confidential analysis” by MOFCOM in the Preliminary and Final Determinations, and as such, complied with Articles 6.5.1 and 12.4.1, the Panel stated that the provisions at hand required that a non-confidential summary be furnished by the “interested parties providing confidential information, and not by the investigating authority”⁸³ (para. 7.53). Put simply, the obligation was incumbent upon the Petitioner and the Panel rightly declined to entertain MOFCOM’s own summarization.

As far as the particular categories of information challenged by the U.S. is concerned, the Panel found that China acted inconsistently by failing to provide a non-confidential summary of information submitted confidentially, that would allow interested parties to understand what kind of information had been submitted, and thus, better defend their interests during the process (para. 7.65).

4.3.3 *MOFCOM’s failure to disclose “essential facts” to U.S. companies, including dumping margins calculations*

Under this claim, the U.S. argued that China failed to comply with the obligation in Article 6.9 of AD Agreement to disclose to interested parties the essential facts forming the basis of MOFCOM’s decision to apply

⁸¹ *Supra* note 72.

⁸² Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, paras. 541-542.

⁸³ See e.g. Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/R, 15 June 2012 (“*China – GOES*”), paras. 7.189-7.190.

anti-dumping duties by *failing to make available the data and calculations it performed* to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents (para. 7.66). Article 6.9 reads:

The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

In the U.S. allegations, “essential facts” include both the calculations *and* the data relied upon by the investigating authority. The U.S. consequently went on to argue that MOFCOM should have made available: (i) all calculations performed with respect to the derivation of the normal value;⁸⁴ (ii) all calculations performed with respect to the derivation of the export price; and (iii) all calculations performed with respect to the determination of costs of production (para. 7.70). China countered stating that Article 6.9 does not require the type of expansive disclosure the U.S. was calling for, and that disclosure under Article 6.9 was limited to facts, as opposed to the reasoning of the investigating authorities (paras. 7.75-76). In China’s view therefore, “disclosure of the calculation program or worksheets was not necessary”, because MOFCOM’s manner of disclosing the essential facts by providing a detailed explanation of the methodology applied, and leaving it to respondents to replicate those steps if they wish to recreate the details, allowed the respondents to “defend their interests” and was consistent with the obligation in Article 6.9 (para. 7.78).

The Panel considered that the questions before it were (i) “what constitute ‘essential facts’ within the meaning of Article 6.9” of the AD Agreement, and (ii) “whether MOFCOM disclosed those essential facts to the three respondents in the anti-dumping investigation on broiler products” (para. 7.85). In the Panel’s view, what constitutes “essential facts” must be understood “in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case” (para. 7.89). “In the context of the determination of whether dumping exists, the magnitude of such dumping, and thus whether to apply definitive measures”, the Panel stated, “the elements an authority is required to examine are those set forth in Article 2 of the Anti-Dumping Agreement” (para. 7.89). In rejecting China’s argument that that too broad of an interpretation of this obligation will require the disclosure of every detail, the Panel stated that the “essential facts” are not simply the disclosure that a determination has been made, but rather are “the data that are the basis of the determination” (para. 7.890).

With reference to the requirements of Article 2 AD Agreement, the Panel found that “essential facts” which must be disclosed include “the underlying data for particular elements that ultimately comprise normal value (...); export price (...); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability” (para. 7.91). It noted that absent such data which formed the basis for the calculation of the margin of dumping, the margin established could not be understood.⁸⁵ Hence, in the context of a determination of the existence and margin of dumping, pursuant to Article 6.9, “the investigating authority must disclose what data was used in: (i) the determination of normal value (including constructed normal value); (ii) the determination of export price; (iii) the sales that were used in the comparisons between normal value and export price; (iv) any adjustments for difference which affect price comparability; and (v) the formulas that were applied to the data” (para. 7.93).

The next question the Panel addressed was whether MOFCOM has *disclosed* those “essential facts” to the respondents. Noting that Article 6.9 does not prescribe a particular format for the disclosure under consideration, the Panel opined that the question before it is not one of form, rather “whether the information in the three disclosure documents provided the necessary level of detail as to the data used in the calculations to satisfy the obligation in Article 6.9” (para. 7.95).

⁸⁴ The U.S. also argued that “[fo]r normal value, export price and costs of production MOFCOM should have provided detailed analyses of the data provided by each respondent, made available adjustments and revisions made by MOFCOM to the sales data provided by each respondent, and specifically described MOFCOM’s elimination or rejection of data provided by each respondent”, Panel Report, *China – Broiler Products*, para. 7.71.

⁸⁵ Panel Report, *China – Broiler Products*, footnote 168 (citing Panel Report, *China – X-Ray Equipment*, para. 7.417).

After examining MOFCOM's disclosure in relation to each interested party, namely Pilgrim's Pride, Tyson, and Keystone (paras. 7.97-106), the Panel concluded that China acted inconsistently with Article 6.9 of the AD Agreement as MOFCOM failed to "disclose all of the essential facts, in particular those pertaining to its determination of the existence and margins of dumping to the three relevant interested parties" (para. 7.107).

4.3.4 *The U.S. claim relating to the calculation of the antidumping and countervailing duties*

i) *Antidumping duties calculation*

The U.S. claimed that China acted inconsistently with Article 2.2.1.1 of the AD Agreement in its determination of the cost of production of the U.S. exporters for the purposes of constructing normal value, by (i) improperly rejecting the cost allocations kept in the normal books and records of the US respondents; (ii) applying its own allocation methodology that did not reflect the costs associated with the production and sale of the products under consideration; and (iii) allocating the costs of producing certain products (blood and feathers) to the other products one of the respondents produced (para. 7.108). In China's opinion, "the respondents' normal books and records did not reasonably reflect the costs associated with the production and sale of the product under consideration" (para. 7.109).

Referring to Article 2.1 AD Agreement, the Panel said that a product is considered "dumped" "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" (para. 7.110). In the same vein, Article 2.2 provides that when there are no sales of the like product in the ordinary course of trade the *margin of dumping* shall be determined either "by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or *with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*" (para. 7.111, Panel report emphasis). The Panel considered appropriate to first address the U.S. claim under the first sentence of Article 2.2.1.1 before turning to claim under the second sentence (para. 7.113).

a. *Article 2.2.1.1 first sentence AD Agreement*

The first sentence of Article 2.2.1.1 imposes an obligation on the investigating authority to calculate the costs on the basis of the exporter's books and records provided two conditions are met: "(i) the books and records are consistent with the generally accepted accounting principles (GAAP) of the exporting country, and (ii) they reasonably reflect the costs associated with the production and sale of the product under consideration"⁸⁶ (para. 7.160). In the Panel's view, the term "normally" present in the first sentence denotes that "an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records" (para.7.161). Since "using the respondents' books and records is the rule and declining to do so is a derogation from that rule, it is for the investigating authority to decide to do so and to justify its decision on the record of the investigation and/or in the published determinations" (ibid.).

While noting that "the fact that the respondents ... maintained their books and records consistently with US GAAP would not, in and of itself require MOFCOM to use them under Article 2.2.1.1", the Panel said that MOFCOM's determination for both Tyson and Keystone in the Preliminary Anti-Dumping Determination that their costs have "not reasonably reflected the production cost related to the Subject Products" was done "without providing the supporting reasoning" (paras 7.166, 7.171). Recognising that China's argument could actually "serve as a basis for determining that Tyson and Keystone's books and records do not reasonably reflect their costs of production for paws", the Panel declined to conclude, based on the record of the investigation, "that the concerns expressed in China's arguments before the Panel were indeed the reasons why MOFCOM departed from the norm of using a respondent's books and records" (para. 7.171).

