CASE COMMENTS ON INTERNATIONAL TRADE LAW

ABOUT THE E-BOOK

International law is defined as a set of norms and rules that States should follow when working together. The sale and procurement of commodities and services across international borders is known as international trade. International Trade Law (ITL) is a body of law that governs international trade. There are two parts to it: public and private. The public side of ITL, which is a part of Public International Law, aims to bring governments' business policies together. The private part of ITL regulates international economic transactions between people from various countries. The basic principles of International Trade Law are: 1) Trade without discrimination 2) Free trade 3) Predictability through binding and transparency 4) Promoting fair competition 5) Encouraging development and economic reform.

The key highlights of the e-book are that the book will deal with all the aspects of international trade law and policy. The e-book will focus on the various landmark case laws which will be comprehended in the form of various case comments, and will also throw light on the various grey and niche areas of Anti-Dumping, Sanitary and Phytosanitary (SPS) Agreement, Technical Barriers to Trade (TBT) Agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), General Agreement on Trade in Services (GATS), Rules of Origin, and Agreement on Safeguards, and also the reader will get an insight knowledge on how the human rights, the environment, health, development, and national security forms a relationship with economic policy and law.

The readers will benefit from various aspects of International Trade Law and will also get to learn and know the practical applicability on how the cases had been decided at an international forum like the World Trade Organisation (WTO) and how trade agreements enhance exports and economic growth, and at the same time the reader will also get to know on how the international competition can damage the small and domestic industries of a member country.

CASE NO. 1

DS 446 ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

- Bhavatharini M[1]

Introduction

In the present dispute a wide range of products exported from Mexico were affected due to the application of certain restrictive measures on imports by Argentina. Therefore, the importers in Mexico were subjected to restrictive measures such as Argentina's import licensing regime that is the procedures to obtain an import license, pre-registration and pre-approval regime which is known as Declaracion Jurada Anticipada de Importacion (DJAI) which came into force from February 2012 on all imports. Apart from pre-registration and pre-approval, Argentina required importers to balance imports with exports for the purpose of not transferring revenues abroad and to increase the local content of the products that are manufactured in Argentina.

Facts[2]

1. A complaint was filed on 24 August 2012 by Mexico with the WTO and requested consultations with the Argentina with respect to the measures imposed by Argentina on the importation of goods.
2. The following measures w.r.t importation of goods in Argentina were challenged by Mexico. They are:

- The requirement to present for approval of a non-automatic import license (DJAI) in the form of Certificados de Importacion (CIs) or Certificados de Libre Circulacion (CLCs) and that the importers must undertake certain trade-restrictive commitments.
- The systematic delay in granting import licenses or refusal to grant such licenses or the grant of import licenses certain trade-restrictive commitments on importers.

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[2] World Trade Organization, Dispute Settlement- Argentina- Measures affecting the importation of goods. (DS 446).

- In the conformity assessment procedure, the imported products were subjected to an examination as prescribed by the technical regulation to find out whether the products contained the content of lead and heavy metals and under this procedure entities may issue conformity certificates only if they are recognized by Argentina.

3. Mexico alleged that the challenged measures applied on importation of goods are found to be inconsistent:

- With certain legal provisions of the GATT 1994 (Articles - III: 4, VIII, X: 1, X:2, X:3 and XI:1) and TRIM's Agreement (Article 2 and Article 6).
- With certain legal provisions of Agreement on Import Licensing Procedures (Articles- 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 2.2, 3.2, 3.3, 3.4, 3.5, 5.1, 5.2, 5.3 and 5.4).
- With Agreement on Agriculture (Article 4.2).
- With the Safeguards Agreement (Article 11).
- And with TBT Agreement (Articles 2.1 and 2.2).

4. A request for the establishment of a panel was made by Mexico on 21 November 2012 later Mexico withdrew its request before the panel was established.

Procedural History

The complainant (Mexico) referred to the Argentina-Measures affecting the importation of goods (DS 438, DS 444, and DS 445) cases and understood that in the present dispute the certain restrictive measures applied by Argentina on the importation of goods will be a subject of challenge under the DSU and challenged those measures to be inconsistent w.r.t certain legal provisions of GATT, TBT Agreement, Safeguards Agreement, Agreement on Agriculture, TRIM's Agreement and Agreement on Import Licensing Procedures.[3] When referring to India-Quantitative Restrictions[4] it was seen that Article XI: 1 of the GATT 1994 imposes a general ban on import or export restrictions or prohibitions. It was observed in China-Raw Materials case[5] that a panel must examine the design and structure of the measure at issue to evaluate whether a measure has a limiting effect or imposes a limiting condition on imports. In Colombia-Ports of Entry[6] the panel observed that

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[3] Panel report, Argentina- Measures affecting the importation of goods, World Trade Organization, WT/DS 438/R, WT/DS 444/R, WT/DS 445/R; Pg 1/170, 22 August 2014.
[4] Panel Report, India – Quantitative Restrictions, para. 5.129.
[5] Appellate Body Report, China – Raw Materials, para. 319.
[6] Panel Report, Colombia – Ports of Entry, para. 7.243.

for an analysis under Article XI: 1 of the GATT 1994 it must be based on the design of the measure and its potential to adversely affect importation and the panel in Colombia-Ports of Entry established that restriction on importation under Article XI: 1 will be seen when a measure has identified negative consequences on the importation of a product. Finally preceding panels have made clear that Article XI: 1 of the GATT 1994 protects competitive conditions available to imported products in preference to actual trade flows.[7] By recalling Argentina-Hides and Leather case it was clearly stated that Article XI: 1, Articles I, II and III of the GATT does not protect trade flows rather the competitive opportunities of imported products.[8]

Issues

1. Whether the DJAI procedure would exclude the applicability of Article XI: 1 of the GATT 1994 to the measure?
2. Whether the DJAI procedure is inconsistent with Article XI: 1 of the GATT 1994?
3. Whether TRRs measure is inconsistent with Articles III: 4 and XI: 1 of the GATT 1994?

Holding

Principle of Effective Treaty Interpretation

The Marrakesh Agreement provides that all WTO agreements are part of the same treaty and thus all WTO provisions should be interpreted harmoniously and cumulatively by applying the principle of effective treaty interpretation whenever possible.[9] The principle of effective treaty interpretation as explained in US-Gasoline case provides that one of the outcome of the General rule of interpretation in the Vienna Convention is that all the terms of the treaty should be interpreted in such a way that it has meaning and effect. The principle of effective treaty interpretation should be applied in this case to prevent the reduction of any provision of a treaty to redundancy or inutility. So, the interpreter shouldn't adopt a reading of Articles VIII and XI of the GATT 1994 which might lead to reduction of any of these provisions to

[7] Panel Report, Colombia – Ports of Entry, para. 7.240
[8] Panel Report, Argentina – Hides and Leather, para. 11.20.
[9] Appellate Body Reports, US – Upland Cotton, para. 549; Korea – Dairy, para. 81; Argentina – Footwear (EC), paras. 81 and 89; US – Gasoline, p. 23, DSR 1996: I, 3 at 21; Japan – Alcoholic Beverages II, p. 12, DSR 1996:I, 97 at 106; India – Patents (US), para. 45.

redundancy or inutility.[10] Hence the panel should think that the obligations contained in Article VIII and Article XI: 1 of the GATT 1994 should be applied harmoniously and cumulatively irrespective of whether they are mutually exclusive.

The Rule of the Burden of Proof

In dispute settlement procedures the general rule that should be applied is that the burden of proof rests upon the party asserting an allegation of a particular claim or defense.[11] Following this principle it is understood that in any given case the complaining party must establish a prima facie case of inconsistency of a measure with a provision of the WTO covered agreements before the defending party takes the burden of showing consistency with that provision or defending it under an exception.[12] In simple words any party claiming an infringement of a provision by another Member w.r.t WTO Agreement that party must assert and prove its claim.[13]

The Judicial Economy Rule

In the present dispute in deciding whether to apply the rule of judicial economy, the principle must be applied remembering the aim to resolve the matter at issue and to secure a positive solution to a dispute of the dispute settlement system.

Other Considerations

1. The DJAI procedure would not exclude the applicability of Article XI: 1 of the GATT 1994 to the measures challenged by Mexico because of the fact that though DJAI procedure is considered to be a custom or import formality it is subjected to the obligations contained in Article VIII of the GATT 1994. Therefore, DJAI procedures are subjected to obligations under Article XI: 1 of the GATT 1994.
2. There is an inconsistency with DJAI procedure and Article XI: 1 of the GATT 1994 because it constitutes an import restriction by creating limiting effect on imports of goods. And it is unnecessary to find the consistency of the measures applied by Argentina with Articles X: 1 and X: 3(a) of the GATT 1994, and several provisions of the Import Licensing Agreement which are at issue because it is not useful in resolving the matter at issue.

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[10] Appellate Body Report, US – Gasoline, p. 23, DSR 1996: I, 3 at 21.
[11] Appellate Body Report, US – Wool Shirts and Blouses, p. 14, DSR 1997: I, p. 323 at p. 335.
[12] Appellate Body Report, EC – Hormones, para. 104.
[13] Appellate Body Report, US – Wool Shirts and Blouses, p. 16, DSR 1997: I, p. 323 at p. 337.

3. There is an inconsistency with respect to TRRs measure and Article XI: 1 of the GATT 1994 because it has a limiting effect on the importation of goods into Argentina and there is an inconsistency with respect to TRRs measure and Article III: 4 regarding the necessity to incorporate local content because it modifies the conditions of competition in the Argentina market to the detriment of imported products.

Case Analysis

1. According to me the decision would be appropriate if the panel adopts it because the decision brings solution to Mexico regarding the dispute which concerned two main measures which was applied by Argentina on the importation of goods. The decision regarding DJAI procedure and Trade related requirements which are question would be appropriate by applying the principle of judicial economy and the principle's main aim is to provide a positive solution and resolve the matter at issue done in the present dispute.
2. The ruling with regard to the present case that is the DJAI procedure and TRR's measures are inconsistent with Article XI: 1 of the GATT 1994 and Article III: 4 of the GATT 1994 is appropriate because the reasoning is clearly justified by explaining that the Article XI: 1 has a limiting effect on imports and thus constitutes an import restriction so it is inconsistent with DJAI procedure and It is not relevant for the present dispute that the TRR's should be consistent with Article III: 4 of the GATT just because the measures published by Argentina is consistent with Article X: 1 of the GATT 1994. Therefore, TRRs measure is inconsistent with Article III: 4 of the GATT 1994.
3. It's not a point of whether the decision is interpreted as a victory for Mexico, but the WTO ruling is significant in a few regards because the decision is transparent, non-discriminatory and prevents the delay and blockage of the goods. The reasoning is consistent with the existing laws because all the WTO provisions in the present case are interpreted harmoniously and cumulatively by applying the principle of effective treaty interpretation. Also, the reasoning of this case is consistent with the previous reasoning in Argentina-Measures affecting the importation of goods (DS 438, DS 444, and DS 445) cases.

Conclusion

This practice of applying various restrictive measures on imports is systematic, non-written and non-transparent. Based on DJAI procedures, imports are systematically delayed or refused on non-transparent grounds and this practice seems to be a condition for the importers to undertake for obtaining the license by allowing imports of their goods. These measures create significant losses to the industries in the Mexico and worldwide because of the delay and blockage of goods at the border.

CASE NO. 2

DS 384: UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

- Yash A. Jodhani[14]

Introduction

Rules of origin are the measures expected to decide the national source of a product. Their significance is gotten from the fact that obligations and limitations in a few cases rely on the source of imports. Usages of Roles of Origin are in stated as follow:

- to execute measures and instruments of business strategy like enemy of anti-dumping and shield measures;
- to decide if imported products will get most-favoured-nation (MFN) treatment or preferential treatment;
- with the end goal of trade measurements.
- for the use of labelling and marking prerequisites; &
- for government obtainment.

It is acknowledged by all nations that harmonization of rules of origin i.e., the definition of rules of origin that will be applied by all nations and that will be a similar whatever the reason for which they are applied - would work with the progression of international trade. Truth be told, abuse of rules of origin may change them into an exchange strategy instrument per se instead of just acting as a device to support a trade policy instrument. Given the assortment of rules of origin, notwithstanding, such harmonization is an unpredictable exercise.

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The Agreement on Rules of Origin targets harmonizing the non-special role of origin, outlines general standards for the creation of rules of beginning and set up two councils, the Advisory group on Rules of Origin (CRO) and Technical Committee on Rules of Origin (TCRO). The WTO Members have conceded to the general arrangement and on the avoidance of particular origin from the harmonization.

The determination of the nation of origin is the last advance in the customs leeway methods, the initial steps being the order of the merchandise and the determination of the worth of the products. The grouping and valuation are significant as such for the customs clearance, yet these are additionally the fundamental apparatuses for the determination of the nation of origin of merchandise as in the guidelines of origin are product explicit principles connected to explicit HS codes, and that to order if esteem added rules are satisfied, the organization of the customs value is required.

Facts of the Case

- Under U.S. law, retailers are needed to give nation of origin labelling to specific products, including homegrown and foreign origin and pork. The United States received and executed these prerequisites to give country of origin data and, as for beef, to eliminate confusion in regard to the nation of origin resulting from United States Department of Agriculture ("USDA") grade labelling. Albeit the U.S. Congress didn't establish compulsory country of origin labelling ("COOL") necessities for meat and other food product at the retail level until 2002, the US (in the same way as other WTO Members) has had nation of beginning naming prerequisites that cover items at the retail level for more than 80 years. As for meat, obligatory origin labelling enactment has an early provenance, having first been considered by the U.S. Congress more than 40 years prior.

- In this Part of its First Written Submission, the US will give an outline of compulsory origin of labelling necessities, trailed by a clarification of the particular resolution and guidelines that are the subject of this question. As will be clarified ahead, what Canada and Mexico depict as “the COOL measure” truth be told comprises of a few separate measures, including: (1) a statute on labelling of certain commodities; and (2) executing regulations gave by USDA. Moreover, Canada and Mexico refer to a letter from the Secretary

of Agriculture (which, as will be clarified, doesn't endorse any necessities as for marking (or some other matter), and two interval guidelines that are presently not basically.

- Congress decision to sanction the COOL Rule was a legitimate response to U.S. customers' longing for better data about where their food comes from – an interest shared by other WTO Members also, as confirmed by arrangements in the WTO Arrangements that mull over nation of origin labelling systems and the obligatory nation of origin labelling prerequisites kept up with by numerous other WTO individuals.

- At last, the US will give an overview of the North American live dairy cattle and hoard industry. This part will portray the numerous components that influence cost and request and will feature critical improvements that have affected the market lately, a large number of which clarify the market impacts complainants inappropriately trait to the COOL measures.

Procedural History

- On December 1, 2008, Canada mentioned counsels with the US according to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade, 1994 ("GATT 1994"), Article 14 of the Agreement on Technical Barriers to Trade ("TBT Arrangement"), Article 11 of Agreement of Sanitary and Phyto-Sanitary Measures("SPS Arrangement"), and Article 7 of the Agreement on Rules of Origin ("ROO Arrangement") with respect to U.S. required nation of origin labelling arrangements in the Agrarian Showcasing Demonstration of 1946, as corrected by the 2008 Homestead Bill and as carried out through the Between time Last Guideline of July 28, 2008. Mexico requested to participate in the conferences requested by Canada on December 12, 2008, and asked for discussions under similar arrangements in regard to similar measures on December 17, 2008. nothing requested to participate in the conferences mentioned by Mexico on December 30, 2008.

- On May 7, 2009, Canada, and Mexico both mentioned further counsels with the US as per Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, Article 14 of the TBT Agreement, Article 11 of the SPS Arrangement, and Article 7 of the ROO Agreement. further meeting solicitations, Canada and Mexico expressed that the Cool estimates they were testing comprised of the Agricultural Marketing Act 1946, as corrected by the 2008 Farm Bill, the Between time Last Standard of August 1, 2008, the Last Principle of January 15, 2009, the letter to "Industry Agent" from the US Secretary of Agribusiness, Thomas J. Vilsack of February 20, 2009, and any alterations, regulatory direction, mandates or strategy declarations gave comparable to these things. Mexico likewise distinguished a USDA public statement from February 20, 2009, as a component of its extra counsel's demand. Canada and Mexico mentioned to participate in their particular counsels on May 15, 2009.

- The US and Canada held consultations on December 16, 2008, and June 5, 2009. The US and Mexico held consultations on February 27, 2009, and June 5, 2009. Neither one nor the other set of consultations had the option to Resolve the question.

- Canada and Mexico requested the foundation of a panel on October 7, 2009, and October 9, 2009, separately. The WTO Dispute Settlement Body ("DSB") set up a solitary board with standard terms of reference on November 19, 2009. On April 30, 2010, Canada and Mexico mentioned that the Director General make the board in accordance with Article 8.7 of the DSU. The Director General made the Board on May 10, 2010.

Issues of the Case

1. which percentage of the meat consumed in the US is sold at the retail locations covered by the COOL necessities and which rate is sold through different channels (cafes, restaurants, and different establishments, and so on) barred from the extent of the COOL prerequisites?

2. Do the parties concur that the commitments under Articles 2.1 & 2.2 of the TBT Arrangement are isolated and combined? In the event that indeed, can an action discovered to be infringing upon the obligations under Article 2.1 still be found predictable with the commitments under Article 2.2?

3. The legislative interaction identifying with the COOL requirements purportedly began in 2002. Will the US allude to a strategy, accepted practice or consumer demand before that date that had required the data on the origin of meat items as characterized by the US?

Holding

- **Article 2.1 of TBT (National Treatment / Technical Regulation:** The Appellate Body maintained, though for altered reasons, the Board's tracking down that the COOL measure was conflicting with Art. 2.1 in light of the fact that it agreed less ideal treatment to imported animals than to like domestic domesticated animals. The Appellate Body reasoned that the most un-expensive method of following the COOL measure was to depend only on domestic domesticated animals, making a motivation for US makers to utilize solely homegrown animals and in this manner causing an adverse effect on the serious chances of imported animals.

- **Article 2.2 of TBT (not more trade prohibitive than necessary):** The Appellate Body switched the Board's tracking down that the COOL measure abused Art. 2.2 in light of the fact that it didn't satisfy the target of giving buyer data on Origin.

- **Article X:3 (a) of GATT (Trade guidelines – uniform, unbiased and sensible organization):** The Board tracked down that the US neglected to regulate the COOL measure in a "sensible" way by sending the Vilsack letter, which contained extra wilful ideas, to the business.

Other Considerations

The Re-appraising Body dismissed the US contentions against the board's discoveries under Article 2.1 of the TBT Arrangement. The Re-appraising Body kept up with the

board's decisions that the changed COOL measure expands the record-saving weight for imported domesticated animals involved by the first COOL measure. The Re-appraising Body dismissed US contentions that the board's decisions depended on "mistaken speculative" situations that did not depend on genuine, or the most well-known, exchange circumstances.

The arbitration was done by the first board. Procedures were joining together with the procedures in the equal debate DS386. On 7 December 2015, the choice by the Referee was coursed to Individuals. The Referee established that the degree of invalidation or disability of advantages gathering to Canada is CAD 1,054.729 million. The Arbitrator finished up, in this manner, that, as per Article 22.4 of the DSU, Canada might demand approval from the DSB to suspend concessions and related commitments in the merchandise area under the GATT 1994 at a level not surpassing CAD 1,054.729 million yearly.

Case Analysis

On 1 December 2008, Canada requested consultations with the US concerning certain required nation of origin labelling (COOL) arrangements in the Agricultural Marketing Act of 1946 as revised by the 2008 Farm Bill and as executed through a Between time Last Standard of 28 July 2008. These incorporate the commitment to educate purchasers at the retail level regarding the nation of origin in regard of covered items, including meat and pork. The qualification for an assignment of a covered ware as only having a US beginning must be gotten from a creature that was solely conceived, brought and butchered up in the US. This would prohibit such an assignment in regard of hamburger or pork got from domesticated animals that is sent out to the US for feed or prompt butcher.

Canada claims that the compulsory COOL arrangements give off an impression of being conflicting with the US's commitments under the WTO Understanding, including:

- Articles III:4, IX:4 and X:3 of the GATT 1994
- Article 2 of the TBT Arrangement, or, in the other option, Articles 2, 5 and 7 of the SPS Understanding
- Article 2 of the Concession to Rules of Beginning.

Conclusion

I conclude on Case of Roles of Origin in DS384: United States — Certain Country of Origin Labelling (Cool) Requirements, In respects to Article 2.2 of the TBT Agreement, the Redrafting Body concurred with the Board that an elective measure giving less or less exact data, yet having altogether more extensive item inclusion, could qualify as making a level of commitment "same" to that of the corrected COOL measure. In any case, the Appellate Body likewise concurred with Canada and Mexico that the board made a few blunders in inferring that the two nations neglected to make a by all appearances case that the revised COOL measure is more exchange prohibitive than needed.

CASE NO. 3

DS 597: UNITED STATES - ORIGIN MARKING REQUIREMENT

-Timur Abdusamatov[15]

Introduction

Whenever a national source of a product needs to be determined, it is done so with the Rules of Origin within the World Trade Organization. The Rules of Origin play a significant role in today's globalizing world and can be used for various purposes like government procurement, labelling and marketing requirements, trade statistics purposes, etc. These rules are also used to determine if and what products require the preferential treatment or the Most Favored Nation (MFN) treatment and can also be used for the implementation of certain safeguard measures and anti-dumping duties. In short, rules of origin provide the basic criteria to determine the origin of goods. Each member state has the liberty to determine its own origin rules, however, it is also agreed by each member state that a harmonization of rules of origin must exist and that these rules must facilitate the flow of international trade and must not act as trade barriers. It is vital that member states do not misuse this liberty for imposing protectionist measures such as trade restrictions or origin marking measures that go against the MFN principle. Marking the country of origin from where the product was obtained or manufactured on the container or packaging of the product is a crucial requirement that each Member State must follow as so is mentioned in the Tariff Act.

Facts of the Case

1. Hong Kong, China requested consultation with the United States with regard to certain measures concerning the origin marking requirement applicable to (Hong Kong), Chinese produced goods.

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2. The United States expressed its willingness to enter into consultation with Hong Kong, China and requested the Chair of the Dispute Settlement Body (DSB) to communicate the same to the Member States.
3. Russia Federation's request to join the consultation was rejected by the United States and communication about the same was requested to the Chair of DSB be circulated.
4. Subsequently, after the establishment of the Panel, the Russian Federation, Korea, Norway, India, Japan, the European Union, Canada, Brazil, China, Switzerland, Singapore, Ukraine, and Turkey reserved their third-party rights.

Procedural History

Consultation was requested on October 30th, 2020, with the United States by Hong Kong, China with regards to certain measures concerning the origin marking requirement applicable to Chinese produced goods. The Chair of DSB was requested by the United States to circulate communication to Members indicating that the United States was willing to enter into consultation with Hong Kong, China. The Russian Federation requested to join the consultation on November 13th, 2020. The United States rejected the Russian Federation's request to join the consultation and requested the Chair of DSB to circulate communication to the Members regarding the same on November 19th, 2020. The establishment of a Panel was requested by Hong Kong, China on January 14th, 2021, however the DSB deferred the establishment of a panel at its meeting on January 21st of the same year. The DSB established a panel on at its meeting on February 22nd of 2021 with the Russian Federation, Korea, Norway, India, Japan, the European Union, Canada, Brazil, China, Switzerland, Singapore, Ukraine, and Turkey reserving their third-party rights. A request was made to the Director General by Hong Kong, China on April 19th, 2021, to compose a panel. The Director General composed a Panel on April 29th of 2021.

Issues

1. Are the measures imposed by the United States concerning the origin marking requirement consistent with the General Agreement on Tariffs and Trade, 1994?
2. Are the measures imposed by the United States concerning the origin marking requirement consistent with the Agreement on Rules of Origin?

3. Are the measures imposed by the United States concerning the origin marking requirement consistent with Article 2.1 of the TBT Agreement?

Holding

The status for the Panel decision and holding of this case is still pending as of August of 2021 and the WTO Panel is yet to declare its findings with regards to the dispute in this case.

Case Analysis

The main tool used to determine the country of origin of a particular goods are the Rules of origin. It is important to understand that certain tariff and trade policies such as tariff rates are applied majorly depending on the origin of goods, therefore it necessary that the determination of the country of origin of goods are done in an objective manner.[16] Rules of origin can be classified into two types; Preferential rules of origin and non-preferential rules of origin. Preferential rules of origin include the application of tariff rates under the Economic Partnership Agreement (EPA) and tariff rates under the Generalized System of Preference (GSP). Non-preferential rules of origin are applied for the purpose of WTO tariff rates and not for granting of preferential tariff treatment. Under EPA, originating goods can either be "wholly obtained goods" (example; livestock, crude oil, etc.) or "goods produced exclusively from originating material" (example; soap produced from oil of country of origin) or "goods satisfying the product specific rules" (if goods undergo specific manufacturing or processing like chemical reaction, etc.). Under GSP, originating products can either be "wholly obtained goods" or "goods that have undergone substantial transformation". In the US, the scheme used to determine the country of origin of a certain product is similar to that mentioned above. The US has an alike "wholly obtained" criterion for goods that are wholly either the growth, product, or manufacture of a certain country. The US rule of origin scheme is claimed to be for the purpose of the MFN or normal-trade- relation duty treatment.[17] However, as mentioned in the facts of the case, the goods produced in Hong Kong, China still face measures and restrictions from the side of the United States, thereby the US being

[16] https://www.customs.go.jp/roo/english/origin/outline_of_roo.pdf
[17] https://www.cbp.gov/sites/default/files/assets/documents/2016-Apr/icp026_3.pdf

inconsistent not only with its own US Customs and Border Protection Laws but also majorly violating Article 1 of the GATT which deals with MFN. By imposing measures and restrictions on Hong Kong produced goods, the US also violates Art. 2.1 of TBT which ensures that products imported from the territory of any member shall be treated no less favorably than that of national origin and the container of the products must be marked with country of origin of its content. As a whole, the measures imposed by the US on Hong Kong act as an international trade barrier and are violating of the Rules of Origin and must be removed with compensation paid to the Hong Kong, China for monetary damages caused due to these measures.

Conclusion

Determining the national source of a product is of crucial importance not only for trade purposes but also for the knowledge of the customer buying the product. Marking and labelling where a particular product originates from or where it was manufactured is vital information as it can benefit the producer for marketing purposes and therefore measures and restrictions in that regard can be harmful for the producer as well as it reduces the transparency about the complete information about the product to the customer. Although each Member State has the right to make their own laws with regard to rules of origin, these laws must be in harmony with the MFN principle and must not act as barriers to trade. Member states that discriminate against the nation from which a product originates or was manufactured from, must face consequences as such actions can be deemed as protectionist and restrictive to international trade.

CASE NO. 4

DS 386: UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

- Nidhi P Gopan[18]

Introduction

The WTO dispute on country-of-origin labeling requirements for imported livestock is the latest in a series of cases dealing with the Agreement on Technical Barriers to Trade (TBT Agreement). This case pitted U.S. cattlemen against large packers and food processors and raised questions about the significance of country of origin labeling when it comes to integrated and international supply chains.

Facts

1. On 17 December 2008, Mexico requested consultations with the United States concerning the mandatory country of origin labelling (COOL) provisions in the Agricultural Marketing Act of 1946, as amended by the Farm, Security and Rural Investment Act of 2002 and the Food, Conservation and Energy Act of 2008, and as implemented through the regulations published as 7 CFR Parts 60 and 65.
2. According to Mexico, in the case of certain products, the determination of their nationality deviates considerably from international country of origin labelling standards, a situation which has not been justified as necessary to fulfil a legitimate objective.
3. Mexico considers that the mandatory COOL provisions appear to be inconsistent with the United States' obligations under the WTO Agreement.

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4. On 30 December 2008, Canada requested to join the consultations. Subsequently, the United States informed the DSB that it had accepted the request of Canada to join the consultations.
5. On 7 May 2009, Mexico requested further consultations concerning related amendments and measures adopted by the United States after Mexico's initial request for consultations. It also includes any modifications or amendments to the COOL measures, including any further implementing guidance or other documents that may be published in relation to such measures.
6. On 15 May 2009, Canada requested to join the further consultations. On 22 May 2009, Peru requested to join the further consultations. Subsequently, the United States informed the DSB that it had accepted the requests of Canada and Peru to join the consultations.
7. On 9 October 2009, Mexico requested the establishment of a panel. At its meeting on 23 October 2009, the DSB deferred the establishment of a panel.

Procedural History

The present arbitration proceedings arise in the disputes initiated by Canada and Mexico concerning the United States' country of origin labelling (COOL) requirements for meat products.

On 23 July 2012, the DSB adopted the original Appellate Body reports in these disputes, and the reports of the original panel as modified by the Appellate Body. The findings adopted by the DSB were that the COOL measure at issue in the original proceedings (the original COOL measure) was inconsistent with Article 2.1 of the TBT Agreement because it accorded less favorable treatment to imported livestock than to like domestic livestock.

On 4 December 2012, following referral to arbitration under Article 21.3(c) of the DSU, an arbitrator determined that the reasonable period of time for the United States to implement the DSB's recommendations and rulings would expire on 23 May 2013. At the DSB meeting on 24 May 2013, the United States announced that, in order to come into compliance with the DSB's recommendations and rulings, the United States "had issued a final rule that made certain changes to the country-of-origin (COOL)

labelling requirements", and that these actions "brought the United States into compliance" with those recommendations and rulings[19].