The Panel then found that China acted inconsistently with the first sentence of Article 2.2.1.1 by refusing to use Tyson and Keystone's books and records (ibid.). Concerning to the third exporter, Pilgrim's Pride, the Panel found that the U.S. has not established that China acted inconsistently with the first sentence of Article 2.2.1.1 because MOFCOM has provided sufficient reasons for rejecting Pilgrim's books and records (paras. 7.173-775).

⁸⁶ *Ibid.*, para. 7.160 footnote 280, quoting Panel Report, *US – Softwood Lumber V*, para. 7.237.

b. Article 2.2.1.1 second sentence – MOFCOM’s allocation methodology

The U.S. claimed that the allocation used by MOFCOM was inconsistent with Article 2.2.1.1 because “it did not reasonably reflect the cost of production” as it attributed costs “based on the weight of the products, not the value of the products” (para. 7.177). Disputing China's claim that the weight-based methodology is neutral, the U.S. instead argued that it is expressly “tailored to find dumping in these particular circumstances” (ibid.).

The issue before the Panel was “whether MOFCOM, in applying its own cost allocation methodology, complied with the requirements in the second sentence of Article 2.2.1.1 to consider all available evidence to arrive at the proper allocation of costs” (para. 7.186). The Panel considered that it was faced with two particular questions here: (i) whether MOFCOM took into consideration “compelling evidence” with respect to the reasonableness of its own methodology and available alternatives; and (ii) whether MOFCOM improperly included costs not associated with the production and sale of the product under consideration in the costs it allocated to that product (ibid.).

The Panel relied on past Appellate Body precedent⁸⁷ and considered that it must address three questions in order to determine whether MOFCOM satisfied the obligation in the second sentence of Article 2.2.1.1. The first question was whether MOFCOM did more than simply receive evidence and take note of evidence. The second question was whether, in this particular instance, MOFCOM was required to reflect on and weigh the merits of the various allocation methodologies; and if it was so required, to assess whether there is evidence of its consideration reflected in relevant documentation. According to the Panel, “there was ‘compelling evidence’ that more than one allocation methodology potentially may be appropriate” given that MOFCOM was presented with explanations and alternative cost methodologies by the respondents. These alternatives required MOFCOM “to reflect on and weigh the merits of the various allocation methodologies” (para. 7.193). As China failed to provide any explanations as to why MOFCOM chose weight-based methodology over the available alternatives proposed by the respondents, the Panel concluded that China acted inconsistently with the obligations in the second sentence of Article 2.2.1.1 (paras. 7.194-195).

In sum, the Panel found China in contravention of this provision because “(i) there was insufficient evidence of its consideration of the alternative allocation methodologies presented by the respondents, (ii) it improperly allocated all processing costs to all products, and (iii) it allocated Tyson's costs to produce non-exported products to the normal value of the products for which MOFCOM was calculating a dumping margin” (para. 7.198).

ii) The amount of Subsidy

The U.S. claimed that MOFCOM improperly calculated the amount of per unit subsidisation in the subject imports and as a result acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. In fact, the “fundamental rule” under Article VI:3 of the GATT is that:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.⁸⁸

Article 19.4 SCM Agreement on its part provides that “no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product”.⁸⁹

⁸⁷ Notably Appellate Body Report, *US – Softwood Lumber V.* paras 133-134, 138.

⁸⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Annex 1A, Marrakech Agreement, 1868 UNTS 201 (1995).

⁸⁹ Agreement on Subsidies and Countervailing Measures (SCM Agreement), Annex 1A, Marrakech Agreement, 1869 UNTS 14 (1995).

The question before the Panel was whether MOFCOM “impermissibly countervailed more than the subsidies that benefited the production of subject imports in contravention of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994”. In particular, the Panel considered that it was being asked to find out whether MOFCOM “used a data set relating to the purchase of subsidized corn and soybeans that benefited the production of live chickens and improperly allocated all of the benefit from that subsidy to the subject broiler products” (para. 7.255). Relying on past precedent, the Panel agreed with the parties that under Articles 19.4 of the SCM Agreement and VI:3 of the GATT 1994 “China was obligated to accurately determine the per unit subsidy amount and not impose countervailing duties exceeding that amount” (para. 7.258). The Panel considered that its task was therefore “review whether MOFCOM has provided a reasoned and adequate explanation of how the evidence on the record supports its factual findings and how the factual findings support its overall determination” (Ibid.).

According to the Panel, the provisions concerned requires more effort on the part of an investigating authority that go beyond merely accepting data provided by the respondents and using it. The authority must ascertain the precise amount of subsidy attributed to the imported products under investigation. Since MOFCOM was alerted to the possibility that the amount of subsidy it was allocating to subject merchandise might have included subsidies to “excluded products”, it “should have taken sufficient account of conflicting evidence and respond to competing plausible explanations of that evidence” in order to make sure that its calculation was correct, but failed to do so (paras. 7.262 and 7.266). Consequently, the Panel found that China acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, “because MOFCOM did not ensure that the countervailing duty levied did not exceed the amount of the subsidization per unit of the subsidized and exported product” (para. 7.266).

4.3.5 The use of “facts available” for “all others” rate determination

The U.S. claimed that China acted inconsistently with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement when it used “facts available” to determine the anti-dumping and countervailing duty rates for unknown US producers and exporters.

i) Antidumping duty rate

In fact, in the case of anti-dumping, MOFCOM applied “facts available” to exporters/producers that were “unknown” to it, and which led it to determine the duty rate applied to the unknown exporters at 105.4% (para. 7.276-278). The U.S. argued that “by imposing an ‘all others’ rate based on adverse facts available on producers/exporters that MOFCOM did not notify of the information required of them and that did not refuse to provide necessary information or otherwise [China had] impeded the anti-dumping investigation”, and has thus acted in a manner inconsistent with Article 6.8 and Annex II, paragraph 1 of the AD Agreement (para. 7.267). The U.S. argued that MOFCOM failed to notify “all other” U.S. producers/exporters of “(i) the initiation of the investigation, (ii) the information required, and (iii) the fact that failure to participate and provide certain information would result in a determination based on facts available.” According to the claimant, the fact that “all others” rate was “more than twice as high as any of the individual margins or the rate applied to companies that registered but were not investigated”, and the fact that MOFCOM had failed to explain how it arrived at this rate, that rate was “apparently adverse” to the interests of the entities concerned in violation of Article 6.8 (para. 7.281).

The Panel noted that “neither Article 6.8 nor Annex II specify what form the request for information should take or how the authority should communicate its request to the interested party concerned” (para. 7.301). It then went on to interpret Article 6.8 “in context”, and stated that Article VI of the GATT 1994 as well as the AD Agreement “permit the imposition of an anti-dumping duty with respect to all imports that are found to have been dumped and to have caused injury” (para. 7.302). Therefore, “the fact that injury is determined on the basis of an assessment of all imports of the subject product justifies the application of duties to all such imports” including “imports from those producers/exporters who were not individually identified, for example due to their non-cooperation or the lack of information about them” (Ibid.).

Since it is “generally recognised and accepted” that the manner to inform unknown interested parties in an administrative or judicial proceeding “is by way of public notices, including notices published in an official gazette or on the internet” (as can also be found in Article X of the GATT and Article 12 AD Agreement) (para.7.303), the Panel concluded that based on the facts of the case at hand, MOFCOM had “fulfilled the conditions set forth under Article 6.8 and Annex II, allowing it to resort to facts available for the calculation of the anti-dumping duty applied to US producers/exporters who failed to register” (para. 7.307).

However, coming to the second aspect of the question where the U.S. criticised the *manner* in which MOFCOM determined the “all others” rate (by using facts apparently adverse to the interest of the unknown producers/exporters) (para. 7308), the Panel agreed with past precedent that “the rate based on facts available must have a logical relationship with the facts on the record and be a result of an evaluative, comparative assessment of those facts” (para. 7.312). It then found that because China could not rebut the presumption that MOFCOM had acted in a manner inconsistent with Article 6.8, China fell foul of that provision when MOFCOM calculated the “all others” rate of 105.4% on the basis of facts available (para. 7.313).

ii) *Countervailing duties rate*

Regarding countervailing duties, U.S. also claimed that “because MOFCOM imposed an ‘all others’ rate based on adverse facts available on producers/exporters that MOFCOM did not notify of the information required of them and that did not refuse to provide necessary”, China had failed to meet its obligations under Article 12.7 SCM Agreement (para. 7.332).

The Panel noted that in spite of the absence of a provision in the SCM Agreement equivalent to Annex II of AD Agreement, Article 12.7 SCM Agreement and Article 6.8 AD Agreement impose similar disciplines concerning the circumstances under which an authority may resort to facts available (para. 7.355). Transposing its reasoning and its conclusions in the U.S. claim under Article 6.8 AD Agreement *mutatis mutandis* to the claim under Article 12.7 SCM Agreement (para. 7.356), the Panel stated that although MOFCOM “could determine the ‘all others’ rate on the basis of available facts on the record of the investigation”, it would nevertheless uphold U.S. claim that China acted inconsistently with Article 12.7 because MOFCOM “applied an ‘all others’ rate determined on the basis of facts available to US producers/exporters who failed to register” (para. 7.360).

4.3.6 *U.S.’s claims on the injury determinations*

i) *The definition of the “domestic industry”*

The U.S. claimed that MOFCOM improperly defined the domestic industry, contrary to Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement, because MOFCOM did not seek to define the domestic industry as the “domestic producers as a whole” *before* defining it as those producers representing a “major proportion” of total domestic production (paras. 7.370-371). These flaws in the determination of the scope of the domestic industry according to the U.S. led MOFCOM to act inconsistently with Article 3.1 AD Agreement and Article 15.1 SCM Agreement since its “improper exclusion of producers from the domestic industry resulted in an injury analysis that was not based on positive evidence or an objective examination of the effects of the subject imports on the domestic industry” (para. 7.372).

While Article 3.1 AD Agreement and Article 15.1 SCM Agreement on the one require an investigating authority to make an objective examination of the evidence of injury to that domestic industry, Article 4.1 AD Agreement and Article 16.1 SCM Agreement on the other hand set forth *how* to determine the composition of that domestic industry (para. 7.407). In the words of the Panel, these two sets of provisions are “inextricably linked” (para. 7.408). For an examination to be “objective” under Article 3.1, “the identification, investigation and evaluation of the relevant factors must be ‘even-handed’ and the investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will reach a certain determination” (para. 7.411).

On the relationship between the definition of the “domestic industry” in Article 4.1 of the AD Agreement and 16.1 of the SCM Agreement and the obligation to base injury determinations on an “objective examination”, the Appellate Body in *EC-Fasteners* made it clear that “to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product” (para. 7.412). The Panel proceeded to conclude that “Articles 4.1 and 16.1 do not require the investigating authority at the outset to attempt to define the domestic industry as the domestic producers as a whole or to have to make efforts to identify all domestic producers before then defining the domestic industry as producers whose output represents a major proportion of total production” (para. 7.420). Based on the facts of this case, China had not acted inconsistently with Articles 3.1 and 4.1 AD Agreement and Articles 15.1 and 16.1 SCM Agreement because MOFCOM never sought to identify all domestic producers in the process of defining the domestic industry (para. 7.423).

The Panel then addressed U.S. claim that MOFCOM's definition of the domestic industry involved a self-selection process which effectively excluded producers from the domestic industry, causing material risk of distortion in the examination of injury. It found that U.S. has failed to establish that MOFCOM's process for determining the domestic industry was inconsistent with either Articles 4.1 and 16.1 or Articles 3.1 and 15.1 (paras. 7.436-438).

4.3.7 U.S.'s claims with respect to MOFCOM's price effects analysis

The U.S. also claimed that MOFCOM's price effects analyses were inconsistent with Articles 3.1 and 3.2 of the AD Agreement and 15.1 and 15.2 of the SCM Agreement (para. 7.439). The U.S. contended that “an investigating authority must use domestic and subject import pricing data that permit reasonably accurate price comparisons” in order to conduct a price effects analysis consistent with the objectivity and positive evidence requirements of Article 3.1 AD Agreement and Article 15.1 SCM Agreement (para. 7.454). The main question before the Panel was “whether MOFCOM ensured the comparability of the two sets of prices that it compared for the purpose of determining price undercutting” in the context of Articles 3.2 AD Agreement and 15.2 SCM Agreement (para. 7.473).

The Panel noted that investigating authority is afforded a certain level of discretion in choosing a methodology it considers appropriate in conducting the examination under Articles 3.2 and 15.2 (para. 7.474), but that discretion is “circumscribed by the overarching obligation under Articles 3.1 and 15.1 that the determinations of injury ‘be based on positive evidence and involve an objective examination’” so much so that a comparison of prices that are not comparable would not satisfy that requirement (para. 7.476). The Panel also agreed with past precedent that although the need for adjustments depends on the factual circumstances of each case and the evidence before an investigating authority, price comparability needs to be examined any time that a price comparison is performed in the context of a price undercutting analysis (para. 7.479).

The Panel then rejected U.S. claim that China acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement Articles 15.1 and 15.2 of the SCM Agreement because MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values at different *levels of trade* (paras. 7.488, 7.494). In respect of *product mix* however, the Panel concluded that China acted inconsistently with Articles 3.1 and 15.1 as well as Articles 3.2 and 15.2 because “MOFCOM relied for its findings of price undercutting on a comparison of subject import and domestic average unit values that included different product mixes without taking any steps to control for differences in physical characteristics affecting price comparability or making necessary adjustments” (para. 7.494).

The Panel also upheld U.S. claims that MOFCOM's findings of price suppression in each of the investigations were inconsistent with the same provisions, because they were based on the WTO inconsistent finding of price undercutting (para. 7.513).

4.3.8 U.S.'s claims with respect to MOFCOM's price effects analysis

The Panel exercised judicial economy with respect to the United States' claims regarding MOFCOM's analyses of the “impact” of subject imports on the domestic industry and on MOFCOM's causation analyses.

4.4 Comments

This case follows a series of what may be seen as China's "systematic" (mis)use of anti-dumping and countervailing measures. The fact that the Panel in this case repeated almost all of its findings under *China – X Ray Equipment* (also reviewed in this volume) is symptomatic of this trend. However, *China – Broiler Products* differs from previous ones in that it addressed for the first time the issue of how to determine dumping margins where the products begin the production process as a single product but are subsequently broken out into separate products. Although the Panel Report in this case can be lauded for confirming that price comparisons in injury determinations must not be distorted by comparing dissimilar products, it left open for the future the debate over the weight-based methodology (advocated by China in this case) as opposed to the value-based methodology (said to be in accordance with the GAAP) when calculating the dumping margin of the products under investigation.