On 19 August 2013, Canada and Mexico requested the establishment of a panel under Article 21.5 of the DSU, to determine whether the "amended COOL measure" brought the United States into compliance. On 29 May 2015, the DSB adopted the Article 21.5 Appellate Body reports in these disputes, and the reports of the compliance panel as modified by the Appellate Body. The findings adopted by the DSB were that the amended COOL measure violated Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 because it continued to accord less favourable treatment to imported livestock than to like domestic livestock.

On 4 June 2015, Canada filed a request with the DSB for authorization to suspend concessions or other obligations under Article 22.2 of the DSU. In its request, Canada sought authorization to suspend concessions and related obligations in the goods sector under the GATT 1994 to an annual value of CAD 3.068 billion.

Issues Involved

1. Whether the Panel erred by failing to assess appropriately the relevance of Label D for the analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions?
2. Whether the Panel erred by failing to correctly articulate the relational component of the analysis under Article 2.2?
3. Whether the Panel erred in finding that Canada and Mexico did not make a prima facie case that the first and second proposed alternative measures would make an "equivalent" degree of contribution to the amended COOL measure's objective?

Holding

On 23 July 2012, the DSB adopted the Appellate Body report and the modified panel report. In those reports, it was found that the measure on country-of-origin labelling (COOL) adopted by the United States was inconsistent with the obligations of Article

[19] United States - Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 22.6 of the DSU (WT/DS384, WT/DS386) Decisions by the Arbitrator

2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement). The DSB recommended that the United States bring the COOL measure into conformity with its obligations.

In this connection, the United States informed the DSB that it intended to implement the DSB recommendations and rulings. On 23 May 2013, the United States Department of Agriculture introduced administrative amendments to the COOL measure (amended COOL measure). In Mexico's opinion, those amendments did not bring the United States into compliance with the recommendations and rulings of the DSB, and Mexico therefore initiated a proceeding under Article 21.5 of the Understanding [20]on Rules and Procedures Governing the Settlement of Disputes (DSU).

The compliance panel found that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement and Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The Appellate Body report circulated to WTO Members on 18 May 2015 upheld the Panel's conclusions on Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

On 29 May 2015, the DSB adopted the Article 21.5 Appellate Body report and the compliance panel report, as modified by the Appellate Body report.

On 17 June 2015, in accordance with Article 22 of the DSU and the "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding", Mexico requested authorization from the DSB to suspend the application to the United States of tariff concessions and other related obligations in the goods sector under the GATT 1994[21].

On 22 June 2015, the United States objected to the level of suspension of concessions or other obligations under the GATT 1994 proposed by Mexico.[22]

Consequently, in accordance with the provisions of Article 22.6 of the DSU, the matter was referred to arbitration.

The Arbitrator issued its decision on 7 December 2015[23], in which it determined the level of nullification or impairment caused to Mexico by the COOL measure.

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[20] WT/DS386/24
[21] WT/DS386/35
[22] WT/DS386/36

In accordance with Article 22.7, Mexico requests authorization from the DSB to suspend the application to the United States of tariff concessions and other related obligations in the goods sector under the GATT 1994 in an amount of US$227.758 million annually.

Mexico will implement the suspension of tariff concessions and other related obligations by increasing import tariffs on goods from the United States.

Then later Mexico submitted the details of this measure at the earliest date and then requested that this communication to be circulated to all Members.

Case Analysis

The panel found that the "measure did not contribute in a meaningful way to the fulfilment of the objective".[24] The United States submits that in determining whether the measure is "more trade-restrictive than necessary" the Panel erred in drawing from the interpretative framework of Article XX(b) of GATT 1994. In particular, the United States submits that jurisprudence under Article XX of GATT 1994, is not a useful guide to the Article 2.2 inquiry, particularly the Article XX(b) inquiry as to whether the measure makes a "material contribution" to its objective.[25]

The Panel found that the objective of the COOL measure is to provide as much clear and accurate origin information as possible to consumers.[26] Accordingly, it was submitted that the examination of legitimacy for the purposes of Article 2.2 of the TBT Agreement is dependent on whether the objective of the COOL measure – i.e., to provide consumer information to minimize consumer confusion – is in fact legitimate.

Conclusion

According to the case analysis, the arbitrator determines that the annual level of nullification or impairment of benefits accruing to Canada as a result of the COOL measure is CAD 1,054.729 million. Therefore, in accordance with Article 22.4 of the DSU, Canada can request authorization from the DSB to suspend concessions and

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[23] WT/DS386/ARB.
[24] Panel Report, paras. 7.715 and 7.718.
[25] United States' Appellant Submission, para. 158.
[26] Panel Report, para. 7.620; see also United States' First Written Submission, para. 206. In addition, the United States notified the "objective and rationale" as "consumer information" in its amended Notification to the Committee on Technical Barriers to Trade: G/TBT/N/USA/281/Add.1, 7 August 2008.

related obligations in the goods sector under the GATT 1994 at a level not exceeding CAD 1,054.729 million annually. And the Arbitrator determines that the annual level of nullification or impairment of benefits accruing to Mexico as a result of the COOL measure is USD 227.758 million. Therefore, in accordance with Article 22.4 of the DSU, Mexico may request authorization from the DSB to suspend concessions and related obligations in the goods sector under the GATT 1994 at a level not exceeding USD 227.758 million annually.

CASE NO. 5

DS 342: CHINA – MEASURES AFFECTING IMPORTS OF AUTOMOBILE PARTS

-Janavi H S[27]

Introduction

The importance of this dispute is to check whether or not the Chinese customs office should impose an tariff of 25 percent on certain automobiles parts having the essential character of auto mobiles while it levies only 10 percent on ordinary auto parts which don't retain such character. Generally, WTO members hold the "right" to interpret Harmonized System (HS) and which is the reason why different members may have different interpretations in the same tariff classification issues, which was the case in this dispute.[28] However, the panel ignored this right of importing countries and instead equated the item and purpose of the WTO Agreement with predictability and expectation exclusively for exporting countries, as it relates to "the substantial reduction of tariffs and other barriers to trade." This is often flawed interpretation which severely undermines the balance of rights and obligations among WTO official members and thus should be corrected by the Appellate Body.

Facts

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[28] The panel acknowledged this point. China – Measures Affecting Imports of Automobile Parts, the Report of the Panel, WT/DS339/R, WT/DS340/R, WT/DS342/R, circulated on July 18, 2008.

1. On 30 March 2006, the European Communities and the United States, and on 13 April 2006, Canada, requested consultations with China regarding China's imposition of measures that adversely affect exports of automobile parts from the European Communities, the United States and Canada to China.
2. The measures include the following: (a) Policy on Development of Automotive Industry (b) Measures for the Administration of Importation of Automotive Parts *and* Components for Complete Vehicles and, (c) Rules for Determining Whether Imported Automotive Parts and Components Constitute Complete Vehicles as well as any amendments, replacements, extensions, implementing measures or other measures related.
3. The European Communities argues that, under the measures identified, imported automobile parts that are used in the manufacture of vehicles for sale in China are subject to charges equal to the tariffs for complete vehicles, if they are imported in excess of certain thresholds. The European Communities considers that the measures are inconsistent with:

    - Articles II:1(a), II:1(b), III:2, III:4, III:5 of the GATT 1994, as well as with the principles contained in Article III:1.
    - Articles 2.1 and 2.2 of the TRIMs Agreement in conjunction with paragraphs 1(a) and 2(a) of the Illustrative List annexed to the Agreement.
    - Article 3 of the SCM Agreement.

4. The European Communities also considers that China had nullified or impaired the benefits accruing to the European Communities under the Accession Protocol, in particular para. 93 of the WP Report, in conjunction with Part I, para. 1.2 of the Accession Protocol, and para. 342 of the WP Report.
5. The United States argues that the measures identified appear to penalize manufacturers for using imported auto parts in the manufacture of vehicles for sale in China. The United States considers that these measures are inconsistent with the following provisions:

- Article 2 of the TRIMs Agreement.

- Articles II (including para. 1) and III (including paras. 2, 4 and 5) of the GATT 1994.
- Article 3 (including paras. 1 and 2) of the SCM Agreement.
- The Protocol of Accession (WT/L/432) (including Parts I.1.2 and I.7.3, and paras. 93 and 203 of the Working Party Report).

6. Canada argues that the measures identified above impose different charges on vehicles manufactured in China depending on the domestic content of the automobile parts used in the manufacture, thus providing domestic manufacturers with an advantage if they use domestic parts. Canada considers that the measures at issue are inconsistent with:
    - Articles II (including para. 1) and III (including paras. 2, 4 and 5) of the GATT 1994.
    - Article 2 of the TRIMs Agreement.
    - Article 2 of the Agreement on Rules of Origin, specifically paras. (b), (c) and (d).
    - Article 3 of the SCM Agreement.
7. Australia, Argentina, Brazil, Japan, Mexico, Chinese Taipei, Thailand requested to join the consultations regarding the dispute WT/DS339, WT/DS340, WT/DS342.

Procedural History

This dispute concerns a set of regulatory measures imposing a 25% 'charge' on imported automobile parts used in the manufacture of motor vehicles in China. The charge is due if the imported auto parts have the character of a 'complete vehicle', something that is determined by the Chinese authorities based on criteria prescribed under three instruments enacted by the Chinese government.[1] The criteria for such a determination are expressed in terms of particular combinations or configurations of imported auto parts or the value of imported parts used in the production of a particular vehicle model. Various combinations of assemblies will meet the criteria, for example: a vehicle body (including cabin) assembly and an engine assembly, or

five or more assemblies other than the vehicle body (including cabin) and engine assemblies.[29]

Issues

1. Weather measures imposed by china is inconsistent with Art. ll, ll:1, lll, lll:2, lll:4, lll:5, X:1, X:3 GATT 1994.?
2. Weather measures imposed by china is inconsistent with Art. 3, 3.1(b), 3.2 Subsides and countervailing measures?
3. Weather measures imposed by China is inconsistent with Art 2, 2.1 trade related investment measures Part 1, para 1.2, Part l, para 7.2, Part 1, para 7.3 protocol of accession?

Holdings

With respect to the complaint by the European Communities (WT/DS339), United states (WT/DS340), Canada (WT/DS342) the Panel concluded that:

— with respect to imported auto parts in general:

(i) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts;

(ii) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts; and

(iii) Policy Order 8, Decree 125 and Announcement 4 are not justified under Article XX(d) of the GATT 1994 as measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994.

— In the alternative, assuming that the measures fall within the scope of the first sentence of Article II:1(b) of the GATT 1994, with respect to imported auto parts in general:

(i) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article II:1(a) and Article II:1(b), first sentence of the GATT 1994 in that they accord

[29] https://doi.org/10.1017/S1474745609990334

imported auto parts treatment less favourable than that provided for in the appropriate Part of China's Schedule of Concessions; and

(ii) Policy Order 8, Decree 125 and Announcement 4 are not justified under Article XX(d) of the GATT 1994 as measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994.

— with respect to CKD and SKD kits:

(i) Policy Order 8, Decree 125 and Announcement 4 are not inconsistent with Article II:1(b) of the GATT 1994; and

(ii) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with China's commitment under paragraph 93 of China's Working Party Report, which is an integral part of the WTO Agreement.[30]

Considerations

In the appeal of the Panel report relating to the European Communities' claims (WT/DS339) (the "EC Panel Report"), and with respect to Policy Order 8, Decree 125 and Announcement 4 (the "measures at issue"), for the reasons set forth in this Report, the Appellate Body:

— upheld the Panel's finding that the charge imposed under the measures at issue is an internal charge within the meaning of Article III:2 of the GATT 1994, and not an ordinary customs duty within the meaning of Article II:1(b);

— upheld the Panel's finding that with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge that is not applied to like domestic auto parts;

— upheld the Panel's finding that with respect to imported auto parts in general, the measures at issue are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts; and

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[30] WT/DS342/15

— found it unnecessary to rule on the Panel's "alternative" finding that with respect to imported auto parts in general, the measures at issue are inconsistent with Article II:1(a) and (b) of the GATT 1994.

The Appellate Body recommended that the DSB request China to bring its measures, found in this Report, and in the EC Panel Report as upheld by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Critical Analysis

China appeals certain issue of law and legal interpretation in the panel reports of china – Measures affecting the imports of automobile parts. The panel was established to consider complaints by the European Communities, United states and Canada regarding the consistency of certain measures imposed by china on imports to auto parts. Australia, Argentina, Brazil, Japan, Mexico, Chinese Taipei, Thailand requested to join the consultations regarding the dispute WT/DS339, WT/DS340, WT/DS342. On 16 July 2007, the Chairman of the Panel informed the DSB that it would not be able to complete its work within six months due to the complexity of the issues presented in this case. The Panel expects to issue its final report to the parties by January 2008. On 18 July 2008, the Panel reports were circulated to Members. On 15 September 2008, China notified its decision to appeal to the Appellate Body certain issues of law covered in the Panel reports and certain legal interpretations developed by the Panel. On 15 December 2008, the Appellate Body reports were circulated to Members. On 12 January 2009, with respect to WT/DS339, the DSB adopted the Appellate Body report and the Panel report, as upheld by the Appellate Body report. On 12 January 2009, with respect to WT/DS340 and WT/DS342, the DSB adopted the Appellate Body reports and the Panel reports, as modified by the Appellate Body reports. At the DSB meeting on 11 February 2009, China informed the DSB that it intended to implement the DSB recommendations and rulings and that it would require a reasonable period of time to do so. On 27 February 2009, China and the European Communities, China and the United States, and China and Canada, notified the DSB that they had agreed that the reasonable period of time would be 7 months

and 20 days. Accordingly, the reasonable period of time expired on 1 September 2009.[31]

At the DSB meeting on 31 August 2009, China informed the DSB that on 15 August 2009, the Ministry of Industry and Information Technology, and National Development and Reform Commission, had issued a joint decree to stop the implementation of relevant provisions concerning the importation of auto parts in the Automobile Industry Development Policy. On 28 August 2009, the General Administration on Customs and relevant agencies had promulgated a joint decree to repeal Decree 125. As all these new decrees would come into effect on 1 September 2009, China declared that it had brought its measures into conformity with the DSB recommendations and rulings.

Conclusion

For the abovementioned reasons, the panel's interpretation breached general and supplemental rules of interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties. This is hardly "an objective assessment of the matter before it" and thus the panel failed to discharge its functions under Article 11 of the DSU. In doing so, the panel undermined the delicate balance of rights and obligations among WTO members. The Appellate Body should correct such flaw and restore the WTO jurisprudence in this matter.

[31] WT/DS/342-15

CASE NO. 6

WT/DS 595: EUROPEAN UNION - SAFEGUARD MEASURES ON CERTAIN STEEL PRODUCTS

- Aaraish Mudassir[32]

Introduction

Protectionism takes place when countries impose regulations and measures on imports into the country. It is means to protect domestic industry from injury due to foreign imports. The countries come up measures to restrict trade and to create trade barriers. The goal is to protect to provide protection to vital industries in the economy and hence protecting people's employment. Though these measures have being criticised have been criticised for hurting economies rather than helping them. They may provide short term benefits, but consequently can cause shortages in supply and cause the prices to shoot up. The measures for protectionism include imposing trade quotas, subsidises, anti-dumping duties, tariffs, etc. One of the key motives of WTO is to

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encourage liberalised trade between nations. Protectionism limits the choices of the consumers. The classical economist favours free trade. However, free trade undeniably has its disadvantages. Free trade can often increase trade deficits of the economies.

Facts of the Case

Turkey raised before the WTO the issue regarding EU regulations which imposed provisional measures and definitive measures on imports certain steel products from Turkey. Following a block of trade imports of steel products into US the flow increased in EU. The European Commission published a notice regarding investigation on imports of steel goods with the intent to impose safeguard measures on the categories of goods of steel if they find it necessary. Following the investigation, based on the Finding definitive measures were introduced such as tariff rate quota was set for concerned categories of goods, as opposed to global import quota which were followed earlier. If the tariff rate quota was exhausted the provisional measures would kick in, whereby an additional duty of 25% would have to be paid by the countries.

Procedural History

Turkey raised a request for consultation with EU over safeguard measures that were imposed on import of steel products. The first request for setting up of the panel was blocked by EU. A panel was established on 28th of August 2020 and composed on 30th of September 2020. As per the DSB Rules the panel is required to submit its final report to the party within six months. The panel in this case communicated that this ule cannot be followed through citing problems such as challenges posed by COVID 19 and the very nature and complexities of the case.

Issues

1. Whether the definitive measures adopted by European Union are violative of its obligations under GATT 1994 and Agreement of Safeguards?
2. Whether the investigation in each of the mentioned category took place in a consistent and done in an adequately and fairly?
3. Whether the European Union is justified in adopting new definitive measures in addition to the pre-existing anti-dumping measures and safeguards measures?

Holding

As of now the panel has not submitted a report however based on the past decisions by the dispute settlement body one may attempt to discern which way the winds may blow. WTO aims to liberalize trades as much as possible and avoid or caution countries against use of protectiveness. Due to protectiveness within United States against foreign steel products trade flow is diverted towards the European Union as well. Due to this increased trade flow the local European manufacturers face a strict competition which proves harmful to them. The restrictions which the case concerns with are also a result of complaint by domestic producers. This is without a doubt protectionism, plain and simple. However, the nation states, have previously cited interest of the domestic industries as the defence against application of additional measures. Whether the panel would find these sets of measures an overzealous attempt at protectionism is yet to be seen.

Other Considerations

The objection by Turkey relies not only on the fact that the measures for safeguard are blatantly protectionist in nature but also the special exemption certain categories of nations.[33] The measures have a different set of provision for trade between European Union and third world countries, special economic zones within nations, and also nations having free trade agreements. These nations not only enjoy favourable treatment but this time around the measures hurt the imports from the nation states differently based on their quotas. As per the objections raised before WTO by turkey the reasoning and deliberation behind decisions and the implementations of these measures are unclear. They hint towards a biased treatment towards themselves. The believe the investigation was not carried on properly or that the investigation results were inconclusive. The investigation does not take into factor other reasons which may cause injury to the domestic industries.

Case Analysis

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[33] SPGLOBAL, 2021. EU steel import safeguards extension divides market opinions | SPGLOBAL [online] .Available at : <https://www.spglobal.com/platts/en/market-insights/latest-news/metals/062821-eu-steel-import-safeguards-extension-divides-market-opinions> [Accessed 28 July 2021]

The world trade relies on liberalization. The provisional measures and safeguard measures adopted by European Union are against the spirit of liberal trade within the international markets. The measures taken by the Commission are overzealous and excessive. They are trade restrictive and biased as they are tailored for each nation-state with certain variations. The measures need to be reformed these measures are a one-step too many. The European Union must also make the investigation and the data based on which such determinations were made. As of now Turkey is already being investigating for dumping activities within the EU these additional measures would kill the trade. The Panel must take into account not only the injury that may be caused to domestic industries within EU but the effect of additional restrictions on trade from other countries.

Conclusion

The protectiveness by nation states as been accused for being harmful international trade and against the spirit of liberalization. The nation states adopt double standards with introduction of rules and regulations discouraging imports to boost domestic markets. Such measures have been accused of ending free trade.

Prior to the pandemic a slowdown was already being witnessed the economies and industries the pandemic only added fuel to the fire. The prices of goods reached all time high within the European market for certain goods. The industry expert has also stated that the definitive measures adopted are for the benefit of the steel industry not the end consumers. There is also a fear that the domestic manufacturers maybe facing additionally difficulty due to shortage of materials for some categories of products.

CASE NO. 7

DS 413: CHINA - CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

-Yash A. Jodhani[34]

Introduction

The formation of the GATS was one of the landmark accomplishments of the Uruguay Round, whose results went into force in January 1995. The GATS was roused by basically similar goals as its partner in stock exchange[35], the General Agreement on Tariffs and Trade (GATT): making a tenable and dependable arrangement of international trade rules; guaranteeing reasonable and impartial treatment, all things considered (guideline of non-separation); invigorating monetary movement through ensured strategy ties; and advancing trade and improvement through reformist liberalization.

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[35] https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf

The GATS applies on a fundamental level to all service sectors, with two exemptions. Article I (3) of the GATS rejects "administrations provided in the activity of legislative position". These are administrations that are provided neither on a business premise nor in contest with different suppliers. Take these examples are federal retirement aide plans and some other public assistance, like health & education, that is given at non-economic situations. Besides, the Addition on Air Transport Administrations excludes from inclusion estimates influencing air traffic rights and administrations straightforwardly identified with the activity of such rights.

The important definition covers any measure, “regardless of whether as a law, regulation, rule, method, choice, authoritative activity, or some other structure, in regard of:

- the buy, instalment, or utilization of a service;
- the admittance to and utilization of, regarding the stock of a service, administrations which are needed by those members to be offered to the public for the most part;
- the presence, including business presence, of people of a Part for the stock of a administration in the territory of another Part.

As expressed in its Preamble, the GATS is expected to add to trade extension "under states of straightforwardness and reformist progression and as a method for advancing the financial development of all trading accomplices and the advancement of non-industrial nations". Trade extension is accordingly not seen as an end in itself, as some basic voices affirm, however as an instrument to advance development and improvement.

The GATS recognizes four methods of providing administrations: cross-border trade, consumption abroad, business presence, and presence of natural people.

1. **Cross-border supply** is characterized to cover administrations streams from the domain of one part into the region of another part (for example banking or compositional administrations communicated by means of media communications or mail).

2. **Consumption abroad** alludes to circumstances where a service customer or client (for example vacationer or patient) moves into another part's domain to get some service.

3. **Business presence** suggests that an assistance provider of one part builds up a regional presence, including through possession or rent of premises, in another part's domain to offer a support (for example homegrown auxiliaries of unfamiliar insurance agencies or lodging networks); &

4. **Presence of natural people** comprises of people of one part entering the domain of another part to supply a service (for example bookkeepers, specialists or instructors). The Annex on Movement of Natural Persons indicates, nonetheless, that individuals stay allowed to work measures in regard to citizenship, home, or admittance to the business market consistently.

Facts of the Case

- The procedures concern a progression of legitimate prerequisites identifying with electronic payment instalment benefits that the US claims are kept up with by China. As indicated by the US, the legitimate prerequisites, alone or in blend, "influence electronic payment instalment administrations for payment instalment card exchanges and the providers of those administrations".

- Administrations through which trades including payment instalment cards (as characterized below) are prepared and through which moves of assets between establishments taking part in the trades are overseen and worked with. Providers of electronic payment instalment administrations supply, straightforwardly or by implication, a framework that regularly incorporates the accompanying: the preparing infrastructure, network, and rules and procedures that work with, oversee, and empower trade data and enable transaction streams and which give framework uprightness, solidness and monetary danger decrease; the cycle and coordination of endorsing or declining an trade, with endorsement by and large allowing a buy to be finished or money to be dispensed or traded; the conveyance of trade data among partaking elements; the computation, assurance, and detailing of the

net monetary situation of important establishments for all trades that have been approved; and the assistance, the executives and additionally other cooperation in the transfer of net instalments owed among taking part organizations.

- The US meaning of the expression “instalment / Payment card” incorporates the following:

  a bank card, Visa, charge card, debit card, check card, computerized teller machine (ATM) card, pre-loaded card, and other comparative card or instalment or cash transmission item or access gadget, and the extraordinary record number related with that card or item or access gadget.

- The US challenges what it charges to be the accompanying legal prerequisites:
  - necessities that command the utilization of China UnionPay, Co. Ltd. (CUP) or potentially build up CUP as the sole provider of electronic instalment administrations for all domestic transactions designated and paid in China's homegrown cash, renminbi (RMB),
  - necessities that instalment cards gave in China bear the CUP logo,
  - necessities that all computerized teller machines (ATM), dealer card preparing equipment, and point-of-sale (POS) terminals in China acknowledge CUP cards,
  - prerequisites on gaining establishments to post the CUP logo & be equipped for accepting all bank cards bearing the CUP logo,
  - panel restrictions on the utilization of non-CUP cards for cross-region or between bank transactions, and
  - prerequisites relating to card-based electronic transactions in Hong Kong, China and Macao, China.
- The 'business determinations' and 'specialized norms' that are recognized in the instruments above, remembering for Report No. 17, Report No. 57, Report No. 129, and Report No. 49".

Procedural History

On September 15, 2010, the US requested meetings with China as per Articles 1 and 4 of the Arrangement on Rules and Procedures Governing the Settlement of Disputes ("DSU"), and Article XXII of the General Agreement on Trade in Services ("GATS") regarding certain limitations and prerequisites kept up with by China relating to electronic instalment administrations for instalment card transactions and the providers of those administrations. The US and China held meetings on October 27 and 28, 2010, yet those conferences didn't resolve the debate. The US presented its solicitation for the foundation of a board on February 11, 2011, the Dispute Settlement Body (DSB) set up a board on Walk 25, 2011, and the Board was made on July 4, 2011.

On July 5, 2011, China documented a solicitation for a primer decision on the consistency of the U.S. board demand with DSU Article 6.2. On July 29, 2011, the US documented an accommodation because of China's solicitation for a preliminary ruling ("U.S. July 29, 2011, Reaction"). (The U.S. July 29, 2011, Reaction, completely and including the entirety of the displays joined thereto, was along these lines fused by express reference into the U.S. First Composed Accommodation, dated September 13, 2011.) On September 7, 2011, the Board gave its fundamental decision where it dismissed the entirety of China's cases that the U.S. board demand neglected to fulfil the prerequisites of Article 6.2 of the DSU.

Issues of the Case

1. Could China explain whether the model given in Exhibit CHI-103, for example instalment instruments prepared in the retail system, is classifiable under subsector (d)?

2. What specific legal and procedural requirements must be met to establish a card payment network providing payment services similar to CUP in China? what might be the competent expert for handling the application and allowing the approval? How much could this organize build up its own working principles and standards?

3. Is there at present a foreign bank card leeway association set up in China that is occupied with foreign cash business?

Holding

- **Order of the administrations at issue:** The Board tracked down that electronic payment administrations for instalment card exchanges are classifiable under Subsector 7.B(d) of China's Administrations Timetable, which peruses "all instalment and cash transmission administrations, including credit, charge, and check cards, voyagers check and financiers' drafts".

- **Scope of China's GATS responsibilities:** The Board dismissed the US's view that China's Schedule incorporates a cross-border (mode 1) market access obligation to permit the stockpile of EPS into China by unfamiliar EPS providers.

- **GATS Article. XVI (market access commitment):** The Board dismissed based on lack of evidence that China keeps up with China UnionPay (CUP) – a Chinese EPS provider – as an in all cases restraining infrastructure provider for the preparing of all homegrown RMB instalment card exchanges, in break of its commitments under Article. XVI.

- **GATS Article. XVII of the GATS (National treatment commitment):** The Board tracked down that a portion of the significant necessities, specifically the necessities that all bank cards gave in China should bear the Yin Lian/UnionPay logo and be interoperable with that organization, that all terminal gear in China should be fit for tolerating Yin Lian/UnionPay logo cards, and that acquirers of exchanges for instalment card organizations post the Yin Lian/UnionPay logo and be equipped for tolerating instalment cards bearing that logo, are each conflicting with China's national treatment commitments under Article. XVII.

Other Considerations

The Board dismissed China's case that the US's solicitation for the foundation of a board neglected to meet the prerequisite in DSU Article. 6.2 to give a concise rundown of the lawful premise of the protest sufficient to present the problem clearly.

Case Analysis

As a lawful matter, the US was fruitful in the debate in light of the fact that, despite the fact that it didn't sway the majority of its market access claims, it did as such concerning its public treatment claims. The goal of the market access asserts involved, as displayed over, an intricate examination of China's responsibilities. The goal of the public treatment claims, then again, was somewhat basic, as plainly the tested measures managed the cost of more positive treatment to CUP than to foreign service providers.

In practical terms, notwithstanding, it isn't certain that this triumph will be adequate to empower the US to acquire whatever further developed market access it looked for at the point when it started the debate. As indicated above, it stays not yet clear how China will execute the board's decisions and proposals. It will be extremely fascinating to realize whether and how execution of the board's discoveries on the US's public treatment claims under Article XVII of the GATS concerning the backer, terminal gear, and acquirer prerequisites can address the market access asserts that were the fundamental driver of the case presented by the US, and on which it lost.

Conclusion

There is currently little uncertainty that the board demand gives a lacking legitimate premise to this procedure to proceed. The game-plan that is both prudent and required by Article 6.2 of the DSU is to require the US to present an amended board solicitation to the DSB.

As far as the commitment of the Board Report to the statute, generally the Board Report addresses basically another cycle of how the standards of the Vienna Convention are utilized to decipher the arrangements of the covered arrangements and, in this specific setting, the content of Part’s Schedules of Responsibilities under the GATS (and, in reality, the GATT 1994).

CASE NO. 8

DS 467: AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS, GEOGRAPHICAL INDICATIONS, AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING

-Timur Abdusamatov[36]

Introduction

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the most comprehensive multilateral agreement on intellectual property to this day. TRIPS sets up the minimum standards for the regulation by member state governments of different forms of intellectual property. Intellectual property rights are of high importance on every level, they ensure the authenticity and help consumers recognize the brand of the product they are buying.[37] Trademarks are one such kind of intellectual property consisting of recognizable signs, colors, text fonts, and designs.

[36] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

[37] https://www.theglobalipcenter.com/why-are-intellectual-property-rights-important/

Imposing measures on trademarks and packaging often times leads to restriction in trade and acts as a trade barrier. Imposing trademark and packaging measures are not actions that are favorable by the World Trade Organization (WTO) as it follows a more protectionist approach. However, what if these restrictions are made for the favor of public health and safety of a nation? Will the packaging measures be valid then? What is WTO’s stance and preference between public health and free trade? All of these are questions can be answered in the given case where Australia was contested for establishing Tobacco Plain Packaging Measures of which objective was to improve public health by reducing the exposure and use of tobacco products.