REGIS YANN SIMO*

5. AWARD OF THE ARBITRATOR, *CHINA – COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES (“CHINA – GOES”)* (ARBITRATION UNDER DSU ARTICLE 21.3(C)).⁹⁰

5.1 Introduction: Arbitration at the WTO

It is not a novelty to list State-to-State arbitration occurring in the final phase of the WTO's mainstream dispute settlement system as an instrument for the determination of certain aspects relating to the implementation of recommendations and rulings of the Dispute Settlement Body (“DSB”).⁹¹ At present, 31 arbitrations under Dispute Settlement Understanding (“DSU”)⁹² Article 21.3(c), 19 under DSU Article 22.6 and 1 under DSU Article 25 are recorded.⁹³

The arbitration regulated by DSU Article 21.3(c) eminently encompasses the determination of the “reasonable period of time” (RPT) for a Member to bring a measure found to be inconsistent with the covered agreements into compliance with the latter.⁹⁴ DSU Article 21.1 solemnly proclaims that “prompt compliance

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⁹⁰ Award of the Arbitrator Claus-Dieter Ehlermann, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States (China – GOES) (Article 21.3(c))*, WT/DS414/12, 3 May 2013 (hereinafter “Award”).

⁹¹ See generally on this topic SACERDOTI, *The Nature of WTO Arbitrations on Retaliation*, in BOWN, PAUWELYN (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, Cambridge University Press, 2010, p. 23; BAPTISTA, *Use of Arbitration in the WTO*, in FERNÁNDEZ-BALLESTEROS, ARIAS (eds.), *Liber Amicorum Bernardo Cremades*, La Ley, 2010, p. 925; BOISSON DE CHAZOURNES, *Arbitration at the WTO: A Terra Incognita to be Further Explored*, in CHARNOVITZ, STEGER, VAN DEN BOSSCHE (eds.), *Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano*, Cambridge University Press, 2005, p. 181; HUGHES, *Arbitration Within WTO*, in ORTINO, PETERSMANN (eds.), *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, 2004, p. 75; PAUWELYN, *Proposals of Reforms of Article 21 of the DSU*, in ORTINO, PETERSMANN (eds.), *op. cit.*, p. 51, 59; ZEKOS, *An Examination of the GATT/WTO Arbitration Procedures*, in AMERICAN ARBITRATION ASSOCIATION, *Handbook on International Arbitration and ADR*, 2nd ed., Juris, 2010, p. 383, 395-401; LORCHER, *WTO Dispute Settlement and Arbitration*, 6 Int'l Arb. L. Rev. 203, 209 (2003); SHOYER, MYERS, *The Use of Arbitration in Securing WTO Compliance*, in ROVINE (ed.), *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 2010*, Martinus Nijhoff Publishers, 2011, p. 201; CHOVANCOVÁ, *WTO Enforcement Procedures. Featuring Arbitration. A Technical Perfection*, 10(4) *Transnational Dispute Management* (September 2013).

⁹² Understanding on Rule and Procedures Governing the Settlement of Disputes (DSU), Annex 2, Marrakesh Agreement Establishing the World Trade Organization (with Final Act, Annexes and Protocol), concluded at Marrakech on 15 April 1994, 1869 UNTS 401 (1995).

⁹³ Available at: <http://www.worldtradelaw.net/dsc/stats.htm> (visited 21 March 2014).

⁹⁴ ZDOUC, *The Reasonable Period of Time for Compliance with Rulings and Recommendations Adopted by the WTO Dispute Settlement Body*, in YERXA, WILSON (eds.), *Key Issues in WTO Dispute Settlement: The First Ten Years*, Cambridge University Press, 2005, p. 88; MONNIER, *The Time to Comply with an Adverse WTO Ruling. Promptness Within Reason*, 35 J. World Trade 825 (2001); PENG, *How Much Time is Reasonable? The Arbitral Decisions Under Article 21.3(c) of the DSU*, 26 Berkeley J. Int'l L. 323 (2008).

[...] is essential in order to ensure effective resolution of disputes to the benefit of all Members.” Indeed, within 30 days from the date of adoption of a Panel or Appellate Body Report, a DSB meeting shall be held, where the Member concerned has to render information about its intentions on the implementation of the report. The violating Member may either comply immediately or, in case of impracticability, ask for a reasonable period of time (a sort of *grace period*) to do so. Such a period may be proposed by the Member itself, subject to the approval of the DSB. Failing this approval, it may be mutually agreed by the Parties within 45 days from the adoption of the relevant report. Absent this agreement, it shall be determined through "binding" arbitration within 90 days from the adoption of the relevant report.

A second example of WTO arbitration is the procedure pursuant to DSU Article 22.6-7 pertaining to the “retaliation” to be exercised by a complaining Member, where the arbitrator (or arbitrators) shall determine whether the level of suspension of concessions or other obligations under the covered agreements is equivalent to the level of nullification or impairment produced by the inconsistent measure adopted by the other party, whether the proposed suspension is allowed under the covered agreements, or, in case of contestation, whether the principles and procedures set forth in DSU Article 22.3 have been correctly followed.⁹⁵ Arbitration shall be completed within 60 days after the date of expiry of the reasonable period of time. The personal identity of the arbitrators makes a difference between arbitration under DSU Article 21.3(c) and DSU Article 22.6-7. As to the former, the arbitrator or arbitrators are appointed by the Parties within ten days after referring the matter to arbitration, or in case of failure of agreement, by the Director-General upon consultation with the Parties. As to the latter, “arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General.”

The third example is the “expeditious” arbitration provided by DSU Article 25, which has been resorted to only once in the case *US — Section 110(5) Copyright Act*.⁹⁶ This arbitration really represents an alternative means of dispute settlement possibly resulting in awards on classes of disputes clearly defined by the Parties, provided that they fall under the covered agreements.⁹⁷ Indeed, DSU Articles 21 and 22 also would apply to arbitration awards under DSU Article 25.⁹⁸ The “arbitration agreements” shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process, so that they may become party to an arbitration proceeding, though only upon consent of the Parties which have agreed to have recourse to arbitration.⁹⁹

Concerning trade disputes unrelated to the WTO covered agreements as applicable law, States may peripherally resort to *sui generis* arbitration held under the auspices of the WTO.¹⁰⁰ In this respect, it is worth to mention the *Banana Tariff* cases, based on procedures agreed in the “Doha Waiver” concerning the European Communities' obligation under Article I:1 of the GATT 1994.¹⁰¹ While *sui generis* arbitration has proved to be rapid and may be possibly confidential, it does not benefit from any enforcement mechanism, being outside the framework of the DSU.

Only the arbitration under DSU Article 25 (plus the peripheral recourse to *sui generis* arbitration) may resemble an adversarial process on the merits of a dispute as international investment or international commercial arbitration is. Instead, the “arbitral” models under DSU Articles 21 and 22 do not proceed on the

⁹⁵ SACERDOTI, *supra* note 91, p. 31.

⁹⁶ Award of the Arbitrators, *United States – Section 110(5) of the US Copyright Act (Article 25)*, WT/DS160/ARB25/1, 9 November 2001. In this case, the scope of the arbitration under DSU Article 25 was really narrow, namely the determination of the level of nullification or impairment of benefits to the European Communities as result of Section 110(5)(B) of the US Copyright Act. See HUGHES, *supra* note 91, p. 81: “Little can be drawn from this single experience with an Article 25 arbitration”; MALKAWI, *Arbitration and World Trade Organization. The Forgotten Provision of Article 25 of the Dispute Settlement Understanding*, 24 J. Int'l Arb. 173, 181 (2007).

⁹⁷ DSU Article 3.5. Cf. United Nations Conference on Trade and Employment, Final Act and Related Documents, 24 March 1948, E/CONF.2/78, United Nations publication, Sales No. 1948.II.D.4 (“Havana Charter”), Article 93.

⁹⁸ DSU Article 25.4.