Facts of the Case

1. Indonesia requested consultation with Australia with regard to Australian laws and regulations that impose restrictions on trademarks, geographical indications and other plain packaging requirements on tobacco products and packaging.
2. Subsequently, Canada, Brazil, Cuba, the Dominican Republic, New Zealand, Guatemala, the European Union, Honduras, Ukraine, Nicaragua, Norway, and Uruguay joined the consultation
3. The product that was brought to issue was tobacco products and their retail packaging.
4. According to Indonesia’s claim, the Australia’s laws and regulations that impose restrictions on trademarks, geographical indicators and other certain plain packaging requirements are acting as trade barriers.
5. Indonesia’s claim states that Australia’s tobacco plain packaging measures (TPP measures) are inconsistent with Australia’s obligations under the TRIPS Agreement.

Procedural History

Consultation was requested with Australia by Indonesia on September 20th of 2013. Guatemala requested to join the consultation on September 26th of 2013, and thereafter Nicaragua and New Zealand requested to join the consultation on September 27th and September 30th respectively. Uruguay, Ukraine, EU and Honduras requested to join the on October 1st, 2nd, and 3rd respectively. On October 4th, Norway, Brazil, Canada, and the Dominican Republic requested to join the consultation, and on October 11th, Cuba made a request to join the consultation. Subsequently,

acceptance of the requests made from all the mentioned nations has been informed to the DSB by Australia. Indonesia requested to establish the Panel on March 3rd of 2014, and on March 26th of the same year, the DSB established a Panel. The Russian Federation, China, Brazil, Canada, Cuba, Honduras, EU, Guatemala, India, Indonesia, Japan, Korea, Malaysia, Mexico, Norway, New Zealand, Nicaragua, Nigeria, Oman, the Philippines, Turkey, Chinese Taipei, Thailand, Ukraine, Uruguay, and the United States reserved their third-party rights. Soon after, the Dominican Republic, Ecuador, Argentina, Chile, Peru, Malawi, Zimbabwe, and Singapore reserved their third party rights. Australia made a request to the Director-General on April 23rd of 2014 to compose the Panel and on May 4th of the same year, the Panel was composed by the Director-General. On October 10th, the DSB was informed by the Chair of the Panel that the panel was expected to issue its final report to the parties no sooner than the first half of 2016, however due to the dispute's complexity, the issue of the final report by the panel was expected not before the end of 2016. On December 1st of 2016, due to certain complexities in the legal and factual issues, the Chair of the panel informed the DSB that the issue of the final report by the parties is expected not before May of 2017. The Chair of the Panel informed the DSB of the further postponement of the date of issue of the final report by the parties due to complexities in the legal and factual issues to the end of the third quarter of 2017. Finally, the panel report was circulated to the Members on June 28th of 2018.

Issues

1. Are Australia's tobacco plain packaging measures imposed for the purpose of discouraging the use of tobacco and other related purposes or are these measures more trade restrictive?
2. Are the TPP measures imposed by Australia used as a means of unfair trade competition?
3. Is the Trademark Amendment (Tobacco Plain Packaging) Act 2011 consistent with Australia's obligation under the TRIPS Agreement?

Holding

With regards to issue of the TPP measures being technical barriers to trade (TBT Art. 2.2), the Panel found that these measures were not more trade restrictive than necessary to fulfill the main objective which was to improve public health by

reducing the exposure and use of tobacco products. This finding was upheld by the Appellate Body, furthermore, the Appellate Body agreed with the Panel's decision that the proposed alternative solutions that were equivalent to Australia's objective were not any less trade restrictive than the TPP measures.

With regards to the issue of an obstacle to registration of a trademark (TRIPS Art. 15.4), the Panel found that there was no demonstration from the side of Honduras, Cuba, and the Dominican Republic that the nature of good that the TPP measures applied to form any obstacle to the registration of trademarks.

In the issue of well-known trademarks (TRIPS Art. 16.3), the Panel found that there was no demonstration on the side of Indonesia and Cuba that the TPP measures were inconsistent with Australia's obligations under TRIPS agreement to protect well known trademarks.

In the issue of unfair competition (Paris Convention Art. 10bis), the Panel found that there was no demonstration on the side of Indonesia and Cuba that the TPP measures impelled market actors to engage in unfair trade competition.

In the issue concerning use geographical indicators constituting unfair competition (TRIPS Art. 22.2 b), the Panel found that there was no demonstration on the side of the complainants that the TPP measures impelled market actors to take actions that would lead to allegations or misleading indications product characteristics.

Conclusively, most of the claims on the appeal of complainants that the Panel failed to make an objective assessment of the facts of the case have been addressed and rejected by the Appellate Body. On review of the econometric evidence, there was not sufficient evidence to support the claim that the TPP measures were acting as trade barriers but instead the TPP measures were fulfilling Australia's main objective which was to improve public health by reducing the exposure and use of tobacco products.

Case Analysis

It is a well-known fact that smoking tobacco is extremely hazardous to health and can cause a variety of health complications including cancer, heart diseases, stroke, lung

disease, and diabetes, most of which can cause death.[38] Attractive packaging with eye-catching colors, designs, logos, and engaging characters has been proven to attract more customers towards smoking cigarettes, especially teenagers, resulting in an overall decrease of public health of a nation. The Tobacco Plain Packaging measures (TPP measures) that has been established in Australia in the year of 2011 was one method that the government applied to battle the increasing use of tobacco products for the betterment of public health of its nation. The TPP measures included the plain packaging along with graphic health warnings on all tobacco products for the purpose of educating the public of how hazardous smoking is. However, applying such measures resulted in a certain degree of trade restriction, and many argued that such measures were more for the purpose of restricting trade than fulfilling its main objective. Imposing restrictions on any product must always be done within the legal framework of the WTO and therefore must be subject to numerous WTO obligations. In this case, the complainants argued that by imposing such restrictions, Australia was going against its WTO obligations as stated under the TRIPS agreement, therefore it was for Australia to prove that the TPP measures were not more trade restrictive than necessary to fulfill the legitimate objective which was protecting human health and safety. For the Panel to come up with a finding, an analysis must take place involving three factors; the degree to which the law and regulation, (i.e., in this case, plain packaging) contributes to a legitimate objective; the trade-restrictiveness of the measure; and the nature of the risks and the gravity of consequences if the objective is not fulfilled.[39] After a thorough analysis and investigation that lasted 8 years, making it one of the longest WTO cases, the Panel came to a conclusion that if a measure is successful in contributing to an objective that is for the benefit of public health, then subsequently restriction of trade to a certain degree might occur, but for the benefit of public health, unfulfillment of certain objectives can be made as long it is within the legal framework.[40]

In conclusion, the WTO Appellate Body found errors in the Panel's analysis regarding the contribution of two of the alternative measures to Australia's objectives.

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[38]https://www.cdc.gov/tobacco/basic_information/health_effects/index.htm#:~:text=Smoking%20causes%20cancer%2C%20heart%20disease,immune%20system%2C%20including%20rheumatoid%20arthritis.

[39] Australia – Plain Packaging (Panel Reports), para. 7.184

[40] https://www.fda.gov/international-programs/international-programs-news-speeches-and-publications/wtos-decision-australias-plain-packaging-tobacco-measures-explained#5

But the WTO upheld the ultimate conclusion that these suggested alternatives were not less trade-restrictive alternatives; and thus, the Australian measures are consistent with WTO rules.

Conclusion

Whenever there is a choice between public health and trade benefits, the preference must always be made to the former. In certain cases, the consequences of not fulfilling particular public health measures can have a very negative impact on the health and safety of the public at large, and hence that must be prioritized over trade benefits. The decision carried out by the WTO Panel and Appellate Body in this case was a good result for the public health authorities not only in Australia but around the world as this case had a great influence on numerous other nations that later also started adopting measures similar to that of TPP for the benefit of their country's public health.

CASE NO. 9

DS 409: EUROPEON UNION AND MEMBER STATE-SEIZURE OF GENERIC DRUGS IN TRANSIT

- Nidhi P Gopan [41]

Introduction

Several recent detentions of generic pharmaceutical products transiting through the European Union (EU) for suspected infringements of intellectual property rights raised serious concerns for public health advocates and threatened to expose systemic problems existing in the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The detentions not only garnered international attention, but India and Brazil formally began WTO dispute settlement proceedings against the EU. The parties recently reached a mutually agreed

[41] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

solution to the matter and the proceedings have been halted, leaving unanswered the complex legal and technical questions raised by the detentions of pharmaceuticals in transit. Despite a solution being reached in this dispute, the matter will undoubtedly resurface in the near future for a number of reasons. For instance, the EU is attempting to export its laws to its trading partners through the negotiation of free trade agreements and in other forums such as the recently concluded Anti-Counterfeiting Trade Agreement which increases the likelihood that similar detentions will occur at some point in the future. Moreover, recent trends in international intellectual property law indicate a move towards increased protection and enforcement in at least the short and medium term. The issue therefore offers the opportunity for rich legal analysis into an underexplored, yet increasingly important, aspect of WTO law.

Facts of the Case

1. In two separate trade dispute complaints at the World Trade Organization (WTO) in 2008 and 2009, India and Brazil asked the European Union (EU) and one of its member states, the Netherlands, to enter into dispute settlement consultations over the alleged violation of multilateral trade rules by illegally confiscating generic drugs exported by Indian pharmaceutical companies in transit through Europe to destinations in Latin America, Oceania, and Africa. According to Brazil and India, the EU and the Netherlands through their actions were also undermining public health in developing countries.
2. In each case, a batch of medicines en route from one developing country to another was temporarily held by border officials at European harbors or airports. The first such case concerned a shipment of a generic version of the hypertension drug Losartan potassium that was confiscated in the Netherlands in December 2008. The Dutch authorities held the shipment in Rotterdam, which was bound for Brazil, for 36 days stating that it infringed an existing Dutch patent on the original drug named Cozaar. However, the medicine Losartan is not patented either in India or in Brazil. After it had been established that the goods were not intended for the EU market, they were released by the European authorities and sent back to India, where the drugs had been manufactured.

3. Similarly, throughout 2009, shipments of legitimate generic drugs transiting through Europe were detained by customs authorities on allegation of intellectual property rights infringement. Around 20 ships were detained by the custom officials, 16 of which originated in India.
4. The Dutch authorities applied the judicially created rule that the IP status of in-transit drugs should be judged as if they had been manufactured in the Netherlands. The customs officials sometimes acted ex officio to initiate temporary seizures based on suspicion of domestic patent law violation. They however continued such seizures based on applications by pharmaceutical companies, which requested delay in shipments of medicines coming from India, where they were lawfully manufactured and exported to countries in Africa, Oceania, and Latin America, where they would have been lawfully imported, marketed, and consumed. After multiple seizures, the customs authorities also required the suspect medicines to be destroyed or returned to India or delayed to their destination.
5. India in response requested dispute settlement consultations on 11 May 2010 at the World Trade Organization with the European Union and the Netherlands, where the shipments were detained. Brazil, Canada, and Ecuador joined the consultation on 28 May 2010, and China, Japan, and Turkey on 31 May 2010.

Procedural History

Brazil requested consultations with the European Union and the Netherlands regarding repeated seizures on patent infringement grounds of generic drugs originating in India and other third countries but transiting through ports and airports in the Netherlands to Brazil and other third country destinations. Brazil alleges that the various European Union and Dutch measures at issue are inconsistent with the obligations of the European Union and the Netherlands under Articles V and X of GATT 1994, various provisions of the TRIPs Agreement, and Article XVI:4 of the WTO Agreement.

On 28 May 2010, Canada, Ecuador, and India requested to join the consultations. On 31 May 2010, China, Japan, and Turkey requested to join the consultations.

Subsequently, the European Union informed the DSB that it had accepted the requests of Canada, China, Ecuador, India, Japan, and Turkey to join the consultations[42].

Issues Involved

1. Whether article V of GATT 1994 as per the request for consultations, the measures taken by the EU member states were stated to be unreasonable, discriminatory, and interfering with, and imposing unnecessary delays and restrictions on, the freedom of transit of generic drugs lawfully manufactured within, and exported from, India by the routes most convenient for international transit?
2. Whether article X of the GATT 1994 as per the request for consultations, the measures taken by the EU member states were stated to be contrary to their obligations?
3. Whether articles 41 and 42 of the TRIPS Agreement, in Brazil's and India's view, the measures created barriers to legitimate trade, permit abuse of the rights conferred on the owner of a patent, are unfair and inequitable, unnecessarily burdensome and complicated and create unwarranted delays?

Holding

The EU accepted Brazil's consultation request on 21 May 2010 and informed Brazil that as the alleged violations all relate to matters for which the EU bears responsibility in the WTO, the EU alone is the proper respondent in this dispute. On 28 May 2010 Canada, Ecuador and India and on 31 May 2010 Japan, China and Turkey made requests to join consultations in DS409 as third parties. A first round of consultations was held jointly with India on 7-8 July 2010 in Geneva. This was followed by a second round of consultations on 13-14 September 2010.

In their Request for Consultations dated 19 May 2010, India and Brazil raised certain legal issues about the seizure of drugs transiting through Europe where the measures instituted by the Netherlands and the EU were considered inconsistent with the following obligations, among others:

• Article V of GATT 1994 – as per the request for consultations, the measures taken by the EU member states were stated to be unreasonable, discriminatory, and

[42] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds409_e.htm

interfering with, and imposing unnecessary delays and restrictions on, the freedom of transit of generic drugs lawfully manufactured within, and exported from, India by the routes most convenient for international transit.

• Article X of the GATT 1994 – as per the request for consultations, the measures taken by the EU member states were stated to be contrary to their obligations to:

o promptly publishes laws, regulations, judicial decisions, and administrative rulings pertaining to the requirements, restrictions or prohibitions of imports or exports or of the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

o administers laws, regulations, decisions, and rulings described in Article X:1 in a uniform, impartial and reasonable manner.

• Article 28 read together with Article 2 of the TRIPS Agreement, Article 4bis of the Paris Convention, 1967 and the last sentence of paragraph 6(i) of the Decision of the General Council of August 30, 2003, on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health (the "August 30, 2003, Decision"). In Brazil's and India's view the rights conferred on the owner of a patent cannot be extended to interfere with the freedom of transit of generic drugs lawfully manufactured within, and exported from, India. In particular:

o Art. 2 of the TRIPS Agreement requires WTO members to comply with certain provisions of the Paris Convention (1967) and provides that nothing in Parts I to IV of the TRIPS Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits.

o Article 4bis of the Paris Convention, 1967 states that patents applied for in various countries shall be independent of patents obtained for the same invention in other countries.

o The Decision of the General Council of August 30, 2003, on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health states that the territorial nature of patents will not be prejudiced.

• Articles 41 and 42 of the TRIPS Agreement. In Brazil's and India's view, the measures create barriers to legitimate trade, permit abuse of the rights conferred on the owner of a patent, are unfair and inequitable, unnecessarily burden and complicated and create unwarranted delays. In particular:

o Article 41 stipulates that WTO members should make enforcement procedures available against infringement of intellectual property rights and must include expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures should be applied in a manner that avoids the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

o Article 42 stipulates that WTO members are to make available to right holder's civil judicial procedures concerning the enforcement of any intellectual property right covered by the TRIPS Agreement. Defendants have the right to timely written notice containing sufficient detail, including the basis of the claims.

• Article 31 of the TRIPS Agreement read together with the provisions of the August 30, 2003, Decision. According to Brazil and India, the measures authorize interference with the freedom of transit of drugs that may be produced in, and exported from, India to Members of the World Trade Organization with insufficient or no capacity in the pharmaceutical sector that seek to obtain supplies of such products needed to address their public health problems by making effective use of compulsory licensing.

Case Analysis

- If the dispute had been brought to WTO's Dispute Settlement Body, the most significant question that would have been addressed would have been whether a regulatory authority, based on the patent, could seize drugs in transit that were not being worked in the regulatory authority's jurisdiction.
- The parties amicably settled the dispute. They reached an understanding that the EU would no longer intercept generic medicines in transit unless there is adequate evidence to satisfy customs authorities that there is a substantial likelihood of diversion of such medicines to the EU market and that the EU would amend the relevant laws accordingly. The EU subsequently revised its

Customs Regulations in 2013[43]and adopted implementation guidelines.[44]In meetings of the WTO Council for TRIPS in 2017[45] and 2018[46],India submitted a series of questions to the EU regarding the revised regulations and the guidelines.

Conclusion

The dispute concerns the questions whether the seizure of goods in transit as border measures for enforcement of intellectual property rights is compatible with the TRIPS Agreement and GATT rules on freedom of transit, among others. Although a request for consultation was made by two complainants, the dispute was amicably resolved between the parties.

CASE NO. 10

DS 373: CHINA – MEASURES AFFECTING FINANCIAL INFORMATION SERVICES AND FOREIGN FINANCIAL INFORMATION SUPPLIERS

- Janavi H S[47]

Introduction

On March 3, 2008, the United States requested WTO dispute settlement consultations with China concerning China's treatment of foreign financial information suppliers. China's regulatory regime required foreign financial information suppliers to operate through a government-designated distributor and prohibited them from

[43] European Union, Regulations 608/2013.
[44] European Union, 2016.
[45] WTO, 2017, IP/C/W/636 and WTO, 2018, IP/C/W/636/Add.1.
[46] See further Abdel Gawad, H. M. (2018). "Detention of 'Non-Union Goods in Transit' at the EU customs and
the right to freedom of transit: a new battle between IP and international trade?", Journal of Intellectual Property Law & Practice, Volume 13, Issue 6, June 2018, Pages 469–476
[47] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

establishing local operations to provide their services. In addition, the agency designated by China to regulate these services appeared to have a conflict of interest as it was closely connected to a commercial operator in China. This regime appeared inconsistent with several WTO provisions, including Articles XVI, XVII, and XVIII of the *General Agreement on Trade in Services*, as well as specific commitments made by China in its WTO accession protocol.

Facts of the Case

1. The United States requested for a consultation with China regarding certain measures concerning the financial information services and service suppliers.
2. The United States made number of claims against the measures of China which affects the financial information services and foreign financial services suppliers in China.
3. These kinds of measures include no fewer than a dozen legal and administrative instruments which require foreign financial information suppliers to supply their services through an entity designated by Xinhua News Agency ("Xinhua"). Xinhua has designated only one such agent, China Economic Information Service ("CEIS"), one of Xinhua's commercial enterprises.
4. According to the United States, China prohibits foreign financial information suppliers from directly associating with the customers for the subscriptions of their services, requiring an agent to contact the subscriptions which is basically done through the Xinhua-designated entity. Which is considered to be an agent.
5. China likewise restricts users of financial information services in China from directly subscribing to services supplied by foreign suppliers.
6. Furthermore, in order to renew their licenses, China requires foreign financial information suppliers to provide the Foreign Information Administration Centre ("FIAC"), a regulatory body within the framework of Xinhua's, with a component of detailed and confidential information concerning their financial information services, their customers and their foreign suppliers.

7. The United States contends that these and other requirements and restrictions done by China is considered to be less favourable treatment to foreign information services and service suppliers than that compared to Chinese financial information services and service suppliers which are not affected by these requirements and restrictions.

8. The United States also claims that China is preventing foreign financial information service suppliers from establishing any commercial presence in China other than limited representative offices.

9. The United States considers that the measures at issue are inconsistent with various provisions of the GATS, the horizontal standstill commitment contained in China's schedule of obligations under the GATS, and China's Protocol of Accession.

10. On 14 March 2008, the European Communities requested to join the consultations. Subsequently, China informed the DSB that it had accepted the request of the European Communities to join the consultations.[48]

Procedural History

The Financial Information Service (FIS) is an education and information service available to everyone in the community. While the FIS service does not provide financial advice, FIS Officers can help you to make informed financial decisions. FIS is provided by specialist Services Australia officers. It is independent, free and confidential, and provided by phone, by appointment and through community outreach.[49] This case first originated through the complaint from united states regarding the measures taken by China concerning the financial information services and financial information service suppliers. The case first came into existence on 3rd March 2008. It is about the restrictions and rules that are supposed to be followed by the financial information services and the services suppliers which was against the articles of XVI, XVII and XVIII of the GATS Services.

Issues

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[48] WTO | dispute settlement - the disputes - DS373

[49] Financial Information Service Department of Social Services, Australian Government (dss.gov.au)

1. Weather china’s measures is inconsistent with the article XVI and XVII of the GATS service?
2. Weather China’s measures is inconsistent with the para 1 and para 1.2 protocol of the Accession?
3. Weather china’s measures is inconsistent with the article XVIII of the GATS service?

Holdings

Article XVI: With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

Article XVII**:** In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

Article XVIII**:** Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.[50]

Considerations

(a) China confirms that a legal instrument (t of at least equal legal stature to the 2006 Measures will be promulgated by 30 April 2009 to replace the 2006 Measures, effective no later than 1 June 2009.

(b) China confirms that under the new measures, a new licensing system will be applied to foreign suppliers of financial information services. China further confirms that this new licensing system will conform to the commitments that China made in paragraph 308 of the Working Party Report accompanying its Protocol of Accession to the World Trade Organization.

(c) China confirms that beginning on the date of the implementation of the new measures, China will permit foreign suppliers of financial information services to supply financial information services, directly or indirectly, without requiring the involvement of any agent or intermediary, and will not impose any licensing requirements or similar approvals on service consumers in order for them to receive financial information services from foreign suppliers.

(d) The new regulator may require foreign suppliers of financial information services to submit only information that is relevant to matters under the license. The new regulator may require foreign suppliers of financial information services to file with the new regulator relevant information identifying each subscriber to the financial information service within thirty days after the conclusion of the subscription contract with that subscriber, but will not require the filing of the subscription contract itself.

Critical Analysis

This case tells us about the complaint from united states regarding the measures taken by China concerning the financial information services and financial information service suppliers. The case first came into existence on 3rd march 2008. It is about the restrictions and rules that are supposed to be followed by the financial information

[50] WTO legal texts - Marrakesh Agreement

services and the services suppliers which was against the articles of XVI, XVII and XVIII of the GATS services. Where United States requested the Chinese government to abolish those restriction regarding the financial information service suppliers. It has been briefly stated in the holdings regarding the favouring articles concerning the inconsistences of the rules and restriction towards the financial information service suppliers.

Conclusion

The agreement calls for China to take certain steps, including the revision and repeal of certain existing measures, as well as the adoption of new measures, to respond to the United States' concerns regarding the absence of an independent regulator and the imposition of unfair requirements and restrictions on U.S. financial information service suppliers operating in China. China's commitments under the agreement include the establishment, by January 31, 2009, of an independent regulator for foreign financial information service suppliers, and the implementation of new non-discriminatory and transparent regulations by June 1, 2009. The United States is continuing to monitor China's implementation of the agreement. The EU and Canada reached identical agreements with China with respect to their disputes on the same matter.

CASE NO. 11

DS 285: UNITED STATES - MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES

- Bhavatharini M[51]

Introduction

The U.S-Antigua was the first case to deal with the Internet and e-commerce and the second one to deal with the GATS. Gambling is an intensely directed action in numerous countries and those guidelines regularly confine the geographic area of wherein gambling can take region. In the U.S–Gambling dispute Antigua and Barbuda challenged various provisions of U.S Federal and State laws mainly the Wire Act, the Travel Act, and the Illegal Gambling Business Act[52] which as indicated by Antigua lead to a successful restriction on Internet gambling.

Facts of the Case

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[51] BBA.LLB. 3rd Year Student, Alliance School of Law, Alliance University, Bangalore.

[52] 18 U.S.S 1084; 18 U.S.C 1952; 18 U.S.C. 1955.

1. Antigua and Barbuda filed a complaint with the WTO and requested consultations with the U.S on 21 March 2003 with respect to the measures that affect the cross-border supply of gambling and betting services which was applied by central, regional and local authorities in the US.
2. Antigua and Barbuda thought that the absolute impact of the U.S measures was to prohibit from another WTO member to the U.S on a cross-border basis the supply of gambling and betting services.
3. Antigua and Barbuda requested for the establishment of a panel on 12 June 2003 and therefore the DSB set up a panel at its meeting on 21 July 2003.
4. Canada, the EC, Mexico, Chinese Taipei and Japan participated as the third parties to the case.
5. Antigua and Barbuda requested the Panel to find that the U.S measures restricting international money transfers and payments and its prohibition on the cross-border supply relating to gambling and betting services were inconsistent with:
    - The U.S's Schedule of specific commitments under the GATS.[53]
    - Articles XVI:1, XVI:2, XVII:1, XVII:2, XVII:3, VI:1, VI:3 and XI:1 of the GATS.[54]
6. The U.S requested the Panel to dismiss Antigua and Barbuda's claims completely.
7. The report of the panel was circulated to the members on 10 November 2004.
8. The U.S was not satisfied with certain legal interpretations created by the panel and on 7 January 2005 the U.S told the DSB of its decision to go for an appeal w.r.t certain issues of law covered in the panel report.
9. Antigua and Barbuda was not satisfied with certain legal interpretations created by the panel and on 19 January 2005 they told the DSB of its decision to go for an appeal w.r.t certain issues of law covered in the panel report.

Procedural History

By recalling Canada-Autos[55] case Antigua submits the panel that in this case the AB found that a threshold question for the application of the GATS is whether the measure at issue is a measure affecting trade in services and Pursuant to Article 7 of

[53] See Panel Report on U.S- Measures affecting the cross-border supply of gambling and betting services, para. 2.1(a).
[54] See Panel Report on U.S- Measures affecting the cross-border supply of gambling and betting services, para. 2.1(b).
[55] Appellate Body Report on Canada – Autos, para. 152. See also Article I: 1 of the GATS.

the DSU the Panel must refer to Antigua's Panel request in determining whether Antigua can challenge a “total prohibition” as a measure in this dispute or not, given that it is the Panel request that defines the terms of reference by referring to the AB’s findings in EC-Bananas III[56] case. The AB referred to the US-Corrosion Resistant Steel Sunset Review[57] case and made it clear that in the present dispute if instruments of a Member containing rules or norms could constitute a measure then it will be a subject of challenge under the DSU. In accordance with the AB’s guidance in US-Gasoline[58], US-Shrimp[59] and Korea-Various Measures on Beef[60] in respect of Article XX of the GATT 1994 the panel believes that for a measure to be justified under Article XIV when it is found to be inconsistent with one or several of the substantive obligations of the GATS then it must be subjected to a two-tiered analysis. The AB by recalling EC – Hormones[61] case stated that it is necessary to remember that a prima facie case is one which requires a panel as a matter of law to decide in favour of the complaining party if there is an absence of effective reputation by the defending party.

Issues

1. Whether the Panel slipped up in finding about the total prohibition on the cross-border supply of gambling and betting services affirmed by Antigua was neither fit for comprising an independent measure that can be challenged all by itself nor recognized as a measure in Antigua's request for the establishment of a panel?
2. Whether the Panel erred in finding the inconsistency in U.S actions w.r.t Article XVI: 1 and sub-paragraphs (a) and (c) of Article XVI: 2?
3. Whether the Panel was wrong in finding that the U.S did not demonstrate that the Wire Act, the Travel Act, and the IGBA satisfy the requirements of the chapeau of Article XIV?

Holding

Vienna Convention

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[56] Appellate Body Report on EC – Bananas III, para. 142.
[57] Appellate Body Report on US – Corrosion-Resistant Steel Sunset Review, paras. 81-82 and 88.
[58] See Appellate Body Report on US – Gasoline, p. 22.
[59] See Appellate Body Report on US – Shrimp, paras. 115–119.
[60] See Appellate Body Report on Korea – Various Measures on Beef, para. 156.
[61] Appellate Body Report on EC – Hormones, para. 104.

In this dispute it was established[62] that the customary rules of interpretation of public international law basically incorporates Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties hereinafter alluded to as the Vienna Convention and the USITC document was managed under the heading Article 32 that deals with Other supplementary means of interpretation. Panel saw that Article 32 of the Vienna Convention isn't really restricted to preparatory material however may permit treaty interpreters to think about other significant material. However, the Panel likewise referred to the 'principle of acquiescence' and to a reporter's statement that Article 31:3(b) of the Vienna Convention may likewise apply.

The AB established that a legitimate interpretation as per the principles codified in Articles 31 and 32 of the Vienna Convention prompts the very outcome that the Panel came to in particular that subsector 10.D of the U. S's GATS Schedule incorporates a particular responsibility as for gambling and betting services.

Rules on Burden of Proof

The Panel recalls the rules on burden of proof in the present dispute that is a party asserting an allegation must prove it in the WTO dispute settlement proceedings.[63] Hence, in this case Antigua has to establish and prove that the measures at issue disregard Articles XVI, XVII, VI and XI of the GATS and U.S has to prove if necessary that the challenged measures profit with the justification provisions of Article XIV of the GATS.

The Judicial Economy Principle

In concluding whether to practice judicial economy over any of Antigua's claims the Panel recalls that the principle of judicial economy is recognized in WTO law. The rule of judicial economy must be applied remembering the aim to resolve the matter at issue and to secure a positive solution to a dispute of the dispute settlement system.

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[62] See for instance Appellate Body Reports on US – Gasoline, p. 17; EC – Hormones, para. 181; India – Patents (US), para. 45; and US – Shrimp, para. 114.
[63] Panel Report on Turkey – Textiles, para. 9.57. See also Panel Report on Argentina – Textiles and Apparel, paras. 6.34-6.40.

Other Considerations[64]

1. The AB approved the Panel's finding that an alleged absolute restriction on the cross-border supply of gambling and betting services can't all by itself establish a measure subject to dispute settlement under the GATS.
2. The AB found that the Panel ought not have ruled on claims progressed by Antigua regarding eight state laws of the U.S concerning which Antigua had not made a prima facie case of irregularity with the GATS.
3. The panel's finding was approved by the AB for various reasons that the U.S Schedule incorporates a commitment to allow full market access in gambling and betting services. Specifically, throughout its understanding of the U.S Schedule the AB couldn't help contradicting the Panel's designation of two reports alluded to as W/120 and the 1993 Scheduling Guidelines as context for the interpretation of Members' Schedules, finding rather that they comprise preparatory work.
4. The AB approved the Panel's finding that the U.S acted inconsistently with Article XVI: 1 and sub-sections (a) and (c) of Article XVI: 2 by keeping up with specific constraints on market access not determined in its Schedule. The AB turned around the Panel's finding that the U.S had not shown that the three federal statutes are important to secure public ethics or to maintain public order within the significance of Article XIV (a) of the GATS and approved the Panel's finding that the U.S had neglected to show that these measures fulfill the conditions of the chapeau of Article XIV.

Case Analysis

1. It's not a point of whether the AB decision is interpreted as a victory for Antigua or the U.S but the WTO ruling is significant in a few regards because the decision legitimizes the online gambling and betting services industry that provides a tradable service recognized by the WTO and the decision places international pressure on the U.S to agree with the WTO ruling. Therefore, I find the WTO's ruling to be appropriate and AB's decision to be inconsistent.
2. So, The WTO should formally address the binding nature of previous Dispute Panel and Appellate Body decisions in order to eliminate inconsistent Appellate

[64] See Appellate Body Report, UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, para 373-374, Page 123.

Body decisions. According to me if the AB is explicitly bound by the reasoning used in past decisions, then the WTO will benefit from a Dispute Settlement system that is fair, predictable, and credible.

3. As the Antigua-U. S. WTO dispute over online gambling has demonstrated, controlling online gambling is not an issue confined to any one specific nation. Online gambling is a global issue affecting virtually all countries and consequently, any meaningful analysis of online gambling requires an international perspective. Although substantial revenues are generated from online gambling, there exist a myriad of domestic problems which accompany gambling. In light of these policy concerns and the long global history of gambling, it is imperative that all nations develop an international scheme to deal with the situation. Several countries have successfully moved toward Internet gambling regulations, such as Britain, Australia, and Belgium, all of which passed new legislation regulating online gambling.
4. Considering the decision of the Appellate Body in the Antigua- U.S case and based on the recently issued Article 21.5 Panel Report it appears that the only truly viable solution involves choosing regulation over prohibition.

Conclusion

Nations would be empowered to design their own online gambling laws with reference to specific domestic social and moral concerns by pursuing an international regulatory scheme. When the International regulation is combined with official adoption of stare decisis at WTO then it would lead to increased certainty for online gaming companies.

CASE NO. 12

WT/DS 574: UNITED STATES - MEASURES RELATING TO TRADE IN GOODS AND SERVICES

-Aaraish Mudassir[65]

Introduction

The South American country of Venezuela has the world's largest reserves of oil. The trade of oil made a large chunk of the country's economy. By the time Hugo Chavez the 45th President of the country came into power the country was started to recover after the loss in revenue in 90's. Country adapted more socialist reforms such as free

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health care. His campaign heavily criticized United States and its interest in the oil reserves of the country. Eventually Chavez overturned the privatization of state oil company PDVSA and double their revenue. He also forged a closer relationship with Cuba. He reinvested the revenue into funding social programs for the public in areas, of employment, health, education, housing, etc. He also broke the relations between the Venezuelan military and USA. He also accused USA of planning against hm and their involvement in the coup attempt against him. He was critical of US foreign policy and accusing them of having imperial interest.

USA accused Chavez's regime of seizure of power. The United States accused Chavez of destabilising democracy within the region. By the time Nicolas Maduro came into power in 2014 the relations between had become increasingly strained. On the other hand, Venezuela was suffering from humanitarian and economic crisis. President Barack Obama sanctioned against Venezuela for alleged violation against human rights. In 2017 President Donald Trump doubled down on these sanctions forcing foreign companies to stop their operations in the country threatening them sanction on failure to comply.

However, during these 2 decades U. S maintained oil trade from Venezuela until Donald Trump. The country depended largely on Venezuela for much of its oil.

Facts of the Case

Venezuela was suffering from humanitarian and economic crisis. In 2017 , USA imposed a number of sanctions on Venezuela which as per them were to prevent misuse of resources by Maduro and his associates. They also supported the opposition leader and recognised him as interim President by previous USA President and his administration. Venezuela moved before the WTO for setting up a panel to examine the sanctions.

Procedural History

In 2018 Venezuela raised a request for consultation with United States of America against the many economic sanctions related to that were originating from manufactured in Venezuela, gold imports from Venezuela, liquidity of Venezuela's public debt, transactions in Venezuelan digital currency, and several state-run body

operations such as the PDVSA , which is the country's largest state-controlled oil operation . The USA did not respond to the request and in 2019 they reapplied before the WTO Dispute Settlement Body with a request to set up a panel. However, USA as of March of 2021 has maintained its stance and had blocked the request for convening of a panel. The USA along with some other countries has refuse to recognise the President Nicola Maduro as legitimate president. The USA under Presidentship of Donald Trump went a step further and had boldly shown support for the opposition leader Juan Guaido and recognised him as the interim president. The new administrator seems to be going along with the same stance. The 2021 meeting of WTO, USA firmly asked for removal of the dispute with Venezuela on the agenda, as they believe the representative do not represent the legitimate Venezuelan government. Venezuela failed to comply, and the meeting could not go further afterwards.

Issues

1. Whether the USA is authorised to impose sanctions on Venezuela?
2. Can the Venezuelan government appeal further against the rejection by USA to enter discussion for dispute resolution?
3. Whether the sanctions were affective against the President's as was desired by the USA?
4. Whether the sanctions against Venezuela were within the exceptions under Art XXI of GATT?
5. Whether the economic problems of Venezuela and its people exacerbated due to the sanctions imposed by USA?

Holding

Since USA disrupted the last attempt for consultations and setting up a panel, Venezuela may appeal again as allowed within WTO dispute settlement process. In their previous appeal the nation has maintained that they may be allowed to reserve their right to "raise additional factual issues and legal claims under other provisions of the covered agreements in relation to the matters mentioned above during the course of the consultations and in any future request for the establishment of a panel in these proceedings."

Other Considerations

A number of nations support USA views on the illegitimacy of the Venezuelan government hence not to be allowed to apply before the WTO dispute settlement body. On the other hand, Venezuela is supported by nations such as China, Cuba, and Russia.

USA is likely to invoke the exception under Article XXI. Previously in the dispute with Nicaragua[66] , USA has expressed its view that a panel is not competent to judge in matters of national interest. The members of WTO hold similar view and have employed the exception to justify their actions. They believe that the exception is self-judging. Though whether these sanctions and whether the USA will be able to prove it as a threat to national security test is debatable.

Case Analysis

The United States relationship with WTO has become quite precarious with the previous President and his Administration often attempting to use forceful methods. The current administration has not actively moved to separate them from the views of previous administration though they may be more willing to enter into the talks with Venezuela to settle the dispute. However, we must keep in mind that United States has remained over the years firmly against interference of parties in matters directly associated with the country or what it considers pertinent to its national interest and security, and they may abandon diplomacy altogether in such a case as may be evident in Nicaragua case or Cuba.

Conclusion

The conclusion of the matter can be left to contemplation. The Biden administration has not rejected its predecessor's views which could be anything with most people believing Biden to be a better statesman hence more likely to take a diplomatic course of action. They provided temporary protected status to Venezuelan refugees.

The crisis created due to United States ballooned Venezuela's problems. Following their example European Union has also imposed certain sanctions against Venezuela. United States froze assets held by Venezuela, which made it difficult to bring money into the country. They also threatened actions against companies who continued operations in the country. The affect has been felt by the people more than the

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[66] US – Nicaraguan Trade L/6053

government. The argument by United States as these actions been taken for the sake of saving democracy, stability in the region and violation of human rights is quite slim. Considering the fact that the countries like Russia, Israel and China continue to violate human rights, stifle opposition or voices attempting to criticize is quickly trampled on. United States dares not to take action for fear of retaliation. To those who may be willing to so consider may see this is an effort to destabilize Venezuela to secure their own interest. United States has been accused multiple time not just by Venezuela but other nations as having imperial interest, and that they conceal their interest behind a concern for democracy and human rights. On the other hand, United States is just doing what it does being a world leader, a champion for human rights, and democracy.

CASE NO. 13

DS 447: UNITED STATES - MEASURES AFFECTING THE IMPORTATION OF ANIMALS, MEAT AND OTHER ANIMAL PRODUCTS FROM ARGENTINA

-Yash A. Jodhani[67]

Introduction

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The Agreement to the Use of Sanitary and Phytosanitary Measures (the "SPS Arrangement") went into power with the foundation of the World Trade Organization on 1 January 1995. It concerns the utilization of food handling and creature and plant health regulations. This introduction talks about the content of the SPS Agreement as it shows up in the Final Act of the Uruguay Round of Multilateral Trade Arrangements, endorsed in Marrakesh on 15 April 1994. This arrangement and others contained in the final Act, alongside the General Agreement on Tariffs and Trade as amended (GATT 1994), are essential for the settlement which set up the World Trade Organization (WTO). The WTO supplanted the GATT as the umbrella association for global exchange.

The Agreement on the Application of Sanitary and Phytosanitary Measures sets the essential guidelines for food handling and creature and plant wellbeing norms. It permits nations to set their own norms. Yet, it likewise says guidelines should be founded on science. They ought to be applied uniquely to the degree important to ensure protection of human, creature or vegetation or wellbeing. What is more, they ought not discretionarily or outlandishly segregate between nations where indistinguishable or comparable conditions win. The arrangement actually permits nations to utilize various norms and various techniques for reviewing/inspecting products.

Member nations are urged to utilize international standards, rules, and proposals where they exist. In any case, individuals may utilize measures which bring about better expectations if there is scientific avocation. They can likewise set better expectations dependent on fitting appraisal of dangers insofar as the methodology is steady, not subjective.

The fact in this dispute is separated into four areas are as follow:

1. Section A examines what is in question in this dispute: the exposure of millions of cloven-hoofed animals to perhaps the most infectious and crippling domesticated animals' illnesses in the world; specifically, foot and mouth sickness. Due to FMD's survivability, contagiousness, furthermore, capacity to debilitate, it is universally perceived as a basic danger to the economic livelihood of numerous nations, including the United States.

2. Segment B portrays how FMD has been a long-term scourge in Argentina and has over and over destroyed to its animal crowd and the horticultural local area that depends on it. Argentina has battled to control FMD. In light of flare-ups somewhere in between of 2000 and 2002 that at last uncovered a larger number of than 2 million creatures to FMD, Argentina's reaction was to cover the flare-ups from the world and postpone making a viable move to stop the sickness. Simultaneously, Argentina proceeded to sell and fare possibly influenced meat in worldwide business sectors. The illness kept on influencing Argentina, confirmed by the way that the nation revealed extra FMD flare-ups through 2006.

3. Segment C examines, as a stark contrast, the shortfall of FMD in the United States for more than eighty years. The United States has set up an intensive arrangement of FMD surveillance, dentification, and control inside and outside its lines. National and local authorities give significant assets to planning for a potential FMD outbreak in the United States. As a feature of its FMD control technique, the US likewise furnishes specialized help and effectively helps out different nations to control and destroy FMD around the world.

4. Section D examines the science-based administrative interaction through which the United States approves importation of creature and creature items that are defenceless to FMD. It then, at that point subtleties the historical backdrop of Argentina's solicitation for import approval, which happened in the middle of times of FMD outbreaks, soon after the 2000 – 2002 FMD flare-ups. This segment additionally features the difficulties according to an administrative point of view that came about because of Argentina's covering of its FMD outbreaks.

FMD is an exceptionally infectious viral disease that influences all cloven-hoofed homegrown domesticated animals and wild animals. Susceptible creatures incorporate steers, sheep, goats, pigs, also water buffaloes. FMD has genuine long-term impacts on tainted animals. Entanglements incorporate tongue disintegrations, auxiliary disease of sores, foot distortion, mastitis and lasting decrease in milk creation,

myocarditis, foetus removal, lasting deficiency of weight, and loss of warmth control. By crippling, and not killing, grown-up creatures, "the infection bridles its hosts as tolerant vectors of virus."

Procedural History

On August 30, 2012, Argentina mentioned counsels with the United States according to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the Overall General Agreement on Tariffs and Trade, 1994 ("GATT 1994"), and Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Understanding"), concerning US estimates influencing the importation of creatures, meat and other creature items from Argentina.

- The United States & Argentina held discussions on October 18 and 19, 2012, however could not resolve the debate.

- Argentina mentioned the foundation of a board on December 6, 2012.The WTO Dispute Settlement Body (DSB) set up the board with standard terms of reference on January 28, 2013. On July 29, 2013, Argentina mentioned that the Director General create the board in accordance with Article 8.7 of the DSU. The Chief General formed the Board on August 8, 2013.

Issues of the Case

1. Argentina contends that the actions at issue are SPS measures covered by Article 1.1 & Annex A(1)(a).

2. The situation of the United States is that a country that vaccinates for FMD is not liberated from the disease?
3. What import prerequisites, assuming any, would be shown by the Terrestrial Code in such a circumstance? Should similar prerequisites be applied to items beginning from the zone where the outbreak happened as to items from different pieces of the exporting country?

Holding

- The United States actions are conflicting with Article 3.1 of the SPS Arrangement (harmonization) since they are not founded on the OIE Terrestrial Code, which is the applicable international standard.

- The United States did not embrace and finish the assessment of Argentina's solicitations right away as required by Article 8 and Annex C(1)(a) of the SPS Agreement.
- The United States actions were not kept up with dependent on a danger assessment and along these lines are conflicting with Articles 5.1 and 2.2 of the SPS Agreement.
- There is no sure obligation in Article 5.4 of the SPS Arrangement (objective of limiting negative trade impacts while deciding the proper degree of protection) and along these lines no violation.
- The United States actions are conflicting with Article 2.3 of the SPS Arrangement (non-segregation) since they arbitrarily and unjustifiably separate between members where indistinguishable or comparative conditions win (Northern Argentina and Uruguay from one viewpoint and Patagonia and Santa Clause Catarina "Brazil" on the other) and are applied in a way which comprises a hidden limitation on worldwide exchange.

- Argentina did not make an at prima facie case that the US actions are conflicting with Article 10.1 of the SPS Agreement necessitating that the US assess Argentina's uncommon requirements as a developing country member.

Other Consideration

The United States response to the proof and contentions introduced by Argentina has been to misrepresent Argentina's cases as being subsumed in its unjustifiable defer claims. Hence, the United States contends that the Board should restrict its survey of Argentina's cases under Articles 8 and Article 5.7. The United States approach is profoundly defective on the grounds that it neglects to recognize Argentina's cases and the United States measures being tested. Argentina raised a few meaningful self-governing claims under the SPS Arrangement and the GATT 1994, which don't rely

upon the Board's goal of Argentina's cases of unjustifiable postponement under Article 8 and Annex C and which are based on various United States arrangements. The Board ought to continue with the examination of cases in the request in which Argentina has introduced them in its Previously First Written Submission.

Case Analysis

The United States measures (9 CFR 94.1, as amended by the 2001 Guidelines, the use of 9 CFR 92.2 to Argentina’s applications for approval to import for fresh (chilled or frozen) beef from Northern Argentina, and FMD-powerless animals and animal products from Patagonia, and Area 737) are SPS estimates liable to the disciplines of the SPS Agreement. The Board tracks down that 9 CFR 94.1, as amended by the 2001 Guidelines, did not depend on the relevant provisions of the Terrestrial Code and is accordingly conflicting with Article 3.1 of the SPS Agreement.

In regard of the Argentina's cases under the GATT 1994, the Board noticed that it had effectively tracked down that the US's actions are conflicting with Articles 1.1, 2.2, 2.3, 3.1, 3.3, 5.1, 5.6, 6.1, 8 and Extension C(1)(a) and (b) of the SPS Understanding. Consequently, the Board practiced legal economy over Argentina's cases under Articles I(1) and XI(1) of the GATT 1994 and the US's protection under Article XX(b) of the GATT 1994. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations accepted under a covered arrangement, the activity is considered prima facie to constitute a case of nullification or disability of advantages under that understanding. In like manner, I infer that to the degree that the US has acted conflictingly with the predefined arrangements of the SPS Understanding, it has invalidated or disabled advantages accumulating to Argentina under that arrangement.

According to Article 19.1 of the DSU, having tracked down that the US acted conflictingly with its obligations under Articles 1.1, 2.2, 2.3 3.1, 3.3, 5.1, 5.6, 6.1, 8 & Annex C(1)(a) and (b) of the SPS Understanding, I suggest that the DSB demand the US to carry its actions into similarity with its commitments under the SPS Arrangement.

Conclusion

I conclude that this dispute concerns the United States maintenance of an import preclusion on all Foot & Mouth disease (FMD) defenceless creatures and creature

items from Argentina forced after an episode of FMD in Northern Argentina in 2001. The general ban is gone ahead in Section 94.1 of Title 9 of the United States Federal Regulations. Argentina mentioned re-approval to import:

- new (chilled or frozen) meat from Northern Argentina, &
- all FMD-defenceless animals and animal items from Patagonia in 2002.

Accordingly, the US noticed that FMD is viewed as quite possibly the most irresistible and economically devastating domesticated animals' infections. The US likewise clarified that it had not had an instance of FMD for over 80 years and that animals in the US are not inoculated against FMD. In this way an outbreak would be especially wrecking to the US economy. The US stated that the survey by the Animal and Plant Health Inspection Service (APHIS) — the significant office of the Division of Farming - of Argentina's applications for authorisation to import had been embraced right away considering the requirement for new and refreshed data on the circumstance in Argentina. In that equivalent vein, the US argued that its actions were canvassed under the exclusion in Article 5.7 of the SPS Arrangement, which considers measures to be embraced in situations where important logical proof is deficient.

As in practically all disputes brought under the SPS Agreement, the Panel consulted with scientific experts to help it in assessing the scientific evidence. Specifically, specialists were occupied with the risk assessment techniques, veterinary practices, and surveillance in the context of foot-and-mouth disease. The Board additionally consulted with the OIE concerning the activity and interpretation of its Terrestrial Animal Health Code.

CASE NO. 14

DS 287: AUSTRALIA-QUARANTINE REGIME FOR IMPORTS

- Timur Abdusamatov[68]

Introduction

Any global health crisis almost always has an adverse effect on the global economy and the economies of individual countries. Epidemics hinder world trade and numerous industries around the world face grave monetary losses. As a desperate measure, many nations in such dark times implement protectionist theories as recourse to save their economy. There are a multitude of laws and agreements within the World Trade Organization (WTO) that restrict and prevent protectionism from being implemented by Member States. The Agreement on the Application of Sanitary

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and Phytosanitary Measures (the SPS Agreement) is one such agreement that was established by the WTO on January 1st of 1995 mainly for the purpose of two things; (1) to provide a set of basic rules for food safety and animal and plant health standards. Member states are allowed to set their own standards and regulations; however, these standards and regulations must be based on science.[69] (2) Although by nature sanitary and phytosanitary measures may result in trade restrictions, SPS also ensures that unjustified sanitary and phytosanitary measures are not implemented for the purpose of trade protection. The agreement provides sovereign right to any member state to set the level of health protection it deems appropriate, nevertheless the agreement also ensures that governments don't misuse these rights to create barriers in international trade.[70]

Facts of the Case

The European Communities (EC) requested consultation Australia with regard to its quarantine regime for imports on April 3rd, 2003.

The European Communities has requested the WTO to rule on the legality of the Australian quarantine regime with regard to the restrictions on imports of certain food products of European Union's interest.

According to EC's claim, the import of deboned pig meat from Denmark that is later to be processed in Australia is permitted by the Australian government.

However, the import of pig meat that has been processed in Denmark is not permitted.

EC's claim states that the processing requirement may be more trade-restrictive than for the purpose of protection against Porcine Reproductive and Respiratory Syndrome (PRRS) in Australia.

[69] https://www.wto.org/english/tratop_e/sps_e/spsund_e.htm
[70] https://academic.oup.com/ejil/article/24/2/503/494119

Furthermore, the request for processing of pig meat or deboned pig meat from other European Union Member States has been denied by Australia.

The import of poultry meat can be permitted by Australia if it has been cooked for a long period of time under high temperatures for the purpose of preventing the entry of infectious bursal disease (IBD).

According to EC's claim, IBD may be already present in Australia's poultry flock and the government of Australia is not putting in efforts to eradicate it.

Therefore, EC also claims that Australia's requirements for the processing of imported poultry acts more as a trade barrier and is more trade-restricting than necessary for protection against IBD in Australia.

Procedural History

Consultation was requested with Australia by the EC on April 3rd, 2003. Philippines and Chile requested to join the consultation on April 16th, 2003. Canada and India requested to join the consultation on April 22nd, 2003. Establishment of Panel was requested by EC on August 29th, 2003. The establishment of the Panel was deferred by the Dispute Settlement Board (DSB) on October 2nd, 2003. Revised request for establishment of Panel was made on October 14th, 2003. Panel was established by the DSB on November 7th, 2003. Notification of a mutually agreed solution between Australia and the EC was made to the DSB on March 9th, 2007.

Issues

1) Are the import restrictions for processed deboned pig meat in Australia truly necessary to protect its citizens from Porcine Reproductive and Respiratory Syndrome or are these restrictions made for protectionisms purposes and restriction of free trade?
2) Are the processing requirements for poultry meat imposed in Australia necessary for protecting Australia from infectious bursal disease or are these requirements more of trade-restrictive practices?

Holding

Both the parties have come to a mutually agreed solution which addresses the European Communities' concern as well respects and takes into consideration

Australia's SPS legislation and import development process. Australia has agreed to enhance the transparency of its quarantine regime as well as the principles of treatment of market access applications from its European partners. Further expert discussions have also been agreed upon in the scientific aspects of trade in poultry meat and pig meat and how to prevent the different diseases that may arise out of them during transportation.

Other Considerations

Australia decides whether to impose a quarantine measure such as banning the import of certain products based on a process known as an Import Risk Analysis (IRA). Risk Analysis plays an important role in Australia's biosecurity protection, it assists the Government of Australia in considering the level of quarantine risk that may be result with the import of certain plants, animals or other goods into Australia.[71] IRA's are conducted by the Biosecurity Service Group of Australia which is a part of the Department of Agriculture, Fisheries, and Forestry. IRAs are done by technical and scientific experts in relevant fields and involve consultation with the stakeholders. Australia's sanitary and phytosanitary protection is of very high standard, with the Australian Government expressing defining it as "providing a high level of SPS protection aimed at reducing risk to very low level but not zero."[72] The Australian Government recognizes that a zero-risk stance would mean restricting tourism, international travel, and all imports and therefore such a stance would be very impractical. Therefore, these points have been considered by the European Union when coming to a mutual understanding. The Australian Government adheres to science-based process when assessing for quarantine import risk, however this process in the given case was not as transparent as it should have been and both the parties have come to a mutual agreement of making the IRA process more transparent to Australia's trade partners and to the rest of the WTO Member States.

Case Analysis

The core function of the WTO is to ensure a free and smooth flow of trade around the world. The SPS Agreement, being one the of the WTO agreements, does a little more than that; it aims to strike a balance between the Member State's right to set their own

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[71] https://assets.ippc.int/static/media/files/cnpublications/2013/06/05/1366783022_import-risk-analysis-handbook-20.pdf
[72] Import Risk Analysis Handbook 2011, pg. 33.

restrictions and measures protecting human, animal, and plant life and health, and on the other hand, the negative effects such restrictions may cause in terms of free trade. The SPS Agreement along with the bodies applying its rules often face criticism where its critiques highlight that more often than not anti-protectionism rules emphasized over the Member State's sovereign right to set their own restrictions for the benefit of human, animal, and plant health and life. The mentioned case is a classic example of such an instance.

It is important to highlight the time period at which the Australian restriction on pig meat and poultry meat were active. 2002-2004 was when the (Severe Acute Respiratory System) SARS epidemic broke out and therefore it was reasonable for nations around the world to enhance and improve their food import policies. Considering that the first people affected by the outbreak were farmers, market vendors, chefs, and people in the food industry, Australia's high standards for food processing was reasonable and understandable.

The shortcomings, however, are that Australia failed to provide scientific risk assessment to the WTO with regards to their restrictions.[73] Therefore, the EU rightfully contested Australia's imposition of quarantine rules which blocked imports without scientific justification.

The case concluded with a mutual agreement between both the parties. In my opinion, the mutually agreed solution was the best possible outcome that could be reached in this case as Australia enhanced the transparency of its quarantine regime, therefore providing justification for the import restrictions that it imposed and hence satisfying the SPS Agreement's terms.

Conclusion

Maintaining good human, animal, and plant life and health is a fundamental duty that all nations must fulfill. The SPS Agreement provides the basic standards in this regard for all its Member States while allowing them to set their standards and restrictions considering that they provide adequate scientific justification for these restrictions to prevent nations from using their sovereign right to create barriers in international trade. The mentioned case is an example of how the SPS Agreement in the WTO can

[73] https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1184

be implemented to resolve issues between governments through peaceful negotiations and mutual understanding.

CASE NO. 15

D467: AUSTRALIA-CERTAIN MEASURES CONCERNING TRADEMARKS, GEOGRAPHICAL INDICATIONS AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBBACO PRODUCTS AND PACKAGING

- Nidhi P Gopan[74]

Facts of the Case

1. On 20 September 2013, Indonesia requested consultations with Australia concerning certain Australian laws and regulations that impose restrictions on trademarks, geographical indications, and other plain packaging requirements on tobacco products and packaging.
2. Indonesia challenged the following measures:

- The Tobacco Plain Packaging Act 2011, Act No. 148 of 2011, "An Act to discourage the use of tobacco products, and for related purposes".
- The Tobacco Plain Packaging Regulations 2011 (Select Legislative Instrument 2011, No. 263), as amended by the Tobacco Plain Packaging Amendment Regulation 2012 (No. 1) (Select Legislative Instrument 2012, No. 29).
- The Trademarks Amendment (Tobacco Plain Packaging) Act 2011. Act No. 149 of 2011, "An Act to amend the Trademarks Act 1995, and for related purposes"; and
- Any related measures adopted by Australia, including measures that implement, complement, or add to these laws and regulations, as well as any measures that amend or replace these laws and regulations.

3. Indonesia claims that Australia's measures appear to be inconsistent with Australia's obligations under:

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- Articles 2.1, 3.1, 15.4, 16.1, 16.3, 20, 22.2(b) and 24.3 of the TRIPS Agreement.
- Articles 2.1 and 2.2 of the TBT Agreement; and
- Article III:4 of the GATT 1994.

4. On 26 September 2013, Guatemala requested to join the consultations. On 27 September 2013, Nicaragua requested to join the consultations. On 30 September 2013, New Zealand requested to join the consultations. On 1 October 2013, Uruguay requested to join the consultations. On 2 October 2013, Ukraine requested to join the consultations. On 3 October 2013, the European Union and Honduras requested to join the consultations.
5. On 4 October 2013, Brazil, Canada, the Dominican Republic, and Norway requested to join the consultations. On 11 October 2013, Cuba requested to join the consultations. Subsequently, Australia informed the DSB that it had accepted the requests of Brazil, Canada, Cuba, the Dominican Republic, the European Union, Guatemala, Honduras, New Zealand, Nicaragua, Norway, Ukraine, and Uruguay to join the consultations.

Procedural History

1. On 3 March 2014, Indonesia requested the establishment of a panel.
2. At its meeting on 26 March 2014, the DSB established a panel. Brazil, Canada, China, Cuba, the European Union, Guatemala, Honduras, India, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, the Philippines, the Russian Federation, Chinese Taipei, Thailand, Turkey, Ukraine, the United States and Uruguay reserved their third-party rights. Subsequently, Argentina, Chile, the Dominican Republic, Ecuador, Malawi, Peru, Singapore, and Zimbabwe reserved their third-party rights.
3. On 23 April 2014, Australia requested the Director-General to compose the panel. On 5 May 2014, the Director-General composed the panel. On 10 October 2014, the Chair of the panel informed the DSB that the panel expected to issue its final report to the parties not before the first half of 2016, in accordance with the timetable adopted by the panel on 17 June 2014 based on a draft timetable proposed by the parties. On 29 June 2016, the Chair of the panel informed the DSB that due to the complexity of the

dispute, the panel expected to issue its final report to the parties not before the end of 2016. On 1 December 2016, the Chair of the panel informed the DSB that in light of the complexity of the legal and factual issues that arise in this dispute, the panel expected to issue its final report to the parties not before May 2017. On 21 September 2017, the Chair of the panel informed the DSB that in light of the of the complexity of the legal and factual issues that have arisen in this dispute, the Panel expected to issue its final report to the parties by the end of the third quarter of 2017.

4. On 28 June 2018, the panel report was circulated to Members.

Issues Involved

1. Whether the TPP measures are "more trade-restrictive than necessary to fulfil a legitimate objective" within the meaning of Article 2.2?
2. Whether the special requirements in the TPP measures encumber the "use of a trademark" "in the course of trade"?
3. Whether the Article 11 and Article 13 FCTC Guidelines constitute a "standard" for tobacco plain packaging within the meaning of Annex 1.2 of the TBT Agreement?