⁹⁹ DSU Articles 25.2 and 25.3.

¹⁰⁰ BAPTISTA, *supra* note 91, p. 926, 933-935: “The basis for this kind of arbitration resides in the old Hague Conventions of 1899 and 1907.”

¹⁰¹ Award of the Arbitrators, *European Communities – The ACP-EC Partnership Agreement (Banana Tariff Arbitration I)*, WT/L/616, 1 August 2005; Award of the Arbitrators, *European Communities – The ACP-EC Partnership Agreement (Banana Tariff Arbitration II)*, WT/L/625, 27 October 2005.

basis of mutual agreement, but rather appear as automatic and complementary default mechanisms applicable when the parties fail to agree on certain substantive element for the purpose of implementation of DSB's final decisions in relation to disputes already settled.¹⁰² This comment will analyze the last recorded arbitration rendered under DSU Article 21.3(c) in the case *China – GOES*.

5.2 Procedural history

This arbitration pertains to the implementation of the Report of the Appellate Body of 16 November 2012 and of the Report of the Panel of 15 June 2012, as upheld by the Appellate Body.¹⁰³ The dispute relates to measures imposing countervailing duties and anti-dumping duties, under China's AD Regulations and CVD Regulations, on grain oriented flat-rolled electrical steel (GOES) from the United States, as applied by the Ministry of Commerce of the People's Republic of China (MOFCOM) through Public Notice No. 21 of 10 April 2010 and its annexes.¹⁰⁴ The DSB found that the Chinese measures were inconsistent with various provisions of the Anti-Dumping Agreement and SCM Agreement.¹⁰⁵ On 30 November 2012, China informed the DSB of its intention to comply with the report, but stated that it would have needed a reasonable period of time in which to do so.¹⁰⁶ As the Parties failed to agree on a RPT for implementation, on 8 February 2013 the United States requested that such a period be determined through binding arbitration pursuant to DSU Article 21.3(c).¹⁰⁷ As the Parties did not agree on an arbitrator within 10 days from the referral of the matter to arbitration, on 22 February 2013 the United States requested the Director-General to appoint the arbitrator.¹⁰⁸ The Director-General, after consultations with the Parties, appointed Claus-Dieter Ehlermann on 28 February 2013, who accepted his mandate on 4 March 2013.¹⁰⁹ Arbitrator Ehlermann undertook to release his award no later than 3 May 2013. In conformity with the rapid procedure of the arbitration under DSU Article 21.3(c), China and the United States filed written submissions on 11 March 2013 and on 18 March 2013, respectively, and the oral hearing was held on 4 April 2013. Notwithstanding the circumstance that on 14 February 2013 the 90 days period following the adoption of the Panel and Appellate Body Reports expired, the decision was considered to be an arbitration award under DSU Article 21.3(c), having the Parties previously so agreed as is standard practice.¹¹⁰ On 3 May 2013, Arbitrator Ehlermann rendered his award, which has been circulated on 6 March 2013.¹¹¹

¹⁰² HUGHES, *supra* note 91, p. 82; SACERDOTI, *supra* note 91, p. 31, who describes the tasks of the DSU Article 21.3(c) arbitrator as “not typical of an arbitrator in a legal dispute; rather, they are more akin to those of an expert entrusted with the completion of an element of a contract.”

¹⁰³ Appellate Body Report, *China – GOES*, WT/DS414/AB/R, adopted 16 November 2012; Panel Report, *China – GOES*, WT/DS414/R, adopted on 16 November 2012.

¹⁰⁴ Award, p. 6.

¹⁰⁵ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), Annex 1A, Marrakech Agreement, *supra* note 92, 1868 UNTS 201 (1995); Agreement on Subsidies and Countervailing Measures (SCM Agreement), Annex 1A, Marrakech Agreement, *supra* note 92, 1869 UNTS 14 (1995). *Cf.* Panel Report, *China – GOES*, paras. 3.8, 8.1. The Appellate Body upheld, albeit for different reasons, the Panel's findings on appeal. *Cf.* Appellate Body Report, *China – GOES*, para. 268.

¹⁰⁶ WT/DS414/9.

¹⁰⁷ WT/DS414/10.

¹⁰⁸ WT/DS414/11.

¹⁰⁹ WT/DS414/11. It is interesting to note that to date DSU Article 21.3(c) arbitrators have been customarily selected among acting or former Appellate Body Members, who performed their mandate in their individual capacity. Claus-Dieter Ehlerman, a German national from the European Communities was member of the Appellate Body from 1995 to 2001, serving as Chairman during the last year of his mandate.

¹¹⁰ WT/DS414/9. Failure to comply with the 90 days deadline imposed by DSU Article 21(3)(c) is one of the most remarkable downsides of the arbitration on RPT. *Cf.* ZDOUC, *supra* note 94, p. 94. Since the 90 days run from the date of the adoption of the report and the arbitrator is appointed sometime after, the extension of the deadline becomes a necessity.

¹¹¹ WT/DS414/13. However, the dispute did not end with the determination of the RPT. On 19 August 2013, the Parties informed the DSB of their agreement on procedures under DSU Articles 21 and 22. On 13 January 2014, the United States sought recourse to DSU Article 21.5, thus resorting to the previously agreed procedure, which provided for prior consultations with China. Consultations took place on 24 January 2014 without success. On 13 February 2014, the United States expressed its disagreement as to the existence or consistency with the Anti-Dumping and SCM Agreements of the measures taken by China to comply with the DSB's recommendations and rulings, namely MOFCOM Public Notice No. 51 of 31 July 2013, including its annexes. Therefore, the United States requested a

5.3 *The Mandate of the Arbitrator under DSU Article 21.3(c)*

The arbitrator preliminary clarified that the scope of his mandate was “to determine the time by when the implementing Member must achieve compliance with the recommendations and rulings of the DSB in the underlying dispute”, keeping in mind that according to DSU Article 21.3 (c) “the reasonable period of time to implement a panel or Appellate Body Report should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances”.¹¹² He further noted that in such a determination the means for compliance available to the Member concerned are of central relevance and that the chosen method of implementation must be otherwise consistent with its WTO obligations.¹¹³ In this respect, he notably quoted Professor Giorgio Sacerdoti, as arbitrator in *Colombia – Ports of Entry*, in recognising that “the means of implementation chosen must be apt in form, nature, and content to effect compliance, and should otherwise be consistent with the covered agreements”.¹¹⁴ Arbitrator Ehlermann also clarified that it was not his duty to declare the consistency with WTO law of the implementing measures actually chosen by China, as that could only be determined through the procedure under DSU Article 21.5. The arbitrator insisted that the non-compliant Member retains a considerable measure of discretion in the choice of the means of implementation it deems to be the most appropriate, “as long as the means chosen are consistent with the recommendations and rulings of the DSB and with the covered agreements”.¹¹⁵ In this respect, the Member concerned is not required to utilize “extraordinary procedures” to bring its measures into compliance. Nonetheless, it must resort to all the “flexibilities” available within its legal system for the sake of compliance with a DSB decision in shortest period of time possible.¹¹⁶ The use of such “flexibilities” is held to be dictated by the principles of prompt and immediate compliance with the DSB’s recommendations and rulings.¹¹⁷ These principles guided the arbitrator to decide on the RPT, faced with a request by China, as violating Member, to be granted 19 months, while the United States, as complaining Member, submitted that either 1 month, in case of immediate revocation of the measures at issue, or otherwise 4 months and 1 week, would be adequate.

5.4 *The Guidelines for the Determination of the Reasonable Period of Time under DSU Article 21.3(c)*

The arbitrator found guidance for the exercise of his mandate in the provisions of the DSU and in the precedents of the WTO arbitral practice.¹¹⁸ First, he relied on the principle of “prompt compliance” by the violating Member pursuant to DSU Article 21.1. Second, he found that the introductory paragraph of DSU Article 21.3 provides that the reasonable period of time for implementation shall be available only if the Member concerned “is impracticable to comply immediately”.¹¹⁹ Third, he noted that, according to the last sentence of DSU Article 21.3(c), the “particular circumstances” of a dispute may affect the calculation of the reasonable period of time for implementation, rendering it “shorter or longer” than the expressly suggested maximum period

decision pursuant to DSU Article 21.5, including resort to the original panel, wherever possible. Cf. WT/DS414/14, WT/DS414/15, WT/DS414/16.

¹¹² Award, para. 3.2.

¹¹³ Award of the Arbitrator, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea (Article 21.3(c))*, WT/DS336/16, 5 May 2008, paras. 26-27; Award of the Arbitrator, *European Communities – Export Subsidies on Sugar (Article 21.3(c))*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005, para. 69.

¹¹⁴ Award of the Arbitrator, *Colombia – Indicative Prices and Restrictions on Ports of Entry (Article 21.3(c))*, WT/DS366/13, 2 October 2009, para. 64.

¹¹⁵ Award of the Arbitrator, *Brazil – Measures Affecting Imports of Retreaded Tyres (Article 21.3(c))*, WT/DS332/16, 29 August 2008, para. 48; Award of the Arbitrator, *EC – Measures Concerning Meat and Meat Products (Hormones) (Article 21.3(c))*, WT/DS26/15, WT/DS48/13, 29 May 1998, para. 38.

¹¹⁶ Award of the Arbitrator, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (Article 21.3(c))*, WT/DS344/15, 31 October 2008, para. 42.

¹¹⁷ See Award, para. 3.4. *Accord*, Award of the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements (Article 21.3(c))*, WT/DS384/24, WT/DS386/23, 4 December 2012, para. 70.

¹¹⁸ Award, paras. 3.3-3.5.

¹¹⁹ Arbitrator Ehlermann might have meant that while immediate compliance is held as the general rule, implementation in a reasonable period of time should be considered as the exception.

of 15 months.¹²⁰ Fourth, he agreed with previous arbitrators that the reasonable period of time for implementation “should be the shortest period possible within the legal system of the [implementing] Member”, as ultimately determined by the arbitrator on the basis of the evidence presented by all Parties.¹²¹ Fifth, he acknowledged the burden of proof that the period of time is “reasonable” to lie on the implementing Member, so that “the longer the proposed period of implementation, the greater this burden will be”.¹²²

5.5 *The Analysis of the Arbitrator*

5.5.1 *The Consequence of the Absence of a Clear Legal Authority in the Chinese Legal System with Regard to the Implementation of DSB's Recommendations and Rulings*

The arbitrator had to preliminarily resolve the issue whether the absence in the Chinese legal system of a clear legal authority to implement the DSB's decisions automatically determined the necessity to revoke or repeal the measures found to be inconsistent with the Anti-Dumping and SCM Agreements. Arbitrator Ehlermann insisted on the principle that a non-compliant Member retains the discretion to choose its preferred means of implementation, provided that they fall within the range of permissible actions that can be taken in order to comply with the recommendations and rulings of the DSB. Indeed, the withdrawal, revocation or repeal of an inconsistent measure is the preferred and prior option to foster “prompt compliance”, but it does not necessarily represent the only means of implementation.¹²³ Accordingly, the Member concerned may object that withdrawal is deemed as impracticable and choose to modify the measure, provided that such a modification is permitted under the DSB's recommendations and rulings, that it is otherwise consistent with WTO law, and that it is performed in the shortest time possible (in light of the impracticability of immediate compliance).¹²⁴ On these grounds, the arbitrator decided that even assuming that withdrawal was possible under the Chinese existing legal system, it did not automatically follow that the RPT had to be based on that method of implementation, as opposed to modification of the measure through remedial action.¹²⁵

5.5.2 *The Two Stages for Implementation*

The arbitrator then proceeded to consider China's request for a RPT on the basis of two stages of implementation, namely: (1) the adoption of rules for making changes to trade remedy measures for the purpose of implementing recommendations and rulings of the DSB (“administrative rulemaking”), and; (2) an administrative redetermination of the AD and CVD at issue (“administrative action”).

i) *Administrative Rulemaking*

The arbitrator found that the “technically complex” question whether MOFCOM could conduct an administrative redetermination of the AD and CVD only after the adoption of specific rules authorizing such an action hinged on the scope and meaning of China's laws. In this respect, China emphasised that, after the

¹²⁰ Award of the Arbitrator, *Japan – DRAMs (Korea) (Article 21.3(c))*, para. 25; Award of the Arbitrator, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (Article 21.3(c))*, WT/DS269/13, WT/DS286/15, 20 February 2006, para. 49.

¹²¹ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 26; Award of the Arbitrator, *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51. Instead, the previous trend of arbitrators “seemed to consider the 15-month period as a benchmark - the reasonable period of time actually granted being shorter or even longer in the light of the particular circumstances of each case.” Cf. ZDOUC, *supra* note 94, p. 95; LORCHER, *supra* note 91, 211.

¹²² Award of the Arbitrator, *Canada – Patent Protection of Pharmaceutical Products (Article 21.3(c))*, WT/DS114/13, 18 August 2000, para. 47; Award of the Arbitrator, *United States – Anti-Dumping Act of 1916 (Article 21.3(c))*, WT/DS136/11, WT/DS162/14, 28 February 2001, para. 33; Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (Article 21.3(c))*, WT/DS246/14, 20 September 2004, para. 27.

¹²³ Award of the Arbitrator, *EC – Hormones (Article 21.3(c))*, para. 38.

¹²⁴ Award of the Arbitrator, *Colombia – Ports of Entry (Article 21.3(c))*, para. 77, where Arbitrator Sacerdoti was also of the view that “modification ... is within the ‘range of permissible actions’ available for Colombia to implement the recommendations and rulings of the DSB.”

¹²⁵ Award, para. 3.14: “I therefore disagree with the United States to the extent that it suggests that the absence of a legal basis to modify a measure means, without more, that the reasonable period of time for implementation must necessarily be based on the time required to revoke, or repeal, the relevant measure.”

adoption of the Panel and Appellate Body Reports, internal, inter-agency, and external consultations were held to determine what, “if any”, authority existed for MOFCOM to engage in implementation under China's current AD and CVD Regulations.¹²⁶ The Arbitrator aptly observed that in arbitrations under DSU Article 21.3(c) the Member concerned bears the onus of establishing that the period it seeks for implementation constitutes a reasonable period of time, so that the longer the proposed period of implementation, the greater this burden would have been. Indeed, the arbitrator cannot superficially defer to the non-compliant Member's plain assertion that a certain stage of implementation is required under that Member's law. Instead, the arbitrator must examine whether that Member has appropriately demonstrated what it asserts.

China alleged that its existing legal provisions - contained in Articles 47, 48, 49, 50, 57, 58 of the AD Regulations and in Article 47, 48, 49, 56, 57 of the CVD Regulations - allowed MOFCOM to conduct limited adjustment of existing anti-dumping measures to account for “new exporters” and “sunset reviews”, to review “on justifiable grounds” the need for the continued imposition of AD and CVD (consistent with the interim reviews under Article 11.2 of the Anti-Dumping Agreement and Article 21.2 of the SCM Agreement), to manage WTO dispute settlement with respect to trade remedies, and to discretionarily formulate implementing measures, but only if in accordance with those Regulations.¹²⁷ According to China, those provisions, although arguably providing for a general authorization to implement trade remedies, did not confer to MOFCOM the actual authority to specifically implement DSB's decisions on the measures at issue. As a consequence, the AD and CVD Regulations did not vest MOFCOM with sufficiently broad authority to make changes to trade remedies for “other reasons” than those expressly and exhaustively provided by Chinese law, because they did not “directly and unambiguously” address the implementation of WTO dispute settlement decisions the area of AD and CVD.