Holding

1. In respect of the claims developed by the complainants, the Panel found that:

- The complainants had not demonstrated that Australia's tobacco plain packaging measures (the TPP measures) are inconsistent with Article 2.2 of the TBT Agreement on the basis that they are more trade-restrictive than necessary to achieve a legitimate objective.
- The complainants had not demonstrated that the TPP measures are inconsistent with Article 6quinquies of the Paris Convention (1967), as incorporated into the TRIPS Agreement by Article 2.1 thereof, on the basis that Australia does not accept for filing and protect “as is” every trademark duly registered in the country of origin;
- The complainants had not demonstrated that the nature of the goods to which the TPP measures apply (i.e., “tobacco products”) forms an obstacle to the registration of trademarks in violation of Article 15.4 of the TRIPS Agreement;

- The complainants had not demonstrated that the TPP measures are inconsistent with Article 16.1 of the TRIPS Agreement on the basis that they stop the owner of registered tobacco trademarks from preventing unauthorized use of identical or similar tobacco trademarks on identical or similar products where such use would result in a likelihood of confusion.
- The complainants had not demonstrated that the TPP measures are inconsistent with Article 16.3 of the TRIPS Agreement on the basis that they prevent tobacco trademarks from acquiring "well-known" status and prevent already "well-known" trademarks from maintaining that status.
- The complainants had not demonstrated that the TPP measures are inconsistent with Article 20 of the TRIPS Agreement on the basis that the measures unjustifiably encumber the use of tobacco trademarks in the course of trade.
- The complainants had not demonstrated that the TPP measures are inconsistent with Article 10bis of the Paris Convention (1967), as incorporated into the TRIPS Agreement by Article 2.1 thereof, on the basis that the measures compel market actors to engage in prohibited acts of unfair competition, or that Australia fails to provide effective protection against acts of unfair competition.
- The complainants had not demonstrated that the TPP measures are inconsistent with Article 22.2(b) of the TRIPS Agreement on the basis that the TPP measures compel market actors to engage in acts that would amount to misleading indications or allegations about product characteristics within the meaning of Article 10bis(3)(3) of the Paris Convention (1967) in respect of geographical indications.
- The complainants had not demonstrated that the TPP measures are inconsistent with Article 24.3 of the TRIPS Agreement on the basis that the protection that geographical indications enjoyed immediately before 1 January 1995 has been diminished as a result of the TPP measures; and
- Cuba had not demonstrated that the TPP measures are inconsistent with Article IX:4 of the GATT 1994 on the basis that they do not constitute "laws and regulations relating to the marking of imported products" within the meaning of Article IX:4, and that in any case, Cuba had not demonstrated that

the restrictions imposed by the TPP measures would lead to a material reduction in the value of the Habanos sign and the Cuban Government Warranty Seal within the meaning of Article IX:4.

2. The Panel made no findings in respect of the complainants' claims that the TPP measures are inconsistent with Article 2.1 of the TRIPS Agreement (incorporating Article 6bis of the Paris Convention (1967)), Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994, considering the absence of argumentation put forth by the complainants in respect of these claims.

Case Analysis

1. The complainants have made claims under the TRIPS Agreement and the TBT Agreement. In addition, Cuba has made a claim under the GATT 1994. We therefore first consider the order in which we should address these claims.
2. As observed by some of the complainants, panels are free to structure the order of their analysis as they see fit and may find it useful to do so taking account of the manner in which a claim is presented to them by a complaining member[75]. However, this is true only to the extent that, based on the "structure and logic" of the provisions at issue, there is no "mandatory sequence of analysis which, if not followed, would amount to an error of law" or would "affect the substance of the analysis itself".[76]
3. We have note that there is no explicit hierarchy between the TRIPS Agreement and the TBT Agreement, which appear in distinct parts of Annex 1 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). We therefore see nothing on the face of those two agreements that would suggest that the adoption of a specific sequence of analysis is mandated. We also note that the complainants have presented arguments, first, under the TRIPS Agreement; second, under the TBT

[75] Appellate Body Report, Canada – Wheat Exports and Grain Imports, paras. 126-127.
[76] Appellate Body Report, Canada – Wheat Exports and Grain Imports, para. 109. See also Appellate Body Reports, Canada – Renewable Energy / Feed-in Tariff Program, para. 5.5; and Panel Reports,
EC – Seal Products, para. 7.63.

Agreement; and third (in Cuba's complaint) under the GATT 1994.[77] Australia has also presented its responses to these claims in the same order. The complainants generally see the cumulative nature of the obligations invoked as indicating that there is no obligation for us to address their claims in a particular order, and none of them contends that there is any mandatory sequence of analysis which, if not followed, would amount to an error of law.

4. It has also been established that a claim under the more specific and detailed WTO agreement should be addressed before a claim under a similar more general provision in another agreement. In line with this principle, the panel in EC – Sardines stated that, "if the [measure at issue] is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994".Accordingly, to the extent that the challenged measure was found to be covered by the TBT Agreement, several panels have addressed claims under the TBT Agreement before addressing concurrent claims under the GATT 1994.[78]

Conclusion

According to the case analysis, The Panel declines to rule on Cuba's claims under Article 2.1 of the TRIPS Agreement in conjunction with Article 6b is of the Paris Convention (1967), Article 3.1 of the TRIPS Agreement, Article 2.1 of the TBT Agreement, and Article III:4 of the GATT 1994, in respect of which Cuba presented no arguments. The Panel also declined Cuba's request that the Panel recommended, in accordance with Article 19.1 of the DSU, that the DSB request Australia to bring its measures into conformity with the TRIPS Agreement, the TBT Agreement and the GATT 1994.

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[77] 0 Panel Report, EC – Sardines, para. 7.16. See also Panel Report, EC – Asbestos, paras. 8.16-8.17; Panel Reports, US – COOL, para. 7.73

[78] See Panel Reports, EC – Sardines; US – Clove Cigarettes; US – Tuna II (Mexico); EC – Seal Products; US – COOL; and US – COOL (Article 21.5 – Canada/Mexico). We also note that, in accordance with
the General interpretative note to Annex 1A, in the event of a conflict between a provision of the GATT 1994
and the TBT Agreement, the provisions of the TBT Agreement would prevail to the extent of the conflict.

CASE NO. 16

DS 430: INDIA - MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

- Janavi H S[79]

Introduction

This dispute concerns measures that India imposes on the importation of various agricultural products because of concerns related to AI. In this section of the Report, the Panel will describe the disease, the measures at issue as identified in the United States' panel request, and the broader factual context of the dispute. This includes a description of India's notifications of its AI measures to the WTO Secretariat, India's measures affecting importation of agricultural products other than the measures at issue in this dispute, India's AI measures affecting domestic agricultural products, the parties' domestic disease situations, and the Terrestrial Code. The Panel notes that the parties disagree on a number of factual issues. To the extent that it is necessary for the Panel to resolve those disputed factual issues, it will do so in its Findings.

Facts of the Case

1. On 6 March 2012, the United States requested consultations with India with regards to the prohibitions imposed by India on the importation of varied agricultural products from the United States of America purportedly due to the concerns related to Avian Influenza.
2. The measures at issue are: the Indian Livestock Importation Act, 1898. In which the 9 section of the livestock act of 1898 as been considered has the up tackle towards the importation of united states agricultural product. Here, the

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livestock has issued many amendments, related measures or any other implementing measures regarding the India's department of animal husbandry, dairying and fisheries.

3. The claims by the United States were that the measures taken by India are inconsistent with:
    - Article 2.3, 2.2, 3.1, 5.2, 5.1, 5.6, 5.5, 5.7, 6.1, 6.2, 7 and annex B, paragraph 2, 5 and 6 of the SPS agreement and
    - Article I and XI of the GATT acts, 1994.
4. It has been said that the United States also claims that the measures taken appear to nullify or become a barrier towards the benefits that are accruing to the United States directly or indirectly under the cited agreements.
5. Colombia sent a request on 15 March 2012, regarding their interest in taking part in the consultations. The United States requested the establishment of a panel on 11 may 2012. The DSB deferred the establishment of a panel at its meeting on 24 may 2012.
6. A panel was established on 25 June 2012 at its meeting by the DSB. The third-party rights were reserved by Colombia, China, Ecuador, the European Union, Japan, Guatemala, and Viet Nam. Subsequently, Brazil, Australia and Argentina reserved their third-party rights.
7. The Director-General was requested by united states to determine the composition of the panel on 7 February 2013. The Director-General composed the panel on 18 February 2013. On 5 August 2013, the DSB was informed by the chair of the panel that the expected report from the panel will be issued by them no sooner than June 2014 based on the scale and complexity of the dispute.
8. The panel report was circulated to Members on 14 October 2014.[80]

Procedural History

As part of capacity-building efforts, the Standards and Trade Development Facility (STDF) supports governments and the private sector in developing countries to address sanitary and phytosanitary (SPS) capacity gaps. The STDF has a target of dedicating at least 40% of total project financing allocated to LDCs or Other Low-

[80] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds430_e.htm

Income Countries. There is also a lower co-financing requirement for technical assistance: beneficiaries from LDCs and OLICs contribute at least 10% of the requested STDF contribution to a project, as opposed to 20% for lower-middle-income countries and 60% for upper-middle-income countries (STDF Operational Rules). Graduation could lead to an increase in the terms of co-financing, from 10% to 20% (WTO/EIF, 2020).

Issues

1. Whether India's AL measures are inconsistent with articles 3.1 of the SPS agreement?
2. Whether India's AI measures are inconsistent with article 5.1, 5.2 and 2.2 of the SPS agreement?
3. Whether India's AI measures are inconsistent with article 2.3 and 5.5 of the SPS agreement?
4. Whether India's measures are inconsistent with article 5.6 and consequently, article 2.2 of the SPS agreement?

Holdings

Articles 2.2, 5.1, and 5.2 of the SPS Agreement. The Appellate Body agreed with the Panel that its finding, that India's AI measures are inconsistent with Articles 5.1 and 5.2 because they are not based on a risk assessment, raised a presumption that those measures are also inconsistent with Article 2.2. However, the Appellate Body found that, by failing to consider whether such presumption had been rebutted by arguments and evidence presented by India to establish a scientific basis for its import prohibitions on fresh poultry meat and eggs from countries reporting low pathogenicity AI (LPNAI), the Panel erred in its application of Article 2.2. The Appellate Body also upheld the Panel's findings that India's AI measures are inconsistent with Articles 5.1 and 5.2.

Articles 3.1 and 3.2 of the SPS Agreement. The Appellate Body found that the Panel did not, as India contended, act inconsistently with Article 11.2 of the SPS Agreement or Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Terrestrial Code. After also rejecting claims raised by India under Article 11 of the DSU, the Appellate Body upheld the Panel's findings under Articles 3.1 and 3.2

that India's AI measures are neither "based on", nor "conform to", the relevant international standard (i.e., Chapter 10.4 of the OIE Terrestrial Code).[81]

Article 5.6 and Article 2.2 of the SPS Agreement. In addressing India's claim that the Panel erred in its application of Article 5.6 to India's AI measures, the Appellate Body found that the Panel did not err in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection, and that the Panel did not fail to identify the alternative measures with precision. After also rejecting claims raised by India under Article 11 of the DSU, the Appellate Body upheld the Panel's findings that India's AI measures are inconsistent with Article 5.6 because they are significantly more trade-restrictive than required to achieve India's appropriate level of protection with respect to the products covered by Chapter 10.4 of the OIE Terrestrial Code, and found it unnecessary to address the Panel's finding under Article 2.2.

Other Considerations

As with the majority of SPS cases, the Panel decided to seek advice on certain aspects of the dispute from experts and international organizations. The Panel consulted with the OIE on the interpretation of the OIE Terrestrial Code and with three individual experts on AI surveillance regimes with particular respect to India's domestic measures and its disease situation.

With respect to India's first request for a preliminary ruling, the Panel issued a preliminary ruling on 22 May 2013 that was circulated to Members on 28 June 2013 and was later incorporated by reference into the Panel's Report.

The Panel responded to India's second request for a preliminary ruling in its Report. The Panel found, inter alia, that:

- Two of India's legal instruments that had not been explicitly mentioned in the United States' panel request were not measures at issue; and

[81] http://www.who.int/topics/influenza/en/>. 22 Swayne & Halvorson, (Exhibit US-6), p. 153. 23 OIE's response to Panel question No. 3. FAO, "What is avian influenza?", accessed 17 January 2014.

- The United States was under no obligation to identify in its panel request India's rules applicable to domestic products in order to be able to rely on them in support of its arguments under Article 2.3 of the SPS Agreement.

In respect of the United States’ claims pursuant to the SPS Agreement, the Panel found as a preliminary matter that India's AI measures are SPS measures within the meaning of Annex A(1) of the SPS Agreement and are subject to the disciplines of the Agreement.

Having found that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement, the Panel found it unnecessary to rule on the United States' alternative claim under Article 5.5 of the SPS Agreement. The Panel also found that the United States failed to make a prima facie case of violation of Annex B(5)(c) of the SPS Agreement (provide upon request to other Members copies of proposed regulations).

Finally, having found that India's AI measures are inconsistent with the provisions of the SPS Agreement as described above, the Panel found it unnecessary to rule on the United States' claim under Article XI of the GATT 1994 (general elimination of quantitative restrictions).

Critical Analysis

This dispute concerns India's import prohibition affecting certain agricultural products from countries reporting Notifiable Avian Influenza (NAI) to the World Organisation for Animal Health (OIE). This import prohibition is maintained through India's Avian Influenza (AI) measures, namely:

- Livestock Importation Act 1898 (9 of 1898) (Livestock Act) published on 12 August 1898, as amended by the Livestock Importation (Amendment) Act 2001 (No. 28 of 2001) (Livestock Amendment Act), and published in the Gazette of India on 29 August, 2001, and

- Statutory Order (S.O.) 1663(E) issued by India's Department of Animal Husbandry, Dairying, and Fisheries (DAHD) pursuant to the Livestock Act and published in the Gazette of India on 19 July 2011.

The United States complained that India's AI measures amounted to an import prohibition that was not based on the relevant international standard (the OIE Terrestrial Code) or on a scientific risk assessment. In particular, the United States requested the Panel to find that India's AI measures were inconsistent with a number of provisions of the Sanitary and Phytosanitary (SPS) Agreement: Article 2.2, Article 2.3, Article 3.1, Articles 5.1, Article 5.5, Article 5.6, Articles 6.1 and 6.2, and Article 7 of the SPS Agreement, as well as Article XI of the GATT 1994 (general elimination of quantitative restrictions).

On 8 December 2015, India and the United States informed the DSB that they had agreed that the reasonable period of time for India to implement the DSB recommendations and rulings shall be 12 months from the date of adoption of the Appellate Body and panel reports. Accordingly, the reasonable period of time was set to expire on 19 June 2016.

On 7 July 2016, the United States requested the authorization of the DSB to suspend concessions or other obligations pursuant to Article 22.2 of the DSU because India has failed to comply with the recommendations and rulings of the DSB in this dispute within the reasonable period of time for India to do so. On 18 July 2016, India objected to the level of suspension of concessions or other obligations and referred the matter to arbitration pursuant to Article 22.6 of the DSU. At the DSB meeting on 19 July 2016, it was agreed that the matter was referred to arbitration pursuant to Article 22.6 of the DSU.

On 22 September 2016, India informed the DSB that it had adopted additional measures to address concerns bilaterally expressed by the United States in respect of the measures notified on 18 July 2016. India considered that through these measures it had complied with the recommendations of the DSB by bringing its measures into conformity with its WTO obligations. India thus urged the United States to terminate the Article 22.6 proceedings in this dispute. In addition, India noted that it had unsuccessfully attempted to reach a sequencing agreement with the United States.

Conclusion

The compliance panel was composed by the original panellists. On 23 November 2017, the Chair of the compliance panel informed the DSB that, due to the complexity of the issues in dispute, the compliance panel expected to issue its final report to the

parties by the end of May 2018. The Chair explained that the report would be available to the public once it was circulated to the Members in all three official languages, and that the date of circulation depended on completion of translation. The Chair of the compliance panel informed the DSB of several joint requests from the parties to postpone the issuance of its final report. In its most recent communication, dated 12 April 2021 the Chair of the compliance panel informed the DSB that it had accepted an additional joint request from the parties to postpone the issuance of its report until the end of September 2021.

CASE NO. 17

DS 406: UNITED STATES-MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES

-Bhavatharini M[82]

Introduction

This case[83] has gained importance not only due to its implications regarding balancing the potentially conflictual relationship between trade and health but also due to the clarifications it provides related to the implementation of the Agreement on TBT.[84]

Facts of the Case

1. Indonesia filed a complaint with the WTO and requested consultations with the U.S on 7th April 2010, w.r.t a provision of the Family Smoking Prevention Tobacco Control Act of 2009 that bans clove cigarettes was applied by the U.S.[85]
2. Section 907 of the Food Drug and Cosmetic Act as amended by the Tobacco Control Act in question prohibits the production and sale of cigarettes with characterizing flavors including fruit, chocolate, cinnamon, and clove flavors that appeal to the youth. The fundamental goal of this prohibition was to protect the public health. Significantly, menthol cigarettes were explicitly exempted from the flavouring prohibition.[86]
3. The practical result was that the U.S denied the sale of clove cigarettes which were imported from Indonesia in a huge number whereas the sale of menthol

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[83] See the Appellate Body Report United States - Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R.
[84] See the Agreement Technical Barriers to Trade (1995) (hereinafter TBT Agreement) and the Marrakech Agreement Establishing the WTO (1994).
[85] Request for the Establishment of a Panel by Indonesia, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/2.
[86] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101, 123 Stat. 1776, 1824–25 (amending 21 U.S.C. 387(g) (a) (1) (A) (2006)).

cigarettes remained lawful which are to a great extent produced by domestic tobacco producers and address about a quarter of the U.S cigarette market.[87]

4. Indonesia had an issue with U.S regarding inconsistency of Section 907(a) (1) (A) with Article III: 4 of the GATT 1994 and this provision of FFDCA was also inconsistent with Article 2.1 of the TBT Agreement and various provisions of the SPS Agreement.[88]
5. The dispute was referred to a panel and on 20th July 2010, the DSB established a panel.
6. Brazil, EU, Guatemala, Norway, Turkey, Colombia, the Dominican Republic and Mexico participated as 3rd parties to the case.
7. The panel found that U.S neglected to notify WTO individuals of products to be covered by section 907 before the enactment of the Tobacco Control Act and that U.S gave just three months between publication and entry into force of the prohibition.[89] Therefore U.S violated procedural prerequisites of the TBT and the DSB in 2011 found that section 907(a)(1)(A) was inconsistent with Article 2.1 of TBT Agreement as it required member nations to treat like products of domestic origin and made in other WTO member countries equally without any discrimination.[90]
8. The U.S was not satisfied with certain legal interpretations created by the panel and on 5 January 2012 the U.S told the DSB of its decision to go for an appeal w.r.t certain issues of law covered in the panel report.
9. Later, in 2013 the U.S objected to Indonesia's request and referred the matter to arbitration pursuant to Article 22.6 of the DSU.[91]

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[87] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, 222–23, WT/DS406/AB/R (Apr. 4, 2012) (*adopted* Apr. 24, 2012) [hereinafter Appellate Body Report].
[88] WT/DS406/R, 2 September 2011.
[89] Panel Report, paras. 7.595 And 8.1(h).
[90] Panel Report, paras. 7.293 And 8.1(b).
[91] WT/DS406/6.

Procedural History

We see that the measure at issue for this dispute in question is Section 907(a) (1) (A) explicitly distinguishes the products it covers that is cigarettes and any of their component parts. The panel decided that the products covered by Section 907(a) (1) (A) are not merely identifiable in this case by recalling the *EC – Asbestos* case[92]. In the present case, Section 907(a) (1) (A) lays down product characteristics in the negative form such as a 'cigarette ... shall not contain' and this point doesn't alter the conclusion that Section 907(a) (1) (A) lays down product characteristics. So, the panel found support for their conclusion by referring to the measures at issue in EC – Asbestos and EC – Sardines where both the cases set down product characteristics in negative form and both were discovered to be technical regulations within the meaning of Annex 1.1 of the TBT Agreement.[93]

We recall that in Korea - Various Measures on Beef case the Appellate Body established a three-tier test for a finding of violation under Article III: 4 of the GATT 1994.[94] Since the language of Article 2.1 of the TBT Agreement is very similar to that of Article III: 4 of the GATT 1994, the board in EC - Trademarks and Geographical Indications followed the same way to deal with that of the Appellate Body without alluding to the current jurisprudence under Article III: 4 of the GATT 1994.Therefore Indonesia and U.S also followed a three-tier test to find the violation under Article 2.1 of the TBT Agreement.[95]

The issue under Article 2.1 of the TBT Agreement regarding the concept of likeness was first addressed in EC – Trademarks and Geographical Indications yet the panel neglected to go into an examination of likeness by giving its discoveries that the complainant didn't make a Prima facie instance of less favorable treatment. Subsequently, the Panel was tasked with interpreting for the first time the concept of likeness under Article 2.1 of the TBT Agreement under this case.

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[92] Appellate Body Report, EC – Asbestos, para. 70. In EC – Asbestos, the Appellate Body concluded that the measure at issue in that case was applicable to an identifiable product or group of products. Appellate Body Report, EC – Asbestos, para. 74.

[93] Appellate Body Report, EC – Sardines, para. 189, quoting Appellate Body Report, EC – Asbestos, para. 67. In EC – Sardines, the Appellate Body agreed with the panel's conclusion that the measure at issue laid down one or more "product characteristics". Appellate Body Report, EC – Sardines, para. 193.

[94] Appellate Body Report, Korea – Various Measures on Beef, para. 133.

[95] Panel Report, EC – Trademarks and Geographical Indications (Australia), para. 7.444.

Issues

1. Whether the Panel erred in finding the inconsistency of Section 907(a) (1) (A) of the FFDCA with Article 2.1 of the TBT Agreement?
2. Whether the Panel erred in finding about "like" products within the meaning of Article 2.1 of the TBT Agreement w.r.t clove cigarettes and menthol cigarettes?
3. Whether the panel slipped up in finding that the U.S acted inconsistently with Article 2.12 of the TBT Agreement by giving just three months between publication and entry into force of Section 907(a) (1) (A) of the FFDCA?

Holding

Doha Declaration- Legitimate Status

To find the existence of breach the Appellate Body wanted to decide the legitimate status of the Doha Decision and regardless of whether under Article IX: 2 of the WTO Agreement it comprised a multilateral interpretation of WTO law. Article IX: 2 interpretations should be embraced in the Ministerial Conference or General Council by a 3/4 greater part of WTO Members acting based on a suggestion by the Council that supervises the important agreement. The Appellate Body contemplated that the Doha Decision may not establish an Article IX: 2 interpretation if the second requirement went missing.

Rules Of VCLT Interpretation

Despite not constituting an Article IX: 2 interpretation of the Doha Decision was finding to establish a subsequent agreement by the Individuals on the interpretation of WTO law. DSU Article 3.2 requires the panel and the Appellate Body to explain the provisions of the WTO Agreements as per customary rules of interpretation of public international law. These rules have for quite some time been perceived to be those of Articles 31 to 33 of the Vienna Convention on the Law of Deals of 1969. Under Article 31 (3) (a) of the VCLT the interpreters should take into account along with the circumstance any resulting agreement between the parties w.r.t interpretation of the treaty and the use of its provisions. Given its adoption by agreement of the Doha

Decision might be saying to reflect the normal agreement by all WTO Individuals accordingly to the WTO Agreements.

Other Considerations[96]

1. The Panel's findings was approved by the Appellate Body and it held that the U.S acted inconsistently with Article 2.12 of the TBT Agreement. Also, it was confirmed that Section 907(a) (1) (A) of the FFDCA is inconsistent with Article 2.1 of the TBT Agreement.
2. The Appellate Body found that the discovery of whether products are 'like' within the meaning of Article 2.1 of the TBT Agreement establishes a competitive connection between the products and it is based on the analysis of the traditional likeness criteria such as physical characteristics, end-uses, consumer tastes and habits, and tariff classification. Hence, the Appellate Body held that the panel was right in finding about "like" products within the meaning of Article 2.1 of the TBT Agreement w.r.t clove cigarettes and menthol cigarettes.
3. The Appellate Body approved the Panel's finding that the U.S acted inconsistently with Article 2.12 of the TBT Agreement by permitting just 3 months between the publication and the entry into force of Section 907(a) (1) (A) of the FFDCA and when this action was interpreted w.r.t to para 5.2 of the Doha Ministerial Decision on Implementation - Related Issues and Concerns required at least 6 months between the publication and the entry into force of Section 907(a) (1) (A) of the FFDCA. In arriving at this resolution, the Appellate Body agreed with the Panel that para 5.2 of the Doha Ministerial Decision comprises a resulting agreement between the parties.

Case Analysis

1. According to me, the WTO's Appellate Body reports in the case of US-Clove Cigarettes have re-ignited the discussion on the WTO's part in balancing the

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[96] Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, 222–23, WT/DS406/AB/R (Apr. 4, 2012) (*adopted* Apr. 24, 2012) [hereinafter Appellate Body Report].

rights of the sovereign to regulate w.r.t public health or the environment inside its domestic domain with the need to keep up with the sanctity of the multilateral trade order and the panel and Appellate body's discoveries of infringement in the Clove Cigarettes case depended on the thought that the rejection of menthol cigarettes from the law, while the contending clove cigarettes were disallowed, comprises protectionism.

2. Despite the fact that the US resolution is beginning unbiased all over, and doesn't have unequivocally various rules for imports and domestic products there was an obvious proof of the discriminatory nature and impact of the rule. This kind of discrimination might be disguised or covered up in evidently real health measures as the Appellate Body did for this case.
3. Critics of this decision have expressed worry that this decision undermines the capacity of WTO Member States to manage tobacco for public health purposes. In all actuality, however, the mere issue with the impugned measure was its discriminatory nature. If the law had prohibited menthol cigarettes too, a move that health advocates upheld, it would probably have been discovered to be reliable with the WTO rules. However, it's important that both the Appellate Body and the Panel's decisions were viably against protectionism as in it prevented the US from adopting a trade-related measure in opposition to the bigger WTO policy of changing international trade for the most part and allowing trade prohibitive measures only exceptionally. In such manner the rulings have the right to be applauded.

Conclusion

The Panel and Appellate Body lost a chance to address the unique advancement needs of creating Member States in the US-Clove Cigarettes case and the WTO should receive a direct way to deal with disguised protectionism focused on products originating from non-industrial/ developing nations. The WTO adjudicating bodies could have taken a more vigorous situation for developing nations, despite the fact that a portion of the issues implicated may have been excessively politically delicate for judicial resolution at the WTO.

CASE NO. 18

DS 400: EUROPEAN COMMUNITIES-MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS

- Aaraish Mudassir[97]

Introduction

The words technical barriers to trade mean application of domestic regulatory measures to asprotective measure for domestic producers. The technical regulations as defined by World Trade Organization is a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. The TBT agreement came in to mean to prevent protectionism as it discourages competition , as well as the right of the nations to implement regulations on products within legitimate reason . The agreement establishes rules and procedures for formation, implementation, of product standards , and mandatory technical regulations. It aims to remove the application of trade regulations as arbitrary trade barriers. It aims to ensure non-discrimination in trade.

Facts of the Case

The outcome was in the favour of the Eu regime; the nations moved an appeal before the Appellate Body. They surmised that the EU seal regime was allowed under GATT Article XX(a) as they considered restriction necessary to protect public morals. The EU seal regime allowed for several exceptions, particularly one which allowed imported of seal products that were derived Inuit and other indigenous communities and from EU producers. The Canada was disadvantaged by this as the hunting by indigenous communities formed a very small portion of the seal products that were traded by the country. Similarly, Norway had a small Inuit population as opposed to a country like Greenland, and so they believed they were discriminated against.

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Procedural History

In November 2009 Canada requested for a consultation with the European Communities over a Regulation that was passed by the European Parliament , Regulation (EC) No. 1007/2009[98] under one of the Articles pf the Regulation the European Commission had to draft a regulation vans the import ,export and sale of aal harp and seal products' they claimed it was against the treaty agreements to which the European Communities were obligated particularly the TBT, GATT and the Agricultural agreements .Additionally Norway also requested consultation over the same regulation as they claimed was discriminatory in nature and favoured the member nations of European Commission and certain third world countries. Later Iceland also joined on the consultations. The Dispute Settlement Body formed a panel to deal with the matter.

Issues

Regulations of the European Union (EU Seal Regime) generally prohibiting the importation and placing on the market of seal products, with certain exceptions, including for seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception). The issues raised before the Appellate body were :

1. Whether the seal regime of EU was a technical regulation under the TBT agreement?
2. Whether pane was correct in its assessment f analysis under the Article XX(a) of GATT?
3. whether the analysis of the Panel regarding Articles I:1 and III: 4 of GATT accurate?

Holdings

Under the TBT agreement the nations are restricted from created arbitrary technical restrictions. The regulation in question of the European Commission banned seal products on the grounds that it was to appease the public moral welfare. The move was hailed by the animal welfare. It was not a means of conservation but rather for the

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[98] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, Official Journal of the European Union, L Series, No. 286 (31 October 2009).

welfare. The regulation allowed for exception for those goods produced by indigenous communities. The Panel found that while aspects of the seal regime were discriminatory however they were justified under the public moral exception under GATT.

Other Considerations

The appellate body has previously ruled those adverse effects arising out of legitimate regularity measures is not discriminatory. The European Union argued the same before the Body but outrightly rejected as under the GATT Articles I:1 and III:4 what matters is the regulatory measure has negative affect on competitiveness. Panel's decision regarding exception under public morals was accepted by the Appellate body however the Seal regime does not meet the requirements and that an exception leads unjustifiable discrimination. The Appellate body also found that since the regime does not put forth any product characteristics it does not fall under TBT. The European Union was given reasonable time to modify and implement the measures to meet the recommendations of the Body.

Case Analysis

The exceptions for the indigenous communities can be applied after undergoing certain modifications that are made in good faith to resolves questionably discriminatory action by EU. The dispute highlighted the difficulties associated with policies regarding public moral concerns. The move of the EU to ban the import on grounds welfare concern made it evident that trade can be restrict for the concerns of animal protection not limited to activities for conservation only.

Conclusion

In 2015 the European Union communicated with the Dispute Settlement Body that they complied with Body's decision and have made adopted the recommendations as fairly as possible. The maritime exception was completely done away with, and the indigenous communities' exception as modified. WTO's decision was hailed for recognising the restriction as a means to help animal welfare. The dispute raised the very pertinent question – whether the member nations of WHO can impose bans on trade on grounds of social or public welfare? The GATT Article XX(a) certainly allows for it. The decision by the body also sets this as a precedent. However the

“public moral” cluse has been warned against for potential abuse. What may be identified as concern for moral clause is highly subjective, religious, social, and economic situation of the society vary greatly. The extent of public moral would be difficult to measure. The could very easily weaponised against other countries creating considerably more difficulty in international trade. As of now the stats with the European Union has shown a decline in trade by indigenous community. The measures have a quite adverse effect on trade[99].The communities had protested against the measures as they claimed it was simply used to appease people who were misled by animal rights groups. The ban on seal trade was seen yet another means to control the practices of indigenous communities. As a result of these a large chunk of the trade by indigenous communities is done through Canadian markets as well as limited them to trade within the communities.

[99] News, N., 2021. *Inuit exemption to European Union's seal product ban is ineffective: report | Nunatsiaq News*. [online] Nunatsiaq News. Available at: <https://nunatsiaq.com/stories/article/inuit-exemption-to-european-unions-seal-product-ban-is-ineffective-report/> [Accessed 20 July 2021].

CASE NO. 19

DS 422: US - SHRIMP AND SAWBLADES

-Yash Jodhani[100]

Introduction

In the cutthroat universe of global exchange, enterprises frequently experience competition from abroad that is helped by foreign governments, either straightforwardly or by remiss implementation of work or natural laws that permit more affordable items to enter the market.

While such competition might be hard for US business to defy, it's anything but fundamentally unlawful or infringing upon exchange laws except if it very well may be shown that the items are being brought into the US through either administrative subsidy or different intends to permit the item or materials to be sold into the US at a cost that is underneath "typical worth," frequently significance at a viable misfortune to the maker or potentially merchant expecting ordinary market esteem is thought of. This memorandum gives an outline of hostile to anti-dumping laws just as possible monetary ramifications of such laws on homegrown shippers.

Basic Law related to Anti-dumping in U.S

Under the Tax Demonstration of 1930, US businesses may request of the public authority for alleviation from imports that are sold in the US[101] at not exactly reasonable worth (i.e., dumped) or which profit with endowments gave through foreign government programs. Under the law, the US Department of Commerce (USDC) decides if the unloading or financing exists and, provided that this is true, the edge of unloading or measure of the appropriation while the United States International Trade Commission (USITC) decides if there is material injury or danger of material injury to the homegrown business by reason of the dumped or subsidized imports.

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[101] Available at https://enforcement.trade.gov/esel/newlaw.htm

For industries not yet completely settled, the USITC may likewise be approached to decide if the foundation of an industry is by and large physically hindered by reason of the dumped or financed imports.

The relief that is typically accessible is the inconvenience of obligations onto the dumped items to both adjust the market and go about as a revenue source for the US government. Antidumping and countervailing duty examinations are led under title VII of the law. The USITC conducts the injury examinations in primer and last stages. China is frequently the objective of such grumblings and numerous businesses have whined of their act of supposed dumping bringing about different exceptional custom obligations being conjured. Against Anti-dumping laws are set up to protect domestic producers from low-estimated foreign products being dumped into the domestic market. For instance, the counter dumping laws currently straightforwardly apply to wood flooring imports from China.

Facts of the Case

1. **ADA Art. 2.4.2 (dumping assurance – zeroing):** ADA Art. 2.4.2 (dumping assurance – zeroing): The Board maintained China's case that the utilization of focusing in zeroing in calculating the margins of dumping in the anti-dumping investigations at issue was conflicting with Art. 2.4.2, and accordingly closed that the US had acted conflictingly with its commitments under this arrangement.

2. **ADA Art. 2.4.2 (dumping assurance – separate rate computation):** The Board dismissed China's case concerning the separate rate in the shrimp investigation. As the investigation concerned imports from a non-market economy, the United States Department of Commerce (USDOC) allocated a "independent rate" to exporters that had the option to show the shortfall of government control, both by law and true, over their fare exercises; different exporters were doled out the rate for Individuals' Republic of China-entity. In ascertaining the different rate, the USDOC had found the middle value of the dumping edges of the researched organizations, which were determined with focusing. China contended that the different rate was likewise conflicting with ADA Article 2.4.2. The Board thought about that China "has not … agreeably clarified how Article 2.4.2 could give the lawful premise to a finding of irregularity regarding the different rate" and said that "the truth that edges of unloading are conflicting with Article 2.4.2 doesn't really imply that a different rate

determined based on such edges is additionally, itself, conflicting with that equivalent arrangement". The Board in any case concurred with the assertion of the board in US – Shrimp (Ecuador) that the computation of the different rate based on singular edges determined with focusing “fundamentally consolidates the WTO-conflicting focusing system”.

Procedural History

1. The Shrimp Investigation

1. On 27 January 2004, the USDOC started an initiated of dumping investigation on certain frozen also, canned warmwater shrimp from China (Investigation No. A–570–893). On 8 December 2004, the USDOC distributed the Shrimp Final Determination, in which the USDOC determined dumping edges for four required respondents separately: (I) Allied Pacific Group (Allied): 84.93%; (ii)Yelin Enterprise Co., Hong Kong (Yelin): 82.27%; (iii)Shantou Red Garden Foodstuff Co., Ltd. (Red Garden): 27.89%; and (iv) Zhanjiang Guolian Aquatic Products Co., Ltd. (Zhanjiang Guolian): 0.07%. For 35 cooperating non-mandatory respondents that breezed through the USDOC’s different rate assessment, the USDOC set up a different rate of 55.23%, which was a solitary weighted-average margin dependent on the unloading edges determined for the obligatory respondents, barring any margins that are zero, de minimis, or in light of on unfavourable realities accessible.

2. Following a final determination of injury by the United States International Trade Commission (USITC), on 1 February 2005, the USDOC gave the Shrimp Changed Final Assurance to address the pastoral blunders made in the Shrimp Final Assurance and an enemy of dumping obligation request on Shrimp. In the Shrimp Altered Final Assurance, the dumping margin of Allied was amended to 80.19%, while the margins of other required respondents stayed unaltered. As an outcome of the adjustment of Allied’s dumping margin, the Different Rate was additionally recalculated to 53.68%.

3. On 17 August 2006, the USDOC gave the Shrimp Second Revised Final Determination, which conceded the Different Rate to an extra 11 Chinese exporters who were dependent upon PRC-wide rate beforehand.

4. On 2 September 2010, the USDOC gave a corrected amended final determination according to a choice made by the United States Court of International Trade (USCIT). On 26 April 2011, the USDOC gave a changed enemy of dumping obligation request that included tidied shrimp inside the extent of the orders. This corrected assurance did not include any progressions to the dumping margin of Allied, Yelin, Red Garden, or the Separate Rate.

5. On April 29, 2011, because of the agreed dumping and injury-probability judgments by the USDOC and the USITC, the USDOC distributed a notification of the continuation of the counter dumping obligation orders on Shrimp. Thus, the previously mentioned obligation orders have been broadened and stayed essentially as of the date of China's First Written Submission.

2. The Diamond Sawblades Investigation:

1. On 21 June 2005, the USDOC started an initiated an anti-dumping examination on precious diamond sawblades and parts thereof from China (Examination No. A–570–900). On 22 May 2006, the USDOC distributed the Diamond Sawblades Final Determination, in which it determined a dumping edge of 2.50% for AT&M.

2. On 22 June 2006, the USDOC distributed an amendment to the Precious Diamond Sawblades Final Determination and modified the dumping edge of AT&M to be 2.82%. On 4 November 2009, the USDOC distributed an enemy of dumping obligation request on imports of Diamond Sawblades from China, applying a pace of 2.82% to AT&M.

Issues of the Case

1. Regardless of whether the Order Should be Revoked as for Yelin & Hilltop?

2. Repudiation of the Order with respect to Red Garden?
3. China consciously demands that the Board recommend that the US bring the tested measures into conformity with its commitments under the Anti-Dumping Agreement?

Holding

Current political difficulties confronting the WTO Appellate Body bring up crucial issues about the connection among rules and qualities in worldwide arbitration. It contends that nothing about the particulars of WTO law would legitimize barring esteems from mediation; that the doctrinal, political, and institutional setting of WTO arbitration makes a positivist record of the job of qualities indefensible; however, an enemy of positivist record requires supplementing set up monetary records of WTO law's motivation with a record of decency and equity in exchange and exchange guideline.

1. United States Department of Commerce and the United States International Trade Commission.
2. The plaintiffs' parties should fulfil two components to prevail with regards to acquiring anti-dumping relief:

I. The cost of the imports should be unreasonably low, which means it should be underneath "ordinary worth," which is defined (arranged by need) by domestic market costs; foreign market costs; or in view of a developed worth.

II. There should be a material physical issue or danger of material injury to the plaintiffs' parties' industry by goodness of bringing in the dumped goods/merchandise.

3. Assuming the plaintiff party builds up dumping that made injury the domestic injury and dumping obligation request is given. A foreign maker can't repay an importer for the obligations. The obligations are proposed to chillingly affect imports. Under 19 C.F.R. 351.402(f), importers should document an endorsement with respect to absence of repayment of antidumping obligations.
4. The dumping duty order is the essential type of alleviation for the plaintiffs' parties. It sets a floor price so that domestic makers can adequately contend.

Other Considerations

Accordance with Article 21.6 of the Arrangement on Rules and Procedures Governing the Settlement of Disputes ("DSU"). The Dispute Settlement Body ("DSB"), recommendations and rulings in United States - Anti-Dumping on Certain Shrimp and Precious Diamond Sawblades from China (WT/DS422), and the US informed the DSB regarding its aim to execute the DSB proposals and rulings.

The US and China concurred that the sensible timeframe for the US to execute the recommendations and rulings of the DSB would end on 23 Walk 2013, and mutually advised the DSB of this understanding. On 5 September 2012, the US Exchange Agent mentioned compliant with area 129 of the Uruguay Round Arrangements Act that the US Department of Commerce ("Commerce") make a move important to carry out the DSB suggestions and decisions of the DSB would end on 23 Walk 2013, and mutually advised the DSB of this agreement.

Case Analysis

Considering the Judgement, the USDOC acted conflictingly with Article 2.4.2 of the Anti-dumping Arrangement by utilizing zeroing in the calculation of dumping margins for Partnered, Yelin and Red Garden in its last determination in the Shrimp investigation, as amended, also, in the estimation of AT&M's dumping margin in its final determination in the Diamond Sawblades investigation, as changed, just as in the comparing against dumping obligation orders, as amended and extended.

Under Article 3.8 of the DSU, in situations where there is infringement of the obligations accepted under a covered agreement, the activity is viewed as by all appearances to establish an instance of invalidation or disability of advantages under that arrangement. Appropriately, I reason that the US has nullification or impairment of benefits under the Counter Dumping agreement. According to Article 19.1 of the DSU, having tracked down that the US has acted conflictingly with Article 2.4.2 of the Anti-Dumping Agreement as set out above, I suggest that the US carry its actions into congruity with its commitments under this Arrangement.

Conclusion

China fights that USDOC's substantiation process does not examine the information that is well-suited to negate the chose rate. However, China depends on a truncated

version of the process USDOC utilized in the tested judgments, as portrayed previously. In addition, China's endeavour to extend the importance of “contradictory facts” to incorporate data that it cases would address a “sensible substitution for the missing data” ought to be dismissed. In China-GOES, the conflicting realities overlooked by the exploring expert all things considered related straightforwardly to the non-coordinating party. Without a doubt, China has not distinguished any realities that would appropriately qualify as conflicting realities which USDOC neglected to consider in the tested conclusions.

CASE NO. 20

DS 471: US – ANTI-DUMPING METHODOLOGIES (CHINA)

-Timur Abdusamatov[102]

Introduction

The core purpose of the World Trade Organization (WTO) is to promote free and fair trade and although the WTO continues to strive to achieve its objective through multilateral talks and negotiations, there are still a large number of loopholes and shortcomings that prevent it from doing so with complete effectiveness. It is a known fact that it is mostly the economically developed nations that use these loopholes within the WTO system to exploit countries with developing economies and non-market economies. 'Zeroing' is one such tool that the USA uses against other foreign governments that causes dumped sales to be masked by fair value. Over the past ten years the WTO appellate body has continuously been convicting the USA of practicing zeroing as an unfair commercial practice, but despite that, there is still no clear prohibition of zeroing.[103] In *US – Anti Dumping Methodologies (China) (DS 471)* zeroing and other certain anti-dumping investigation methods used by the US against China have been discussed, as well as this case throws light on the effectiveness and flaws in the different tests used to recognize dumping.

Facts of the Case

- On December 3rd of 2013, consultations were requested by China with the USA regarding implementation of specific methodologies in anti-dumping investigations involving products from China.
- China challenged the use of the WA-T methodology that includes the use of zeroing by the United States Department of Commerce.
- China also challenged the treatment of exporters from non-market economies as NME-wide entities.

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[103] https://www.emerald.com/insight/content/doi/10.1108/JKT-03-2017-0026/full/html

- China claimed that the methodologies used for the anti-dumping investigation were inconsistent with Art. 2.4.2, 6.1, 6.8, 6.10, 9.2, 9.3, 9.4, and Annex II of the Anti-Dumping Agreement, as well as Art. VI:2 of the GATT 1994.

Procedural History

1. The consultation took place on 3rd December when China filed a complaint against the United States for use of certain methodologies in anti-dumping investigations regarding products from China.
2. After requesting the establishment of a panel on 13th February, the DSB deferred the establishment of the panel at its meeting on February 26th of 2014, and on 26th March of 2014 the DSB established a panel at its meeting.
3. After requesting Director General to compose the panel on August 18th, 2014, on August 28th, 2014, the panel was composed by the Director General.
4. On February 23rd of 2015, the proceeding was deferred due to the unavailability of the Secretariat lawyers.
5. The circulation of the panel report took place on 19th October of 2016.
6. On November 18th of 2106, China informed the DSB of its decision to appeal particular legal issues and interpretations that the panel developed.
7. On March 22nd of 2016, the DSB was informed by the Appellate Body that the appellate body report was expected to be circulated no later than 11th May of 2017.
8. The circulation of the Appellate Body report took place on 11th May of 2017
9. The DSB adopted the Appellate Body report and the modified panel report on 22nd May of 2017.
10. On June 19th of 2017, the US made a statement of its intention to implement the DSB's ruling and recommendations in accordance with its WTO obligations, mentioning that it would need reasonable time for implementation.
11. On November 7th of 2017, Mr. Simon Farbenbloom was appointed as the arbitrator pursuant of Art. 21.3(c) of the DSU by the Director General.
12. On January 19th of 2018, the Award of the Arbitrator was circulated, and the arbitrator determined the reasonable time period to be fifteen months.
13. Due to US's failure to comply with the DSB's recommendations within the specified period, China requested DSB's authorization to suspend concessions pursuant to Art. 22.2 of the DSU on September 9th, 2018.

14. On September 19th of 2018, US informed the DSB of its objection to China's proposed suspension.
15. On November 1st of 2019, the Arbitrator's decision was circulated to the Members.

Issues

In this case, mainly three issues arise concerning the measures imposed against anti-dumping by the United States Department of Commerce (USDOC). These issues are as follows;

1. Is the use of the exceptional weighted average-to-transaction (WA-T) methodology and the implantation of zeroing under this methodology applicable and justifiable?
2. Can the USDOC treat exporters from non-market economies (NME) as NME-wide entity (single rate presumption)?
3. Are the methods and facts used in determining anti-dumping rates and level of these duty rates for such entities applicable in this case?

Holding

With regards to the W-T Methodology, it was founded by the Panel and later, on appeal, upheld by the Appellate Body that it has not been established by China that the US had acted inconsistently with Art. 2.2 with regards to flaws in the Nails test. Furthermore, the Panel found that it was not a requirement for the USDOC to consider the reasons for the differences in export prices forming the relevant pattern in order to determine whether those differences were qualitatively significant within the meaning of the pattern clause. The Appellate Body also declared moot the Panel's statement concerning the understanding that combining of comparison methodologies to establish dumping margins is permitted under Art. 2.4.2. With regards to the issue of Single Rate Presumption, the Panel found that this practice is inconsistent "as such" with Art. 6.10 and 9.2 due to the reason that NME exporters are subjected to a single dumping margin and duty rate. With regards to China's plea that the alleged Adverse Facts Norm has a prospective application, the Panel rejected China's assertion on the basis of insufficient evidence and therefore, for the same reason, the Appellate Body could not complete the legal analysis.

Case Analysis

Some of the fundamental duties of the WTO are to promote free and fair trade and to minimize price discrimination to the largest degree possible. Dumping is a practice that comes in the way of that, it is a practice where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country.[104] It is a form of unfair competition because the price of the products sold do not accurately reflect their actual cost and that, as a result, can be very harmful for a country's economy. Dumping can lead to consumers buying products at much lower prices which will result in stagnant companies becoming more competitive and therefore allowing exporting companies to sell more products and increase revenue. Dumping can also make it extremely difficult for companies in the importing country to grow and gain market share.

There are numerous methods to calculate anti-dumping duties and each country can adopt its own method. However, some methods can be used by governments for their personal gain. Zeroing is one such method that the United States uses, and many criticize it as this practice artificially inflates dumping margins. However, this methodology has never been banned by the WTO despite numerous cases being filed against the US with regards to this issue, with the above case being one such prominent example. The reason for that can be evident in the bigger picture of WTO's systematic bias towards rich countries and multinational corporations therefore harming smaller countries and leaving them with lesser power to negotiate. In the above case, China has been successful in establishing the Single Rate Presumption practice as being inconsistent with certain articles and hence the NME wide technology can no longer be applied by the US.

Conclusion

The creation of the WTO was for the purpose of improving free trade among member states and the organization has been successful in a multitude of ways by raising the living standards, especially in the South-East Asian region, which lead to an incredible growth of world trade. However, in the recent years, its role has been controversial and has faced great criticism. The anti-dumping methodologies being used by certain developed countries (the US in particular), created polarised views.

[104] https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

Similar to the criticism of the “Free Trade benefits” that WTO offers that seem to benefit developed countries more than developing countries, the anti-dumping methodologies such as zeroing seem to be deemed unfair yet permissible by the WTO.

CASE NO. 21

DS 473: EU-BIODIESAL CASE

-Nidhi P. Gopan[105]

Introduction

Anti-Dumping Measures on Biodiesel by the European Union is a WTO Dispute Settlement case. Argentina and Indonesia were the two biggest exporters of biodiesel to the European Union. Together, they were responsible for about 90% or 2.5mn tons of the biodiesel imports of the European Union in 2012. But by mid-2012, the European Union accused Argentina and Indonesia of dumping their biodiesel in the European Union, meaning that they were both selling their biodiesel under the price of the home market and implemented anti-dumping tariffs on biodiesel from the two countries, effectively halting flows.

Facts of the Case

1. On November 2013, the EU has imposed definitive anti-dumping duties on imports of biodiesel from Argentina and Indonesia. The anti-dumping measures consisted of an additional duty of about 24.6% for Argentina and 21.3%, which measures were based on decisions taken by the Council after a 15-month investigation that the European Commission carried out in 2012. The investigation revealed that Argentina's biodiesel products were being dumped in the EU market, just as thought by the congress. This Dumping have had a significant negative effect on the financial and operational performance of European producers. [1]

2. the European commission has proposed tariffs of 217 Euros per ton of biodiesel imported, this has caused the sales of the biodiesel imported more expensive than the one produced nationally, causing the sales of the Argentine and Indonesia biodiesel to decrease, considering that the sales

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had decrease severely due to the strict import laws on biodiesel newly applied. The amount of biodiesel imported to the European Union has decreased a 36% overall in 2013, and just from Argentina's overall imports decreased a 57%.

3. the European government started to charge a $1 tax per gallon of biodiesel in 2013, and it has constantly been increasing since then, making the biodiesel more expensive for the consumers. So, as we can see, Europe has not only decreased the number of imports of biodiesel from Argentina and Indonesia, but from other countries too. As a result, even though the total amount of imports has decreased drastically, the domestic producers of biodiesel have seen a huge increase in sale and in revenues thanks to the taxes and tariffs applied to imports that caused the drops in total imports.
4. Argentina has presented a case (DS459) to a special group against the EU in relations to the biodiesel dispute in May 2013. This case was against certain restrictions in the imports and commercialization of biodiesel in Europe and also claims that say that the European Government is unfairly subsidizing the national biodiesel industry. In October 2016 the dispute panel found in favour of Argentina and ruled that the anti- dumping tariffs must be reduced. The European Commission is in the process of passing these proposals but so far has met with strong opposition from Europe's main biodiesel and oilseed producer states.
5. In Switzerland, Indonesia has officially launched a complaint against the EU (DS480) at the World Trade Organization (WTO) over anti-dumping tariffs Europe has lodged against Indonesian biodiesel imports since May 2013. The WTO established a dispute panel over similar charges already made by Argentina.

[1] European Commission - PRESS RELEASES - Press release - EU to impose definitive anti-dumping duties on biodiesel from Argentina and Indonesia

[2] Biodiesel imports declined 36 percent in 2014

Procedural History

The EU—Biodiesel dispute arose out of the European Union's (EU) antidumping investigation into biodiesel exported from Argentina and Indonesia. While the EU authorities found dumping margins between 6.8% and 10.6% in provisional determinations against Argentina's exports of the subject goods, their final findings increased the margins to a range from 41.9% to 49.2%.

The significant increase in the dumping margins was a result of the use of surrogate costs of soybeans and soybean oil, the main raw materials used in the production of biodiesel, in the calculation of a CNV. A CNV was employed because the EU authorities found domestic sales of biodiesel in Argentina were not made in the ordinary course of trade due to government intervention. In calculating a CNV, the authorities relied on the production costs recorded by the Argentinean producers under investigation in the provisional determinations, whereas in the final determinations they found that the domestic prices of soybeans and soybean oil were artificially lowered due to Argentina's imposition of export taxes on the raw materials. This resulted in the domestic prices lower than international prices. Consequently, the domestic input prices were found to have not been reasonably reflected in the records kept by the Argentinean producers and were replaced with the average reference prices of the raw materials published by the Argentine Ministry of Agriculture. According to the EU authorities, the Argentine export tax system created a PMS in the raw materials market so that the actual costs incurred by the Argentinean producers were distorted and artificially low and, therefore must be disregarded in the calculation of CNV. Before the panel, Argentina claimed that both the EU regulations authorizing the use of surrogate input costs (i.e., "as such" claims) and the EU's application of the regulations in this investigation (i.e. "as applied" claims) were in breach of the AD Agreement.

Issues

1. Whether EU's Claims of error about the Interpretation of Article 2 of the AD Agreement?
2. Whether the panel incorrectly Interpreted Article 2.2 of the Antidumping Agreement?
3. Whether the panel correctly interpreted Article 2.4 in concluding that Argentina failed to establish that the EU acted inconsistently with that provision?
4. Whether an examination of Argentina's appeal suggests its claim that the panel

erred in Its appreciation of the meaning of Article 2(5) is properly evaluated pursuant to Article 11 of the DSU?

Holding

In EU–Biodiesel, the main task of the Appellate Body was to interpret the following provisions of the AD Agreement:

Article 2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined 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.

Article 2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

Case Analysis

1. State intervention and resultant price distortions do not constitute sufficient ground for the use of surrogate production cost for the construction of normal value. The Reasonably Reflecting Test under Article 2.2.1.1 of the AD Agreement concerns whether the cost records of producers or exporters suitably and sufficiently reflect the actual costs incurred by the producers or exporters in the production of the

subject goods and does not allow for consideration of whether the costs reflect competitive market prices.

2. The terms ‘suitably’ and ‘sufficiently’ leave no room for consideration of price distortions caused by state intervention. They concern business activities, including whether production costs are reasonably and accurately allocated to the subject goods or whether the terms and conditions for the sale of the inputs at issue are compatible with normal commercial practice for such sales in the market concerned.
3. The production costs used for the construction of normal value must reflect the market conditions prevailing in the country of exportation. Such market conditions include government policies and regulations that directly or indirectly affect prices. Therefore, if surrogate prices are employed to counteract price distortions, adjustments to such prices must be made to reintroduce the distortions into the production costs.
4. If the adjustments contemplated under point 3 are not made, then adjustments of the difference between the CNV and the export price which are established using different cost bases (i.e., undistorted vs. distorted) must be made under Article 2.4 to ensure fair comparison between the two prices.

Conclusion

The EU–Biodiesel decision does not offer clarifications on the meaning of PMS; it applies to the use of PMS on the basis of state intervention and price distortions as a pathway to the use of surrogate costs and ultimately to inflating dumping margins. This pathway is unequivocally closed by the Appellate Body in the case. Towards this end, the flexibility to deal with state intervention and price distortions under the AD Agreement (if any) predominantly hinges on the interpretation and application of the ‘ordinary course of trade’ test. However, the existing WTO jurisprudence strongly suggests that this test concerns business activities (i.e., terms and conditions of commercial transactions) rather than state intervention. Read together with the relevant WTO jurisprudence on the ‘ordinary course of trade’ test and subsidies, the EU–Biodiesel decision indicates that state intervention and price distortions should be dealt with under other WTO rules such as the SCM Agreement, leaving the AD Agreement to focus on business practices, particularly pricing behaviors of producers or exporters, that result in price differentiation between domestic and foreign markets.

The EU–Biodiesel case is the first WTO Appellate Body decision which starts to remove the flexibility of condemning state intervention and price distortions through antidumping measures. However, given the past and current practice, it would be realistic to recognize that antidumping will continue to be applied in this manner either in overt violation of the EU– Biodiesel decision or through creative utilization of the flexibilities (if any) left by the decision. In the case of China, China's unique economic system and significant state-trading practices will remain a major concern of its trading partners and will continue to attract antidumping actions. The adequacy of the world trade rules in dealing with China will be increasingly debated and tested. However, the EU–Biodiesel decision suggests that these debates should be moved away from the AD Agreement and the use of antidumping measures and focus on other WTO rules. Therefore, to protect the credibility of the WTO dispute settlement mechanism, member states should shift their focus to, and seek to explore the capacity of, the other WTO rules to overcome the challenges arising from China's state capitalism.

CASE NO. 22

DS 382: UNITED STATES – ORANGE JUICE (BRAZIL)

- Janavi H S[106]

Introduction

Over the past decade, the United States has played a game of 'cat and mouse' when it comes to the use of 'zeroing' in anti-dumping proceedings. As will be described below in greater detail, zeroing is a methodology employed by governments in anti-dumping investigations in which transactions with negative dumping margins are not allowed to offset those with positive margins. As a result, when aggregating transactions, the use of zeroing causes the weighted average dumping margin to be higher than it would be without zeroing. This leads to higher anti-dumping margins, much to the chagrin of US trading partners.

Beginning with the *US–Softwood Lumber V* complaint brought forth by Canada in 2002, numerous WTO Appellate Body (AB) decisions have found the US practice of zeroing to be impermissible under WTO rules.

US–Orange Juice (Brazil) is yet another one in this extensive line of cases. At the time the Panel issued its report, 20 zeroing disputes had already come before WTO Panels.

Facts of the Case

1. On 27 November 2008, Brazil requested consultation with respect to certain determinations of the United States department of commerce (USDOC) concerning the imports of certain orange fruit juice from Brazil.
2. Also, any actions taken by the us customs and border protection (USCBP) regarding the gathering of definitive anti-dumping duties at duty assessment established in periodic reviews covered by the preceding paragraph, including the issuance of USCBP liquidations instructions and notices
3. certain US laws and regulations, administrative procedures, practices and methodology.

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4. it's explained has Brazil is bothered that these laws regulations, administrative procedure, practice and methodologies are intrinsically and as applied within the determinations and actions identified above inconsistent with obligations of united states under the WTO agreement and therefore the agreement annexed from there.
5. Brazil has alleged stated that the provisions with which these measures appear to be inconsistent include, but aren't completely limited to Articles II, VI:1, and VI:2 of the GATT 1994, Articles 1, 2.1, 2.4, 9.1, 11.2 and 18.4 of the Anti-dumping Agreement, and Article XVI:4 of the WTO agreement.[107]
6. On 10 December 2008, Japan requested to affix the consultations.
7. On 22 may 2009, Brazil consider that these complementary measures are inconsistent with

• Articles ll states that, Vl:1 and Vl: 2 of the GATT 1994

• Articles 1, 2.1, 2.4 .2, 9.1, 9.3, 11.2 and 18.14 of the anti-dumping agreements

• Article XVI: 4 of the WTO agreement.

8. On 5 June 2009, Japan requested to affix the further consultations.
9. On 20 august 2009, Brazil requested the establishment of the panel. At its meeting on 31 August 2009, the DSB deferred the establishment of a panel.
10. At its meeting on 25 September 2009, the DSB established a panel.
11. Argentina, the other European Communities, Japan, Korea, Thailand and Chinese Taipei reserved their third-party rights. Subsequently, Mexico reserved its third-party rights.
12. On 29 April 2010, Brazil requested the Director-General to compose the panel. On 10 May 2010, the Director-General composed the panel.
13. On 19 July 2010, the Chairman of the panel informed the DSB that it might not be possible for the panel to finish its work in six months in light of scheduling conflicts. The panel expected to finish it work in February 2011.
14. On 25 March 2011, the panel report was circulated to Members.