The United States found “surprising” China's apparent position that administrative authority was delegated to MOFCOM, but not the power to revise AD and CVD in case they are found to be inconsistent with China's WTO obligations. It also countered that China's Administrative Reconsideration Law,¹²⁸ together with provisions under the AD Regulations, had already been used in the past by MOFCOM to conduct administrative reconsiderations in three cases.¹²⁹ These cases were found by the United States as the demonstration that MOFCOM could, using its *existing* authority, indefinitely suspend or revoke AD and CVD. It must be noted that as a matter of fact the cases mentioned by the United States were not related to the implementation of WTO dispute settlement decisions.

Confronted with the byzantine argument proposed by China, the arbitrator initially held that “a general authorization to act would usually encompass the authority to take specific measures on the basis of such authorization”.¹³⁰ At the oral hearing, he actually had asked China to clarify why MOFCOM's general authorization to implement was not sufficient to implement the specific DSB recommendations and rulings in this dispute. In reply, China explained that MOFCOM's general authorization to implement made clear that MOFCOM was the responsible agency for implementation, but that this did not empower it to take specific implementing measures until its authority to implement had been “actualized” through administrative rulemaking. Thus, based on the arguments and evidence submitted by the Parties, Arbitrator Ehlermann accepted China's assertion that, under China's existing laws, there was no legal authority and mechanism allowing China to implement the DSB's recommendations and rulings.¹³¹ He also emphasized the difference between the present dispute and the one in *Argentina – Hides and Leather*, where Argentina itself acknowledged that the legislative enactment that it proposed was not necessary to implement the relevant DSB's decisions.¹³²

In light of this conclusion, the question became whether the RPT should take into account the time required by China to adopt rules authorizing MOFCOM to take specific implementation action. The United States

¹²⁶ For greater detail *see ibid.*, para. 2.9, footnote 28.

¹²⁷ *Ibid.*, paras. 3.20-3.21.

¹²⁸ *Ibid.*, Award, p. 6.

¹²⁹ Cold Rolled Steel Administrative Review (2004); Kraft Linerboard Administrative Reconsideration (2005); and Electrolytic Capacitor Paper (ECP) Reconsideration (2007).

¹³⁰ Award, para. 3.25.

¹³¹ *Ibid.*, para. 3.26.

¹³² Award of the Arbitrator, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather* (Article 21.3(c)), WT/DS155/10, 31 August 2001, para. 43.

admitted that the administrative rulemaking proposed by China represented an “ambitious legislative endeavour”, but concurrently suggested that the time necessary to realize it should not be relevant to the determination of the RPT. The arbitrator did not exclude that there may be circumstances in which bringing a measure into conformity with the recommendations and rulings of the DSB may require, as a first step, legislative action or administrative rulemaking by the implementing Member. [...] the time required for an implementing Member to adopt or amend laws or regulations as a first step of its implementation process is not, necessarily, irrelevant to the determination of the reasonable period of time for implementation under Article 21.3(c) when such laws or regulations have not been the subject of recommendations and rulings of the DSB.¹³³

Nevertheless, the arbitrator acknowledged that China was going to fill a normative gap, whose existence long pre-dated the DSB's decisions. On this issue, China asserted that it would have been unreasonable to expect China, “as a developing country”, to have addressed this issue in advance. On the contrary, the United States underlined that China could have adopted or commenced to adopt administrative rulemaking at differentiated given times, namely in chronological order: (1) at the time of China's accession in the WTO in 2001; (2) at the time the measures were initially challenged by United States; (3) at the time of circulation of the Panel Report; (4) at the time China appealed very circumscribed Panel's findings of inconsistency, and; (5) at the time the Appellate Body Report was circulated. Arbitrator Ehlermann started by affirming that it is well established that the duty to implement recommendations and rulings of the DSB and the corresponding RPT clearly begin when the relevant Panel and/or Appellate Body Reports are adopted. However, he found that the time when the obligation to implement arises was not central in the present dispute. Rather, the question was “whether circumstances pre-dating the adoption of the relevant Panel or Appellate Body reports may inform what is reasonable in a given case”.¹³⁴ He affirmatively answered, thus deciding in the same vein of Professor Giorgio Sacerdoti, as arbitrator in *US – COOL (Article 21.3(c))*, who considered the United States’ “awareness of the need to modify the COOL measure even before the DSB adoption of the Panel and Appellate Body Reports”.¹³⁵ As a matter of fact, the United States filed their request for the establishment of a Panel on 11 February 2011.¹³⁶ The range of possible outcomes of the Panel proceedings (and *a fortiori* the circulation of the Panel Report on 15 June 2012, whose findings have been only partially appealed by the violating Member)¹³⁷ should have served concrete notice to China that its trade remedy system might have to accommodate adverse decisions by the DSB.¹³⁸ In light of these facts, the arbitrator refused to qualify China's alleged exigency to take administrative rulemaking as “particular circumstances” relevant for determination of the RPT, pursuant to DSU Article 21.3(c).¹³⁹ Indeed, he held that China should have taken steps to timely ensure that it had a legal basis, if necessary, to implement DSB recommendations and rulings concerning trade remedies “well before” the adoption of the relevant Panel and Appellate Body Reports. As a consequence, he considered not to be “reasonable” to award China any time for its “administrative rulemaking”.

This finding by Arbitrator Ehlermann embodies the central rule formulated in his award and represents a consolidation of solutions already adopted by arbitrators in previous cases in the context of DSU Article 21.3(c). This rule provides that a WTO Member, in case it reasonably and concretely envisages adverse WTO dispute settlement decisions, shall not temporize until finality of such decisions, but rather shall take action in a timely manner in order to render its legal system as capable of compliance with the covered agreements, if required. This case law does not indicate a precise criteria to identify the *dies a quo*, starting from which the violating Member should attempt at such an internal normative review, the detailed determination being remitted to the arbitrators' appreciation on a casuistic basis (Arbitrator Ehlermann merely stated that China should have acted to provide a legal basis for the implementation of DSB's decisions “well before” the adoption of the Panel and

¹³³ Award, para. 3.28.

¹³⁴ Award, para. 3.30.

¹³⁵ Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 84.

¹³⁶ WT/DS414/2.

¹³⁷ China's Notice of Appeal, WT/DS414/5, 23 July 2012, paras. 5, 6 and 9.

¹³⁸ Award, para. 3.31: “Had China been attentive to this prospect at the time of the panel request, it would have had well in excess of the 9.5 months that it now requests for the purpose of adopting legal authority and a mechanism for the implementation of DSB recommendations and rulings concerning trade remedies.”

¹³⁹ *Ibid.*, para. 3.33.