[107] ('WT/DS/382 'e')https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds382_e.htm

Procedural History

Zeroing is a method used by the government to implement in the case of anti-dumping duties investigation in which it is made sure that the negative margin does not affect the positive margin. When the transaction is aggreged the weighted average margin will be higher than it is actually supposed to be with the usage of zeroing method. This leads to higher anti-dumping margins, much to the chagrin of US trading partners. Beginning with the *US–Softwood Lumber V* [108] complaint brought forth by Canada in 2002, numerous WTO Appellate Body (AB) decisions have found the US practice of zeroing to be impermissible under WTO rules. The US has consistently interpreted each ruling against it narrowly, eliminating the practice of zeroing in the specific factual context under the legal complaint, but keeping the practice alive in other situations where the context differed ever so slightly. This narrow compliance behaviour, in turn, has sparked additional cases, resulting in additional rulings against the use of zeroing. This incrementalistic approach toward outlawing zeroing by the AB has resulted in large resource costs, for the litigants as well as the WTO as an institution. Because of the importance of the US as an export market and the prevalence of zeroing in US anti-dumping investigations, many trading partners have willingly expended litigation resources in an attempt to stop this US practice.

Issues

1. Whether United states department of commerce's ("USDOC") uses of zeroing in two administrative reviews were violating the WTO agreement?
2. Whether United states department of commerce's ("USDOC") continued use of zeroing procedure in successive anti-dumping proceedings has to be terminated according to the WTO agreement?
3. Whether U.S. is liable according to the ADA. Art 2.4 agreement?
4. Whether the panel erred in finding that the United States is inconsistent with the anti-dumping agreement provision such as articles- 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 11.4 and 18.4?

[108] United States – Final Dumping Determination on Softwood Lumber from Canada, *DS264 [*US–Softwood Lumber V*]*.

Holdings

Standard Review

On 8 April 2011, Brazil and therefore the United States requested the DSB to adopt a draft decision extending the 60-day period of time stipulated in Article 16.4 of the DSU, to 17 June 2011. At its meeting on 21 April 2011, the DSB agreed that, upon an invitation by Brazil and therefore the United States, the DSB, shall no later than 17 June 2011, adopt the panel report, unless the DSB decides by consensus to not do so or Brazil or the United States notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU.[109]

At its meeting on 17 June 2011, the DSB adopted the panel report.

The DSU informed that, pursuant to Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Brazil and therefore the united states have agreed that the reasonable period of your time for the united states to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") within the dispute us – Anti-Dumping Administrative Reviews and Other Measures associated with Imports of Certain orange fruit juice from Brazil (DS382) shall be 9 months from the 17 June 2011 date of adoption of the DSB recommendations and rulings. Accordingly, the reasonable period of your time expires on 17 March 2012. We request that you circulate this notification to the Members of the DSB.[110]

Reasonable Period of Time

On 17 June 2011, Brazil and therefore the United States notified the DSB that they had agreed that the reasonable period of your time for the United States to implement the DSB recommendations and rulings shall be 9 months. Accordingly, the reasonable period of your time expired on 17 March 2012.

Settled or Terminated

On 14 February 2013, the United States and Brazil informed the DSB of a mutually satisfactory solution to the present dispute. The parties noted that in their Understanding of 3

[109] ('WT/DS/382 'e')https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds382_e.htm
[110] https://trade.ec.europa.eu/wtodispute/show.cfm?id=497&code=3#_wto-documents

April 2012, that they had agreed to consult before the end of 2012 so as to attain a resolution to the dispute. As a result of these consultations, the parties had reached a mutually satisfactory solution.

Other Considerations

1. In this dispute, Brazil challenged the 2005-2007 and 2007-2008 anti-dumping duty administrative reviews conducted by the United States Department of Commerce ("USDOC") on imports of certain orange juice from Brazil ("the First and Second Administrative Reviews"), also because the USDOC's continued use of "zeroing procedures" in successive anti-dumping proceedings, in respect to the protective tariff order issued in respect of imports of certain orange fruit juice from Brazil.
2. The panel report addresses two main issues: (i) the use of "zeroing" by the USDOC in the First and Second Administrative Reviews; and (ii) the notion of "continued zeroing". With respect to the latter issue, the Panel examined whether the "continued use" of "zeroing" as "ongoing conduct" is a "measure" susceptible to WTO dispute settlement. The Panel noted that, conceptually, the alleged "measure" challenged by Brazil appeared to be very similar, if not identical, to the "ongoing conduct" measure that was the subject of the European Communities' complaint in US — Continued Zeroing. The Panel described this measure as conduct that's currently happening and is probably going to continue within the future, recalling that the Appellate Body in US — Continued Zeroing had found that such a measure was liable to WTO dispute settlement.

Critical Analysis

The case comment revels the facts about the in convinces caused by united states towards the exports of Brazil. It has been found that the United States has been using zeroing procedure while calculating anti-dumping which is against the agreement of anti-dumping article 1, 2.1, 2.3, 9.1, 9.3, 18.14. It's also inconsistent with XVI: 4 of the WTO agreement. According to the previous statements and panel review it has been stated that the ADA Art. 2.4 (dumping determination – fair comparison): The Panel concluded that the use of zeroing to determine margins of dumping and importer-specific assessment rates was inconsistent with Art. 2.4 because it involves a comparison between export price and normal value which will invariably lead to a better margin of dumping than would rather be the case. In reaching this

conclusion, the Panel clarified that, for systemic reasons, it followed the Appellate Body's previous findings on the United States' use of zeroing in anti-dumping proceedings. Brazil challenged the alleged continued use by the United States of zeroing in successive anti-dumping proceedings under the fruit juice anti-dumping duty order by characterizing such continued use as “ongoing conduct”. In light of the Appellate Body's finding on an identical matter in US – Continued Zeroing and therefore the scope of “measure” as clarified in previous disputes, the Panel concluded that the continued use of zeroing as “ongoing conduct” may be a measure liable to WTO dispute settlement.[111] The Panel concluded that Brazil established the existence of the alleged continued zeroing measure because the pc programme employed by the USDOC to calculate the relevant margins of dumping contained the zeroing instruction. Although the zeroing instruction wasn't applied within the relevant proceedings in dispute during this dispute due to the actual fact pattern of the first investigation, the Panel did not find this to invalidate Brazil's claim because the subject of Brazil's complaint was the very existence of the zeroing instruction within the software system, independent of its application. As the USDOC's use of “zeroing” within the First and Second Administrative Reviews was inconsistent with Art. 2.4, it necessarily followed, found the Panel, that the USDOC's “continued use” of zeroing under the fruit juice protective tariff order was inconsistent with Art. 2.4.

Conclusion

After the reasonable period given to united regarding the implementation of the adopted reports where United States has informed DSB at its meeting that the US Department of Commerce was continuing its work on the December 2010 proposal to alter the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. The United States has reported the DSB on its meeting regarding the 9 march 2011, order which has been ordered in the interest of the revoking the prevailing anti-dumping order on fruit juice has been recently focused on by the USITC. Brazil stated that it had been still assessing whether the US implementation measure would resolve the dispute or whether it might get to pursue its rights through implementation and retaliation panels. Later that year, both Brazil and United States informed the DSB regarding the Agreed Procedures of Articles 21 and 22 of the DSU.

[111] https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds382sum_e.pdf

CASE NO. 23

DS 397: EC – FASTENERS (CHINA)

- Bhavatharini M[112]

Introduction

The WTO's AB dealt with a number of issues for the first time in this case and mainly it discussed the consistency of the EU regulation with the multilateral rules on the conditions for deviating from the obligation to calculate individual dumping margins.

Facts of the Case

1. The EC On 9th November 2007, issued a "Notice of initiation"[113] for the anti-dumping investigation/Original investigation on imports of certain iron or steel fasteners from china which resulted in imposition of definitive anti-dumping duties on fasteners from China and it was notified through the "Definitive Regulation" of 26 January 2009.
2. China on 31st July 2009, requested consultations with EC concerning Articles 1 and 4 of the Understanding on Rules and Procedures Governing the DSU, Article 23:1 of the GATT 1994 and Article 17.4 of the AD Agreement. China requested for the establishment of a panel on 12th October 2009 and the original panel was established by DSB on 23rd October 2009[114].
3. Brazil, Canada, Chile, Colombia, India, Japan, Norway, Taiwan, Penghu, Kinmen and Matsu, Thailand, Turkey, and U.S participated as 3rd parties to the case in the Panel proceedings.
4. China challenged Inter alia, WTO consistency of Definitive Regulation imposing anti-dumping duties on fasteners from China and Article 9(5) of EC's Basic Anti-Dumping Regulation before the Original panel.

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[113] European Commission, Notice of Initiation of an anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Official Journal of the European Union, C Series, No. 267 (9 November 2007), pp. 31-35 (Original Panel Exhibit CHN-14).

[114] WT/DS397/3; WT/DS397/4.

5. The Panel issued its interim report to the parties on 10 August 2010 and the final report to the parties on 29 September 2010. The panel's report was circulated to the members of the WTO in which the original panel found that the EU had violated certain provisions of the Anti-dumping Agreement such as:
   - Articles 6.10 and 9.2 w.r.t the treatment of individual exporters and producers in the calculation of margins of dumping under Article 9(5) of the "Basic AD Regulation"[115].
   - Articles 3.1 and 3.2 w.r.t the assessment of the volume of dumped imports in the injury determination and Articles 3.1 and 3.5 dealing with the causation analysis of the injury determination
   - Articles 6.4 and 6.2 w.r.t the failure of the EC to disclose in a timely manner information regarding certain aspects of the normal value determination.
   - Article 6.5 w.r.t confidential treatment of certain information and Art 6.5.1 w.r.t non-confidential summaries of questionnaire responses.
6. The EU and China both appealed certain issues of law and legal interpretations developed by the original panel.

Procedural History

Going to the EU's claim, we recall that in EC – Bed Linen AKA Article 21.5 – India, the Appellate Body expressed that a complainant ought not be permitted to bring up claims in compliance proceedings that were already raised and dismissed in the original proceedings in regard of a part of the implementation measure that is equivalent to in the original measure.[116] In any case, in subsequent disputes, the Appellate Body explained that a similar claim concerning an unaltered component of the measure can be re-prosecuted in Article 21.5 proceedings if, in the original procedures the matter was not settled on the grounds that, for example, the Appellate Body couldn't finish the analysis.[117] To prevail with regards to

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[115] EUROPEAN COMMUNITIES – DEFINITIVE ANTIDUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA, Report of the Appellate Body WT/DS397/AB/RW and Add.1, "Cambridge University Press— Dispute Settlement Reports 2016".

[116] Appellate Body Report, EC – Bed Linen (Article 21.5 – India), paras. 96 and 98. See also Appellate Body Report, US – Shrimp (Article 21.5 – Malaysia), para. 96. In US – Zeroing (EC) (Article 21.5 – EC), the Appellate Body further clarified that a panel has jurisdiction under Article 21.5 in respect of new "claims against a measure taken to comply – that is, in principle, a new and different measure" and that "[t]his is so even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply." (Appellate Body Report, US – Zeroing (EC) (Article 21.5 – EC), para. 432).

[117] Appellate Body Report, US – Upland Cotton (Article 21.5 – Brazil), para. 210. For the same reasons, the Appellate Body has suggested that the same claim that was dismissed in the original proceedings due to an exercise of judicial economy could also be raised in the compliance proceedings. (See Appellate Body Reports,

claiming that China couldn't raise its claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement before the Panel then the EU is expected to show that the claims are the very claims that were brought up in the original proceedings, and that these cases were settled in the original proceedings.

Issues Involved

1. Whether the Panel erred in finding that the EU is inconsistent with the Anti-Dumping Agreement provisions such as- Articles 6.5, 6.5.1, 6.4, 6.2, 4.1 and 3.1?
2. Whether the Panel erred in submitting that Article 2.4 of the Anti-Dumping Agreement's obligation varies due to the methodology used to determine normal values?
3. Whether the Panel erred in finding that the EU is inconsistent with Article 2.4.2 by excluding, in the Commission's dumping determinations that the models exported by Chinese producers and the models sold by Pooja Forge did not match?
4. Whether the Panel erred in rejecting the China's claim under Article 6.1.2 of the Anti-Dumping Agreement?

Holding

Standard of review

Article 11 of the DSU gives the standard of review to WTO panels and imposes upon panels an obligation to make an objective assessment of the matter which basically embraces all parts of a panel's assessment of the "matter", both factual and lawful. Article 17.6 of the AD Agreement provides the special standard of review applied to disputes under the AD Agreement which says that, in its examination of facts of the matter, the panel will decide if the authorities' establishment of facts was appropriate, and the evaluation of those facts was fair-minded and objective. Even though the panel may have arrived at a different conclusion with proper establishment of facts, unbiased and objective evaluation, the evaluation will not be overturned.

Taken together Article 11 of the DSU and Article 17.6 of the AD Agreement set up the standard of review which is applied in the present dispute w.r.t both the factual and the legal aspects.

US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina), para. 148; and EC – Bed Linen (Article 21.5 – India), 115 to para. 96).

Rules of Treaty Interpretation

In the context of disputes under the AD Agreement and its separate standard of review, the Appellate Body, in the context of disputes under the AD Agreement and its separate standard of review, has stated that Under the AD Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute when considering the interpretation of the AD Agreement but the difference is that Article 17.6(ii) provides that if a panel finds more than one permissible interpretation of a provision of the AD Agreement then it shall endorse a measure that rests on one of those interpretations.

Burden of Proof

The applied principles in WTO dispute settlement w.r.t burden of proof is that a party claiming an infringement of a provision of the WTO Agreement by member should attest and prove its claim.[118] In this case, China should make a prima facie case of infringement of the applicable provisions of the WTO agreements it refers, to which the EU should refute. Now, each party stating a fact, regardless of whether complainant or respondent ought to give proof thereof.[119] And in absence of effective refutation by the other party then it requires a panel, as a matter of law to rule in favour of the party introducing the prima facie case.

The Basic AD Regulation

The Basic AD Regulation (Council Regulation No. 1225/2009) is currently in force EU legislative instrument which lays down the substantive and procedural requirements related to antidumping investigations in the EU. Article 2 of the Basic AD Regulation talks about the determination of dumping, including the determination of normal value. So, the basic rule set out in Article 2(1)-(6) for the determination of normal value basically replicates the provisions of Article 2.2 of the AD Agreement and applies to market economy countries, whether they are members of the WTO or not.

[118] Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, para. 337.
[119] Appellate Body Report, US – Wool Shirts and Blouses, para. 337.

Other Considerations[120]

1. The Appellate Body rejected the EU’s claim that the panel failed in finding that the EU is inconsistent with the Anti-Dumping Agreement provisions such as- Articles 6.5, 6.5.1, 6.4, 6.2, 4.1 and 3.1 and it upheld the panel’s finding that China’s claims under Articles 6.5, 6.5.1, 6.4, 6.2, 2.4, 4.1 and 3.1 were within the Panel’s terms of reference.
2. The Appellate Body dismissed the EU's claim that the Panel failed in the interpretation of the procedural obligation set out in Article 2.4 of the Anti-Dumping Agreement because it allegedly suggested that this obligation differs based on whether one or another permissible normal value methodology is used.
3. The Panel’s finding that this methodology was inconsistent with the prerequisites of Article 2.4.2 the Anti-Dumping Agreement was accepted by the Appellate body as to establish dumping margins based on a comparison of all comparable export transactions. The Appellate Body considered that as per Article 2.4.2 it requires a comparison of all models of the investigated producers that really fall inside the meaning of like product and thusly, upheld the Panel's finding that the EU acted inconsistently with this provision.
4. As per the Panel's finding the meaning of Article 6.11 of the Anti-Dumping Agreement and the obligation under Article 6.1.2 of that Agreement is that, the analogue country producer (Pooja Forge) was not an interested party in the review investigation and therefore didn’t apply to information submitted by Pooja Forge. Thus, the Appellate Body reversed this finding and found, instead, that, in the conditions of this case, Pooja Forge was an interested party in the review investigation and that, in light of the fact that the Commission neglected to unveil the information given by Pooja Forge concerning the list and characteristics of its products to the Chinese producers, the EU acted inconsistently with Article 6.1.2.

Case Analysis

1. According to the panel the DSB requested the EU to bring its measure into conformity with its obligations under the AD Agreement and GATT 1994 and that the contested measures are inconsistent with the AD Agreement, the GATT 1994 and the WTO

[120] EUROPEAN COMMUNITIES – DEFINITIVE ANTIDUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA, Report of the Appellate Body WT/DS397/AB/RW and Add.1, “Cambridge University Press— Dispute Settlement Reports 2016”.

Agreement in a number of respects in the present case, and I do not find it appropriate to make a suggestion w.r.t implementation and therefore China's request was denied.

2. The WTO adjudicating bodies are specialists with no position to scrutinize the authenticity of the actual law. Like other reports in the area of unexpected security, this report proves the somewhat liberal mentality of the Appellate Body when managing these issues. For instance, the Appellate Body could have halted when finding that the EU can't figure an all-others rate to products originating in a NME. There was little need to examine the likelihood to do as such if there is a specific connection between the state and its nation companies. But then it did, as the Panel had done before in Korea-Certain Paper. By a similar token, it might have stopped its analysis when finding that the limit set up in Article 5.4 AD Agreement can't be used lock, stock, and barrel with regards to analysis under Article 4.1 AD Agreement. But it didn't and continued onward to give its comprehension of how this term ought to be perceived using plastic terms that we have no clue about how they will be formed in future.

3. In the past the Appellate Body has confirmed a similar mentality when dealing with difficulties with regards to sunset reviews. Shockingly, it is the Appellate Body, a body frequently denounced for being clearly textualist when interpreting WTO law that has recourse to similar interpretative mentalities. Besides, this sort of legal activism has so far figured out how to escape from the attention of critics. Nevertheless, its results could be spectacular.

Conclusion

In future case law, the Appellate Body could hold that Chinese, Vietnamese etc. organizations have specific connections with the state and consequently there is no obligation for an Investigating Authorities to calculate individual margins. Instead, the Investigating Authorities could stop at determining national rates and the danger for abuses here ought not to be underestimated. In this regard, the Appellate Body might be careless if it accepts that it can tame exuberant Investigating Authorities in future; for one, the Appellate Body is no trier of facts, and the subject of connections among organizations and the state is a prominently authentic issue. In future practice w.r.t this point alone should give pause to the Appellate Body.

CASE NO. 24

JINDAL SAW LIMITED VS DIRECTORATE GENERAL OF ANTI - DUMPING

C/SCA/12368/2018

- Aaraish Mudassir[121]

Introduction

Anti-Dumping duty are imposed by the Indian Government on an exporter who causes substantial injury to the domestic industry to ensure that dumping activity does not affect the domestic market. It is governed by the Customs and Tariffs Act ,1995. It is an important weapon in the governments arsenal to protect the domestic industry from exporters who may dump their inventory at prices significantly lower than the normal value, it helps against unfair trade practices. Normal value are the comparable prices at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country[122]. It is remedial method not protective one.

Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 – The rules .

Facts of the Case

The petitioner had filed an application for Sunset Review of anti-dumping duty on DI pipes imports under Rules 239(1B) of the Customs Tariff Rules, 1995. In their application the petitioner counsel among other evidences has drawn attention to the interest in the investment and development in smart cities where these pipes would be used and due to which likelihood of China dumping its inventory in Indian Market is high.[123] They also stated during the time of cessation dumping due to imposition of duty the import was negligible which ensured no problems were faced by domestic industries,

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[122]"India and China Antidumping Wars: Who Is the Winner?" <https://www.researchgate.net/publication/275642239_India_and_China_Antidumping_Wars_Who_Is_the_Winner> accessed November 2, 2021

[123]MM Sury, 'How China dumps its products in India' (*ETNEWSNOW*, 16 September 2020) <https://www.timesnownews.com/business-economy/industry/article/how-china-dumps-its-products-in-india/653146> accessed 2 November 2021

this however would be flipped once the duty is stopped. The counsel for the petitioner also stated that the application for Review was rejected without following of proper rules as stated under the Customs Tariff ,1995 . under the Rules it is required to hold an investigation after an application is made to inquire into the necessity of continuation or cessation of the dumping duty, however the impugned order suggests that this did not take place.

Procedural History

The Government of India via a Notification dated 14/29/2007 by the Ministry of Finance imposed an anti-dumping duty on imports of ductile iron pipes (DI) from Peoples Republic of China for 5 years. Following the expiry of the period a review was done on matter of continuation of the duty on the particular product. The Designated Authority came to the conclusion that the duty should be continued in order to prevent harm to the domestic industry it was extended for another period of 5 years. The Notification in the official gazette stated that the duty would be imposed up to 9/10/2018. The petition challenged the order dated 17/5/2018 rejecting application for a Review Application that was made before the designated authority.

Issues

i) Whether the impugned order refusing to initiate a Sunset Review was within legal parameters?

ii) Whether the designated authority complied with the Rules stated?

iii) Whether the designated authority required conducting an investigation prior to deciding on the matter?

Holding

Customs and Tariffs Rules, 1995 provide under Rule 23 that review can be made the Central government the Designated Authority, or upon a request by interested parties who provide substantial reason to prove the need for the review.

Rule 6 of the Rules provide the procedure that has to be followed by the Designated Authority while conducting investigation for the review. The Rules 6,7,8,910,11,16,17,19, and 20 are applicable as per necessity.

Other Considerations

The Court in its consideration of the impugned order did not think that the designated authority considered the application. They failed to call for relevant data from exporters, foreign producers, trade association, etc. They order also failed to show whether the determination of injury took place as been stated in the Rules. The order failed whether the decision was reached after following the due procedure. The Court in its decision set aside the impugned order and called for a fresh Sunset review application. The court also mandated that till the time a decision is made the anti-dumping duty would be extended.

Case Analysis

The impugned order by the designated authority, Director General of Anti-Dumping and Allied Duties failed to follow the rules under the Customs and Tariffs rules, 1995. They failed to collect the relevant data from the parties that have been mentioned under the Customs and Tariffs Rules or even determine the normal value, export price and margin of dumping. The principles under the Rules if complied were not stated in the order. The investigation by designated authority. The decision was taken based solely on the submission of the petitioner. The Designated Authority failed to comply with Rules 6, 7, 10 read along with Rules 23.

The market for ductile iron pipes is prone to price sensitivity and it has been suffering overseas due to measures by European Union and Brazil. China having greater capacity to manufacturing can pose serious threat to the domestic industry causing serious economic damages. In the light of these factors, it is pertinent that the rules as are should be followed for the benefit of the domestic producers.

Conclusion

In today's competitive market the nation states have taken to adopting protective measure in order to defend their interests against unfair trade practices. India and China trading partners, yet India has accused of dumping Chinese goods in Indian market. The Chinese goods are made available in a range of varieties, good quality and at affordable prices. The Chinese companies are able to provide goods at lower prices due to lower indirect taxes in the home country allowing them to dominate the world market. The country also has the highest number complains against them for dumping activities. Imposing anti-dumping duties does not provide an effective solution to the problem. Well, it is not sustainable in the long term it is bound to put a strain in the already tumultuous relations between the

countries. Experts have also warned against it causing anti competitiveness which is detrimental to the industries. More often than not imposition of these duties results in retaliatory action which is undisputable damaging. It is important to come up with long term solutions which requires for the two countries to come with solution together. India has to up their prowess in manufacturing while China needs to address its polarity when it comes to domestic and export prices.

CASE NO. 25

DS429 UNITED STATES – ANTI DUMPING MEASURES ON CERTAIN SHRIMP FROM VIETNAM

- Madhav Goyal[124]

Introduction

The significance of this dispute had intensified the need for the WTO to take a stand against the US zeroing practice to prevent similar situations in the future. This case primarily deals with the unfair practices followed in the US regarding the calculation of anti-dumping duties. The anti-dumping duties here refer to the duties and tariffs levied by the US for the trade of fresh water shrimps from Vietnam. No prior strict action by the WTO against the US was ever taken about their practice of zero, which has led to numerous tariff disputes within the nations. Similarly, is the basis of this case as the zeroing practice followed by the US is in question here, and that is the reasoning provided by the US for the excess duties and tariff levied on Vietnam for the import of freshwater shrimp. Now, this case plays a major role against the Zeroing method as it is one of the few cases where the WTO held that the US zeroing methodology must be revoked.

Facts of the Case

1.Shrimp imports account for eighty-seven percent of the one billion pounds of shrimp consumed in the U.S. annually. Of that, shrimp imports from the six countries, which are Vietnam, Brazil, Ecuador, India, Thailand, and China make up seventy-five percent of the total shrimp imports into the U.S. market.

2.This issue was investigated by the US Department of Commerce. It was alleged that dumped products from these countries caused the price of the U.S. shrimp harvest to decrease by fifty percent from 2000 to 2002, falling from $1.25 billion to $560 million; thus the U.S. fishers could not compete, leading to nearly 70,000 job losses in the shrimp industry within the eight states. The USDOC then initiated its dumping investigation on 8 January 2004.

3.The USDOC in its findings upheld that Vietnam is a non-market economy as prescribed in the Tariff Act of 1930. Upon determining that Vietnam is an NME, to determine the normal values and export values of Vietnamese shrimp, the USDOC chose Bangladesh as a surrogate

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country as it is an economically comparable ME that is a significant producer of comparable merchandise that could substitute for Vietnam's costs of production.

4.The US utilized zeroing method to determine dumping margin in the case at hand. In contrast with the E.U.'s prospective zeroing system, under the U.S. retrospective system, the anti-dumping duty imposed at the end of the original investigation following the calculation of the dumping margin only serves as a temporary estimation for future liability. The actual payment of anti-dumping duties will be determined during the annual administrative or duty assessment reviews.

5.During the process, several companies were investigated. The mandatory defendants were Minh Phu Seafood Corporation, Kim Anh Limited Company, Minh Hai Joint Stock Seafoods Processing Company, and Camau Frozen Seafood Processing Import – Export Corporation (Camimex). Some voluntary defendants that could be mentioned are CaiDoiVam Seafood Import Export Company, Can Tho Agriculture and Animal, Products Import Export Company; Can Tho Animal Fisheries Product Processing Export Enterprise, Cuu Long Sea products company, Danang Sea products Import Export Company.

6.Eventually, after over a year of investigation, ITC announced that Vietnamese shrimp are sold at dumping prices and the import of this shrimp is detrimental to the shrimp industry of the US. As a result, Vietnamese shrimp were subjected to anti-dumping duties at varying rates depending on the results of the investigation. The USDOC imposed an insignificant duty rate of 0-0.01 percent on mandatory respondents. The country-wide rate was the same as in the initial determination, i.e., 25.76 percent.

7.For fear that the DOC would continue using the same calculation methodology used in the second and third administrative reviews, resulting in unfair treatment for Vietnamese enterprises in the fourth administrative review, the Vietnam Association of Seafood Exporters and Producers, and the Vietnam Chamber of Commerce and Industry recommended the Government to initiate the WTO dispute settlement mechanism by first holding consultation with the U.S. on this matter on 01 February 2010. The consultation failed and the Government of Vietnam requested the establishment of a panel on 07 April 2010.

8.In the present case, Viet Nam challenged two administrative reviews of the order on shrimp.

Procedural History

The primary cases used as references by the WTO panel in this case were-

US – Corrosion-Resistant Steel Sunset Review: This case was referred by the Panel to see whether nonmandatory measures can be challenged "as such".The Appellate Body, in this case, held that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement. In the same dispute, the Appellate Body also considered whether there are any limitations as to the types of measures that may be the subject of an "as such" challenge under the Anti-Dumping Agreement. For this analysis, the Appellate Body considered Article 17.3 and Article 18.4of the Anti-Dumping Agreement, and concluded that there is "no reason forconcluding that, in principle, non-mandatory measures cannot be challenged 'as such'"

US – Oil Country Tubular Goods Sunset Reviews: This case was referred by the Panel as in this case, the Appellate Body clarified that the relevant issue is not whether the measure subject to an "as such "challenge is a binding legal instrument within the domestic legal system of a Member, but, rather, whether it is "a measure that may be challenged within the WTO system". The Panel by analysing this case concluded, the Sunset Policy Bulletin has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all sunset reviews conducted in the United States. It is also intended to have prospective applications, as it is intended to apply to sunset reviews taking place after its issuance. Thus, it was held that the SPB, as such, is subject to dispute settlement.

US – Zeroing (EC):In this case, the Appellate Body considered whether unwritten rules or norms could be challenged "as such". The Appellate Body found that there is no basis to conclude that rules or norms can be challenged "as such" only if they are expressed in the form of a written instrument. The Appellate Body however indicated that the complainant must establish the following to meet the particularly high burden of establishing the existence of a rule or norm of general and prospective application that is not expressed in a written document. It was laid that a panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm "in order to conclude that such "rule or norm" can be challenged, as such.

US – Softwood Lumber V: In this case, the Appellate Body held that the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994, indicate

clearly that the term "dumping" is used in relation to the product, and not in relation to individual export transactions. The Appellate Body has also found that the "margin of dumping" is used in relation to the dumped "product as a whole" and must be determined on the basis of all export transactions of a given exporter or foreign producer.