Appellate Body Reports).¹⁴⁰ Thus, it is worth to note that this principle of “reasonability” can be further extended so as to hold, as the United States proposed in this dispute, that a Member is obligated to provide legal basis and authority within its legal system for the implementation of any possible DSB’s recommendations and rulings by sole virtue of accession to the WTO. Indeed, Article XVI:4 of the WTO Agreement prescribes that “[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”.¹⁴¹ Accordingly, a complaining Member may develop an argument that a violating Member cannot reasonably invoke the absence of a legal basis in its municipal order to weaken its international obligation of “prompt compliance” pursuant to DSU Articles 3.3 and 21.1, by way of requesting a longer period than the “shortest possible” for the purposes of implementation.¹⁴²

ii) *Administrative Action*

Arbitrator Ehlermann then turned to the second stage for the determination of RPT, estimated by China to last 9.5 months, plus 45 days for preparatory work, consisting of the translation and study of the Panel and Appellate Body Reports, for a total time of 11 months. First, the arbitrator dealt with the preparatory work, acknowledging that time could be allocated in that respect.¹⁴³ However, he manifested his concern that China did not commence such a work far before the adoption of the Reports by the DSB on 16 November 2012, as they were circulated on 15 June 2012 and 18 October 2012, respectively.¹⁴⁴ Second, he addressed the question of the duration of the administrative action in relation to China’s submission of a very detailed schedule articulated in eleven steps with associated timeframes, including the participation of interested parties. Arbitrator Ehlermann dismissed the United States argument that China’s schedule was overinflated in comparison to Chinese ordinary administrative reconsiderations under the AD and CVD Regulations, as the United States could not rely on procedures that are distinct by nature from the redetermination for the purpose of implementation of WTO dispute settlement decisions. Hence, he did not accept that the average time period in which MOFCOM conducted such previous reviews was an appropriate measure for RPT.¹⁴⁵ The arbitrator even praised China, because, even though some steps and time periods were not required by law, they could nonetheless be useful in ensuring that implementation be performed in a transparent and efficient manner, fully respecting due process for all stakeholders involved.¹⁴⁶ The United States further admitted that some of those steps stemmed from a “legitimate source”, namely, from the covered agreements, but also argued that due process concerns must be balanced with the principle of prompt compliance under the DSU.

The Arbitrator proceeded to the conclusion of his award by actually determining the RPT. He considered the involvement of various factors and acknowledged that their flexible balance on a casuistic basis, as demanded by the word “reasonable” in DSU Article 21.3(c), was of threshold importance.¹⁴⁷ To this extent, DSU Article 21.1 requires prompt compliance with the decisions of the DSB, so that all “flexibilities” within the legal system of an implementing Member must be employed in order that RPT is the shortest possible.¹⁴⁸ By the same token, implementation must be effected in a transparent and efficient manner affording due process to all interested parties. The two objectives are not collocated in a relation of mutual exclusion and RPT ought to be capable of accommodating both. Such an accommodation is directly related to the proper exercise by the arbitrator of the

¹⁴⁰ *Ibid.*, paras. 3.31-3.33.

¹⁴¹ Marrakech Agreement, *supra* note 92, 1867 UNTS 154, 164 (1995).

¹⁴² Vienna Convention on the Law of Treaties (VCLT), signed on 23 May 1969, entered into force on 27 January 1980,

1155 UNTS 331 (1980), Article 26 (“*Pacta sunt servanda*”): “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”; Article 27 (*Internal law and observance of treaties*): “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” Cf. BOISSON DE CHAZOURNES, *supra* note 91, p. 191, who insists on the application of the principle of good faith in the evaluation of the notion of RPT, as related to the maxim *nemo suam turpitudinem allegans auditur*.

¹⁴³ See Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 83.

¹⁴⁴ Award, para. 3.37.

¹⁴⁵ *Ibid.*, para. 3.40.

¹⁴⁶ Cf. Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (Article 21.3(c))*, WT/DS268/12, 7 June 2005, para. 51.

¹⁴⁷ Award, para. 3.46.

¹⁴⁸ *Ibid.*, para. 3.4.

balance between the two.¹⁴⁹ He then applied this conceptual framework to the concrete dispute at issue and decided that, while on one hand China had succeeded in persuading him that two stages of its proposed redetermination procedure (whose timeframe is mandatorily fixed by its municipal law for the generality of cases) were necessary to protect due process rights of interested parties, on the other hand it had failed to demonstrate that the remaining components of its schedule could not be “flexibly” reduced in their duration.¹⁵⁰ Therefore, Arbitrator Ehlermann determined that the RPT in *China – GOES* corresponded to 8 months and 15 days, commencing from 16 November 2012 (the date of adoption by the DSB of the Panel and Appellate Body Reports) and elapsing on 31 July 2013.

5.6 Comment

The arbitration procedure under DSU Article 21.3(c) proves to be a consolidated mechanism for the determination of RPT, based on expeditious procedures and absent any prejudice to the right to a fair hearing of both the implementing and the complaining Member.¹⁵¹ Arbitrators have constantly considered on a case-by-case scrutiny all the relevant factors that could affect compliance with the DSB's recommendations and ruling, so as to tailor the RPT in the most balanced and flexible manner.¹⁵² Notwithstanding the casuistic approach, which represents a desirable feature of this mechanism, the examination of the awards issued in the context of DSU Article 21.3(c) reveals that arbitrators had proffered consistent solutions progressively building a coherent body of case law. Such an attitude of arbitrators is going to foster the predictability of future decisions on the same issue and to contribute to the effectiveness of the fundamental principle of prompt compliance, having particular regard to the prospective nature of the non-pecuniary remedies available under the DSU.¹⁵³ Notably, in *China – GOES* Claus-Dieter Ehlermann reiterated a principle already expressed by arbitrator Sacerdoti in *US – COOL* and phrased it, so as to mean that the implementing Member is barred from reliance to the non-availability in its domestic system of legal authority for the implementation of adverse DSB's decisions, when these were reasonably and concretely foreseeable. Such determinations certainly limit opportunistic tactic by implementing Members in the compliance phase of WTO dispute settlement and may generally enhance a virtuous process of systemic pressure on Members, so that they adjust their national systems to be capable to conform with the covered agreements prior to final findings of inconsistency of their measures with WTO law.

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¹⁴⁹ Award of the Arbitrator, *Japan – DRAMs (Article 21.3(c))*, para. 51.

¹⁵⁰ Award, para. 3.41.

¹⁵¹ Holistically considered, arbitration under DSU Articles 21.3(c) and 22.6 is illustrative of “an expansion of the category of legal disputes amenable to third party adjudication - arbitration and judicial - beyond the traditional realm”. Cf. SACERDOTI, *supra* note 92, p. 28.

¹⁵² Cf. Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted on 23 August 2001, paras. 84-85.

¹⁵³ PAUWELYN, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 AJIL 335, 345-347 (2000); MAVROIDIS, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EJIL 763 (2000); CHARNOVITZ, *Should the Teeth be Pulled? An Analysis of WTO Sanctions*, in KENNEDY, SOUTHWICK (eds.), *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec*, Cambridge University Press, 2002, p. 602, 627; ID., *The Enforcement of WTO Judgments. Essays in Honor of W. Michael Reisman: Trade, Investment and Dispute Settlement*, 34 Yale J. Int'l L. 558, 562 (2009) (finding “in the WTO [...] a generally positive record of compliance”); RAJESH BABU, *Remedies Under the WTO Legal System*, Martinus Nijhoff Publishers, 2012, p. 131 *et seq.*; VIDIGAL, *Re-assessing WTO Remedies: The Prospective and the Retrospective*, 16 JIEL 505 (2013); PELZMAN, SHOHAM, *WTO DSU-Enforcement Issues*, in HARTIGAN (ed.), *Trade Disputes and the Dispute Settlement Understanding of the WTO: an Interdisciplinary Assessment*, Emerald, 2009, p. 369, 387; BRONCKERS, VAN DEN BROEK, *Financial Compensation in the WTO. Improving the Remedies of WTO Dispute Settlement*, 8 JIEL 101 (2005).

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