Issues

1. Whether the USDOC's use of the "simple zeroing" methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;

2. Whether the USDOC's practice, in anti-dumping proceedings involving imports from NMEs is inconsistent with Articles 6.10, 9.2, 9.4 and 6.8 of the Anti-Dumping Agreement;

3. Whether the USDOC's reliance on margins of dumping calculated with zeroing and its failure to properly establish the facts and to conduct an objective evaluation in the first sunset review under the Shrimp order is inconsistent with Articles 11.3 and 17.6 of the Anti-Dumping Agreement.

Holding

With respect to the first issue, Article 2.4 of the Anti-Dumping Agreement states that when an investigating authority calculates dumping margins, a "fair comparison" must be made between the export price and the normal value. Based on which, Vietnam argued that the application by the USDOC of "simple zeroing" in the administrative reviews at issue violated the provision of the ADA.

For this claim, United States agreed that it used simple zeroing in the administrative reviews for shrimp from Vietnam. US stated that the margins of dumping resulting from the reviews were minimal. The United States for this issue argued that, as the margins of dumping were minimal, "they cannot be characterized as 'artificially inflated' or 'inherently unfair.' The WTO Panel rejected this US position, by stating that in cases where no anti-dumping duties are assessed, the application of zeroing distorts the prices of export transactions, because export transactions made at prices above normal value are not considered at their real value. The Panel therefore ruled that the United States breached Article 2.4 by using zeroing in the reviews.

The Panel based on its analysis ruled that the use of simple zeroing in reviews violated US obligations under both GATT Article VI and Article 9.3 of the Anti-Dumping Agreement,

which provides that the amount of the anti-dumping duty cannot exceed the margin of dumping.

With respect to the second issue where Vietnam challenged the USDOC decision to assign a high anti-dumping margin to “Vietnam wide” entity as the USDOC treated Vietnam as a non-market economy. Here, Vietnam argued that this is inconsistent with the ADA.

Here the USDOC stated that all shrimp exporting companies are controlled by the Government of Vietnam, such that they may be treated as operating units of a single, government-controlled, Vietnam-wide entity, rather than individual exporters in their own right. Exporting companies that were considered part of the “Vietnam-wide entity” were assigned neither their own, individual margins, nor the residual “all others” rate, but rather a distinct – and much higher – rate.

The Panel analysing the claims of the USDOC stated that Article 9.4 of the ADA clearly iterates that any rate assigned to non-selected respondents should not exceed the maximum allowable amount provided for in that provision. The Panel also added that there is no provision under Article 9.4 of the ADA suggesting that authorities are entitled to render application of an ‘all others’ rate conditional on the fulfilment of some additional requirement. The Panel concluded that under Article 9.4 there exists no legal basis for the USDOC not to have applied an ‘all others’ rate to the Vietnam-wide entity.

The Panel similarly ruled against the USDOC decision to have recourse to “facts available” provided under Article 6.8, since it allows an investigating authority to use “facts available” in cases where any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. The Panel therefore concluded that the USDOC violated Articles 9.4 and 6.8 of the Anti-Dumping Agreement.

Finally with respect to the third issue, where Vietnam claims the USDOC's reliance on margins of dumping calculated with zeroing and its failure to properly establish the facts and to conduct an objective evaluation in the first sunset review under the Shrimp order is inconsistent with Articles 11.3 and 17.6 of the Anti-Dumping Agreement.

Here, The Panel found that the United States acted inconsistently with Art. 11.3 by relying on inconsistent margins of dumping in the first sunset review under the shrimp anti-dumping order. The Panel also found that the United States acted inconsistently with Art. 11.2 by

relying on WTO-inconsistent margins of dumping in its determination, in the fourth and fifth administrative reviews, not to revoke the shrimp anti-dumping order, with respect to certain Vietnamese exporters.

In this case, the WTO Panel ruled that anti-dumping measures taken by the United States on shrimp from Vietnam violated US obligations under the WTO Anti-Dumping Agreement. The WTO Appellate Body has ruled against the use of zeroing both in original investigations and reviews.

Following the decision of the Panel, on 20th May 2016, upon Vietnam's request, the USDOC has implemented procedures to comply with the WTO Panel's decision. Eventually, on July 18th, 2016 Vietnam and the US finally signed an agreement, according to which a Vietnamese exporter of frozen warm-water shrimp – Minh Phu Group – will no longer be subject to the antidumping duty order. In addition, certain domestic litigation will be resolved, and duty deposits will be refunded to the Minh Phu Group. The antidumping duty order will remain in place for all other exporters of warm-water shrimp from Vietnam.

Other Considerations

For such cases concerning the issue of dumping, the Appellate Body uses a case-by-case analytical approach when trying to find the institutional balance between ensuring a fair trial through proper disclosure and leaving the discretion to the investigating authority. The panel also found serious flaws in the analysis of price set up by the USA and in the anti-dumping investigations America appeared to have violated various obligations of the Anti- Dumping Agreement and the GATT 1994.

Case Analysis

The World Trade Organizationis the only international organization that is regulating the global rules of trade of goods and services. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. The purpose of the organization is providing rules and regulations for the proper and lawful conduct of international trade of goods and services. The organization also provides the rights and obligations that are required to be followed by the various governments in the set of multilateral agreements. Thus, its unbiasedness is of utmost importance when dealing with international trade disputes.

This case clearly deals with the unfair practices followed in the US regarding calculation of anti-dumping duties. Vietnam had to deal with high duties and tariffs levied by the US for the

trade of freshwater shrimps from Vietnam. Though the WTO Panel ruled against the unfair practices of the US no strict action was taken.

This case plays a major role as it is one of the cases where the WTO held that the US zeroing methodology must be revoked. The WTO never takes strict action against the US for its controversial methodology for calculating anti-dumping duties, because of which similar cases keep on occurring.

This case is an important one as it intensifies the need for the WTO to take a stand against the US zeroing practice in order to prevent similar situations in the future.

Conclusion

The panel for this case was in favor of the Vietnam on most of the issues related to anti-dumping that were taken up. Given the shortcomings of the USDOC, the decisions of the panel, were justified. However, in a broader sense, I believe that the WTO must take stricter action against the USDOC and the Zeroing method followed by USA as it causes a lot of issues and effects international trade adversely.

CASE NO. 26

DS414 CHINA - COUNTERVAILING AND ANTI-DUMPING DUTIES ON GRAIN-ORIENTED FLAT-ROLLED ELECTRICAL STEEL FROM THE UNITED STATES

- Naman Jain[125]

Introduction

DS 414 : China – Grain Oriented Flat-rolled Electrical Steel is a compliance proceedings under Article 21.5 of the DSB concerned the measures taken by China to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the China - Grain Oriented Flat-rolled Electrical Steel case. In DS 414, the DSB found that the imposition by the Ministry of Commerce of the People's Republic of China (MOFCOM) of countervailing and anti-dumping duties on grain-oriented flat-rolled electrical steel from the United States violated certain provisions of the Anti-Dumping Agreement and SCM Agreement. In response, MOFCOM reinstated the case, according to which China continued to impose anti-dumping and countervailing duties on GOES imports from the United States. This new determination was the core of this compliance procedure.

Facts of the case

On June 1, 2009 MOFCOM **(Ministry of Commerce of the People's Republic of China)** initiated injury investigations on anti-dumping, countervailing, following a request from WISCO and Baosteel alleging that the United States manages GOES **(Grain oriented flat-rolled electrical steel)**, and that US and Russian GOES imports have been dumped into the Chinese market (with an estimated 25% margin of dumping for US imports). It was also alleged in the petition that the imports were causing and were threatening to cause material injury to the domestic industry.

Of the 27 federal and state laws that could be countervailed as subsidies in the application, MOFCOM included 22 in the CVD notice. The applicant submitted a supplemental application, which included ten additional federal and state subsidy laws, six of which were included in the investigation initiated by MOFCOM on October 19, 2009. The investigation

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period for anti-dumping and countervailing duties began from March 1, 2008 to February 28, 2009.

There are only two US GOES producers, AK Steel Corporation (AK Steel) and Allegheny Ludlum Corporation (ATI), both of which are registered and cooperated in the investigation at issue. On April 10, 2010, MOFCOM made its final determinations for the AD and CVD review. The definitive anti-dumping duties were 7.8% for AK Steel and 19.9% for ATI, and the definitive countervailing duties were 11.7% for AK Steel and 12% for ATI. The definitive anti-dumping and countervailing duties "All others" were 44.6% and 64.8%, respectively. MOFCOM further found that subsidized imports from the United States and dumped imports from the United States (and Russia) were causing material injury to the domestic industry.

On September 15, 2010, the United States requested consultations with China on China's anti-dumping and countervailing measures on US GOES products. After consultations failed to resolve the dispute, the United States requested the establishment of a panel on February 11, 2011.

Procedural History

- US-Softwood Lumber V. Interpretation of the analogous provision of the US Anti-Dumping Agreement - Softwood Lumber V, in particular was referred and held that a panel must determine "whether an impartial and objective investigating authority would have determined that the request contained sufficient information to justify the initiation of the investigation

With respect to the standard of review to be applied by the panel under Article 11.3 of the SCM Agreement, both parties agree with the interpretation of the analogous provision of the Anti-Dumping Agreement.

- Japan – DRAM (Korea) for further support of the 'current subsidization' requirement, where it was stated that 'in the case of one-off or expired grants', 'current subsidization' requires that the benefit of the subsidiary be granted research period up to the period in which anti-subsidy duties have been imposed. The Panel referred to the AB report US–Countervailing Duty Investigation on DRAMS in determining the definitions of ‘entrusting’ and ‘directing’ and found that both involve a transfer of

authority or responsibility, but under which the late transfer of authority implies responsibility, but under which the exercise of authority is transferred from the government to a private entity.

Further according to the Appellate Body, the "objective assessment" to be made by a panel examining the decision of the investigating authority must be based on an examination to determine whether the body has provided a reasoned and adequate explanation as to: (i) how the evidence considered supported its factual and Substantive findings; and (ii) how these factual findings supported the overall case purpose. The Appellate Body also noted that a panel reviewing an investigating authority's decision cannot conduct a de novo review of evidence or substitute its judgment for that of the investigating authority. A panel must limit its investigation to the evidence presented to the agency during the investigation and must take into account all the evidence presented by the parties to the dispute.

- Mexico-Rice and found that the unknown producers could not be considered to have refused to provide the necessary information as to whether the investigations under Article 6.8 and paragraph 1 of Annex II to the ADA and Article 12.7 of the SCM (**Subsidies and Countervailing Measures**) agreement when they had not informed of the investigation.

Issues

1. Whether China violates Articles 11.2 and 11.3 of the SCM Agreement by investigating the 11 US federal and state programs that alleged countervailing measures against the subsidies provided to US GOES producers?
2. Whether the non-confidential summaries provided allow "a reasonable understanding of the information provided in confidence"?
3. Whether MOFCOM resort to "facts available" without qualification pursuant to Article 6.8 and Annex II: 1 of the ADA and Article 12.7 of the SCM Agreement?
4. Whether China has failed to disclose the "essential facts" that form the basis for the application of the "facts available" to "unknown" US exporters under Articles 6.9, 12.2, and 12.2.2 of the ADA and Articles 12.8, 22.3, and 22.5 of the SCM Agreement if China has violated Articles 12.9 and 12.2 of the Anti-Dumping Agreement and 12.8 and 12.5 of

the SCM Agreement due to deficiencies in the "essential facts" related to the disclosure and in the public notice and explanations.

Holding

The panel, which interpreted the relationship between Articles 11.2 and 11.3 of the SCM Agreement and analyzed the application of the evidentiary standard to each of the 11 programs, found that China had violated Article 11.3 of the SCM Agreement by initiating countervailing (anti-subsidiary) duty investigations on all disputed programs. . While the panel's ruling may set an important precedent, GOES's immediate order impact was limited, as China had not based any of its grant margins on these 11 programs (i.e., during its investigation, MOFCOM found that these programs should not provide a compensatory or anti-subsidy). China was also found to have violated other relevant provisions of the Anti-Dumping Agreement, the SCM Agreement, or both concerning most of the other claims of the United States. Under Article 11.3 of the SCM Agreement, the investigating authority must determine whether there is "sufficient evidence" to justify the initiation of an investigation.

In examining Part II of the application containing the non-confidential summaries, the Panel found that the summaries consist of "minimal descriptions of the nature, rather than the content" of the confidential information, thus failing the reasonableness test required by article 12.4.1 of the SCM Agreement and Article 6.5.1 of the Anti-Dumping Agreement. The panel found the argument unconvincing, stating that the interested party providing the information has an express obligation to provide the summary under the Articles and that it is not for others to derive their summaries from it. Therefore, the Panel concluded that China had acted in violation of Article 12.4.1 of the SCM Agreement and Article 6.5.5.1 of the ADA. This issue was not challenged in China's appeal.

In assessing the conditions for the application of "facts available", the Panel found that MOFCOM's initiation notice did not contain all the detailed information (ie, the absence of a "notice of the specific information required to exporters and the consequences of not providing the information ") necessary for unknown exporters to fully participate. The Panel further noted that no other US exporting producer of GOES was registered with MOFCOM, except AK Steel and ATI. The Panel found that China violated the Articles 6.8 and Annex II:

1 of the ADA and Article 12.7 of the SCM Agreement by applying "facts available" to unknown exporters.

The AB determined that MOFCOM was required to disclose the "essential facts" related to the "low price" finding, and did not do so because this fact was not included in MOFCOM's preliminary determination and final injury determination and therefore violates Art. 6.9 of the ADA and Article 12.8 of the SCM Agreement. AB considered that what constitutes "relevant factual information" must be understood in light of the content of the findings necessary to meet the substantive requirements for the imposition of definitive measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case "China has failed to disclose" relevant factual information "within the meaning of Article 12.2.2 of the ADA and Article 22.5 of the Subsidies and Countervailing Measures Agreement. MOFCOM has reinstated the case that China continues to impose anti-dumping duties and compensations on GOES imports from the US This redetermination was at the center of this compliance procedure

Other Considerations

Essentially, the Appellate Body uses a case-by-case analytical approach when trying to find the institutional balance between ensuring a fair trial through proper disclosure and leaving the discretion to the investigating authority. The panel also found serious flaws in the analysis of price effects in China. To a large extent, the central problem was that China had done very little to document the basis for establishing that subject imports had caused price reductions and / or price freezes.

The Panel also found that during China's anti-dumping and countervailing duty investigations relating to GOES, China appeared to have violated various obligations of the SCM Agreement, the Anti-Dumping Agreement, and the GATT 1994, i.e. investigations without sufficient evidence, lack of objective examination of the evidence, failure to disclose the essential facts underlying the allegations, and failure to adequately explain the legal calculations and conclusions.

Case Analysis

· **Was the Court's decision appropriate?**

From a legal or economic standpoint, this dispute is minor. The majority of the concerns were lost at the panel level, and then all of the issues were appealed to AB. The panel's and appellate bodies ‘ decisions appear to be largely unexpected, given China's lack of attention to protocols and procedures. It should be emphasised that China applied its CVD statute for the first time in the GOES case. China's lack of experience with countervailing tariffs can be blamed for some of the issues. China's lack of experience with countervailing duties can be blamed for some of the issues. However, lack of expertise does not justify the procedure, and the Panel's and AB's conclusions were reasonably uncontroversial and appropriate in light of the facts.

Does this decision conform with existing law? Was the reasoning consistent with previous reasoning in similar cases? Is it likely that the decision will significantly influence the existing law?

As the Panel noted, this was the first time the issue of the standard of substantive proof before initiation had been reviewed in the context of WTO dispute settlement under Articles 11.2 and 11.3 of the SCM Agreement. The panel found that China had violated Article 11.3 of the SCM Agreement by initiating countervailing duty investigations on all disputed programmes, after interpreting the relationship between Articles 11.2 and 11.3 of the SCM Agreement and analysing the application of the evidentiary standard to each of the 11 programmes. While the panel's verdict may set a significant precedent, the immediate impact of the GOES order was limited because China had not relied any of its grant/subsidy margins on these 11 programs (i.e., during its investigation, MOFCOM found that these programs should not provide an anti-subsidiary subsidy). With respect to the majority of the United States' other allegations, China was found to have violated other relevant articles of the Anti-Dumping Agreement, the SCM Agreement, or both.

Did the court adequately justify its reasoning? Was its interpretation of the law appropriate or not?

The DSB has said in various WTO panel and Appellate Body reports that certain components of MOFCOM's trade remedies are in violation of WTO regulations. Panels and the Appellate Body have highlighted transparency as one of the most pressing issues. MOFCOM's complainants in the DS414 case requested and obtained confidential treatment for a variety of types of information. By failing to require the complainant to provide non-confidential

summaries of the substantive information, the Panel confirmed the United States' claim that MOFCOM violated Article 12.4.1 of the Agreement on Subsidies and Countervailing Measures (SCM) and Article 6.5.4.1 of the Anti-Dumping Agreement. The panel came to the conclusion that the asserted summaries did not give a reasonable grasp of the content of the confidential material. China also violated Articles 6.9 and 12.2.2 of the Anti-Dumping Agreement, as well as Articles 12.8 and 22.5 of the SCM Agreement, according to the panels, because it failed to disclose key facts to support its non-causal link analysis and did not provide an adequate explanation of the causation conclusions and findings.

Conclusion

Almost every question was decided in favour of the United States by the panel and the Appellate Body. The panel's and Appellate Body's decisions were warranted in light of the Chinese administration's faults and handling of the matter. In a broader sense, I believe China will emerge as the "winner" in this dispute, as this case establishes important standards for assertions and evidence in claims, as well as rules that other countries (including the United States) are unlikely to win, based on what they discovered when they imposed anti-dumping and countervailing duties on the main and large target countries such as China, India, and Japan.

CASE NO. 27

DS405 EU – FOOTWEAR (CHINA)

- Priydharshini.P[126]

Introduction

An anti-dumping duty is a protective levy imposed by a domestic government on foreign goods that it deems are under-priced. Dumping is the practise of a corporation exporting a product at a considerably lower price than it would typically charge in its local market.

The World Trade Organization is considered as an international organisation that regulates international trade rules. WTO is in charge of international anti-dumping regulations. The World Trade Organization helps in countries to establish how their government can act towards the dumping happening in their country.

In this case, China has file for counsel in the European Union, noting that their provisions are inconsistent with certain WTO anti-dumping regulations and also about the import duties on certain leathers from China. The EU set an panel and passed their report on 2011 and it was adopted in 2012.

Facts of the Case

The complainant in this case is China and the respondent is the European Union. Countries like Australia, Brazil, Vietnam, Colombia, USA, Japan, Turkey reserved the third party rights.[127]

On 4th February, China requested for consultation with the EU under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

China wanted consultation for the following-

(1) Article 9(5) of Council Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries Not Members of the European Community, as amended;

[126] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

[127] Wto.org. 2021. *WTO | dispute settlement - the disputes - DS405*. [online] [Accessed 4th July 2021].

(2) Council Regulation (EC) No. 1472/2006 of 5 October 2006, imposing definitive anti-dumping duties and collecting definitively the provisional anti-dumping duties imposed on imports of certain footwear with upper from China.

(3) Council Implementing Regulation (EU) No. 1294/2009 of December 22, 2009, imposing definitive anti-dumping duties on imports of certain footwear with leather uppers originating in, among other places, China, as extended to imports of certain footwear with leather uppers consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Art 11(2) of the council regulation.[128]

China stated that 3 measures introduced by the EU were inconsistent and in direct violation with its obligations under WTO in relation to the imposition of anti-dumping duties on imports of certain leather footwear from China. China is disputing Article 9(5) of the Basic EC Anti-Dumping Regulation, which states that in cases involving imports from non-market economies (NME) country, the antidumping duty must be defined for the providing country concerned rather than for each individual provider, as being in violation of the WTO. According to China, WTO rules demand that an individual margin and duty be calculated and specified for each known exporter and producer, rather than for the entire providing country.

China claimed that the Basic Regulation requires exporters to demonstrate that they meet the criteria set forth in Article 9(5), the Individual Treatment rules, and is thus in conflict with various provisions of the WTO Agreement, China's Protocol of Accession, the GATT 1994, and the Anti-Dumping Agreement. The Review and Definitive Regulations imposing anti-dumping duties on imports of specific footwear from China, as well as other parts of the expiration and original judgments and investigations behind those regulations, were also challenged as WTO-inconsistent by China.

European Union and China began to have consultations from 31st March 2010, but these consultations did not help in resolving their disputes. So, China on 8th April, requested for the establishment of a panel to help in resolving the issue in accordance with Articles 4 and 6 of the DSU, Article XXIII:2 of the GATT 1994, and Articles 17.4 and 17.5 of the AD Agreement.

[128] 2011. Trade.ec.europa.eu. 2011. [online] [Accessed 5 July 2021].
WT/DS405/R.

The Dispute Settlement Body (DSB) on 18th May, established a panel under the document WT/DS405/2 in accordance with Article 6 of the DSU.

Issues

There are 3 main issues discussed in this case-

1. Whether the EU's anti-dumping regulation article 9.5 is inconsistent with its obligation under WTO's anti-dumping provisions.
2. Whether the definitive regulation imposing anti-dumping duty on products are inconsistent with the WTO provisions relating to the anti-dumping.
3. Whether EU's Review regulation of expiry review of duties is inconsistent with EU's obligation under WTO.

Holdings

The panel found that the EU had acted inconsistently with respect to article 9(5) of the Basic AD regulation with its obligation under Articles 6.10, 9.2, and 18.4 of the AD Agreement, Article I:1 of the GATT 1994, and Article XVI:4, and that the application of Article 9(5) of the Basic AD Regulation in the footwear original investigation was in conflict with Articles 6.10 and 9.2 of the AD Agreement. The panel also found that the EU had acted inconsistently with the determination of profit for one producer exporter. The Panel also stated that China had not established that how EU acted inconsistently with certain provisions relating to the ADA.

The panel provided with a report of regulating rules and guideline methods to the DSB summarizing how the EU and China are to resolve the conflicts between them for now and also for any future issues too.

Orbiter Dicta Of The Case

The Panel on 28th October circulated the report of its findings regarding the conflict between EU and China.

The findings of the panel are as follows:

The Panel identified that Article 9(5) of the Basic AD Regulation was incompatible with the European Union's WTO obligations, and that the European Union had acted inconsistently with the AD Agreement in some aspects of the original investigation and expiry review but

dismissed the majority of China's specific claims of violation in connection with the original investigation and expiry review, and the resulting Definitive regulations. The Panel continued that Article 9(5) of the Basic AD Regulation was "as such"[129] incompatible with the European Union's obligations under Articles 6.10, 9.2, and 18.4 of the AD Agreement, Article I:1 of the GATT 1994, and Article XVI:4 of the WTO Agreement and that the application of Article 9(5) of the Basic AD Regulation in the footwear original investigation was incompatible with Articles 6.10 and 9.2 of the AD Agreement, Article I:1 of the GATT 1994.

The Panel found that the European Union acted inconsistently with Article 2.2.2(iii) of the AD Agreement in determining the amounts for SG&A and profit for one producer-exporter in the original investigation, and as such the European Union acted improperly with its obligations under Articles 6.5 and 6.5.1 of the AD Agreement in regard to the confidential or non-confidential treatment, for certain information from the original investigation along with the expiry review.

The Panel also recognized that China had not been able to clearly establish that the EU had acted inconsistently in regards with certain provisions relating to anti-dumping-

In the original investigation, Article 6.10.2 of the AD Agreement had been used to examine four Chinese producers' individual treatment requests.

In the original investigation, selected Chinese manufacturers' petitions for market economy treatment being examined under Articles 2.4 and 6.10.2 of the AD Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Accession Working Party Report.

In the original investigation, the sample for the dumping determination is whether selected in accordance with Article 6.10 of the AD Agreement. In the procedure for selecting Brazil as analogous nation in the expiry review, Article 11.3 of the AD Agreement is being used.

The PCN system utilised in the expiry review is described in Article 11.3 of the AD Agreement. With respect to the PCN system employed and the leather quality modification made in the original investigation, for which given in Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994.

[129]Wto.org. 2021. *WTO | dispute settlement - the disputes - DS405*. [online] [Accessed 5th July 2021].

With respect to the scope of the product under consideration, or a similar product, see Article 2.6 of the AD Agreement coupled with Articles 3.1 and 4.1 of the AD Agreement. In the original inquiry and the expiry review, the technique for and selection of the sample for the injury analysis is governed by Articles 3.1 and 6.10 of the AD Agreement, as well as Article VI:1 of the GATT 1994.

Concerning some information in the non-confidential questionnaire replies of the sampled EU producers in the original investigation, Article 6.5.2 of the AD Agreement, and as a result, Article 6.2 of the AD Agreement; Article 6.5 in the expiry review's confidential treatment of some material;

Articles 3.1 and 6.8 of the AD Agreement prohibit the use of facts discovered during the expiry review.

Article 6.9 of the AD Agreement, relating to the time limit for commenting on the Additional Final Disclosure in the original inquiry.

In connection with the information and explanations supplied in respect of specific issues in the original inquiry and expiry review, as stated in Article 12.2.2 of the AD Agreement; and

In the original investigation, Articles 3.1, 3.2, 9.1, and 9.2 of the AD Agreement applied to the imposition and collection of anti-dumping duties.

⇨ The panel was in the intention to reject all of the EU's objections about China's claims. The Panel determined that Article 17.6(i) of the AD Agreement imposes no requirements on WTO Members' investigative authorities in anti-dumping investigations that might result in a finding of violation, and dismissed all of China's claims of violation of Article 17.6. (i). Concerning certain of China's assertions involving all three measures, the Panel used judicial economy.
Due to the expiration of the Review and Definitive Regulations on March 31, 2011, the Panel determined that there was no rationale for recommending that the expired measures be brought into compliance under Article 19.1 of the DSU.
In the case of Article 9(5) of the Basic AD Regulation, the Panel advised that the European Union bring this provision into compliance with its WTO obligations.

China and the EU jointly requested for a drafting decision of 60 days to adopt the panel report towards the DSB. The DSB in February adopted the panel report.

The report detailed how the EU and China are required to solve this issue, and if there were to be any conflicts between them relating to anti-dumping, then they must follow this regulation to solve.

Both the parties agreed to the DSB to follow the recommendation with the base time for adopting the rules in 7 months and 19 days from 22 February 2012.

Case Analysis

In this particular case, it details the situation with the involvement of NMEs and also the importance of the presence of the WTO's role as a guardian to make sure that no other body or country violates their obligation under WTO.

The case also helps in resolving the conflict of anti-dumping regulations established by the EU that China felt was to be inconsistent and to also make both the parties understand the exact meaning of the provisions relating to dumping.

The provisions of GAAT and ADA that were being violated by the EU were highlighted by the panel and the panel rightly found the EU to be inconsistent in its obligations.

In the case, the panel's report was not only established to solve the particular case but also was in a way to help in solving future issues that may arise between them.

Conclusion

This particular case will be considered to be a precedence in the future because it helps in understanding the real meaning of certain provisions of the Anti-dumping Agreement. The case also highlights the importance of legal bodies like the EU act within its power and not failing its obligations towards the WTO. This case also helped to eliminate claims that are submitted with any inconsistency in finding like few of the claims made by China against the EU that were found to be not properly based upon.

CASE NO. 28

DS464 US (WASHING MACHINES)

- Ramya. S. R.[130]

Introduction

Dumping when seen from the perspective of international trade law, means, injuring the pricing of a product or service. This happens when one country starts exporting a product manufactured to another country for a price that is lower than the normal price, which can cause injuries to the products that are sold at their normal price. Normally, this act is seen as an act of creating a monopoly market by eliminating the competition. So to handle this, every country has its own set of mechanisms. Under WTO Anti-dumping Agreement, dumping is permitted unless and until it threatens the domestic company in the importing country causing material injury, it is also prohibited if it causes material retardation in the establishment of an industry in that country[131]. In the United States, domestic firms that is the companies in the importing country, in this case, the US can file an anti-dumping petition under the regulations established by the US Department of Commerce, which determines "less than fair value" and the US International Trade Commission, which determines "injury". This is what happened in the case of the USA- washing machines too between South Korea and the US.

Facts of the Case

In 2012, the anti-dumping and anti-subsidy investigation was initiated by the USA regarding imports of washing machines from South Korea into their customs territory. During the anti-dumping investigation, it was found that imports of washing machines from South Korea were done at dumped prices, which caused injury to national domestic producers. Because of this, anti-dumping duties were imposed on the washing machines that were imported from South Korea. Along with that, the anti-subsidy investigation established that the injury to domestic industry in the United States had been caused because of the subsidies for three manufacturers in Korea had been exempted from income tax, subject to a condition which says, generally, while calculating the dumping margin the negative margin on particular types of goods can be recorded as a zero margin while calculating the final index for the product. Based on this, the US, in addition toanti-dumping duties also imposed countervailing duties

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[130] BBALLB, Alliance School of Law, Alliance University, Bengaluru.

[131]Wto.org.2021. *WTO|AntidumpinTechnicalInformation*.[online]Availableat:<https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm> [Accessed 4 July 2021].

on washing machines originating from Korea. On 5th December 2013, Korea requested the establishment of the WTO Dispute Settlement Body Panel, claiming that the investigations had been carried out in violation of the relevant provisions of the WTO agreements, resulting in too high a level of respective duties. Regarding the anti-dumping duties, Korea challenged the methodology on how to determine the dumping margin while calculating the amount of the duty, including the use of the zeroing method by the US Government. When it comes to the countervailing duties, Korea challenged the targeting nature of subsidies and compliance with the procedures of duty calculation, which was aimed at neutralizing the negative impact of subsidies on the producers from the US. South Korea also contested the methodology used to calculate the duties and won an appeal ruling at the WTO in 2016. At a later stage, Korea claimed that the US had not lifted the duties to comply with the WTO ruling, and also it demanded the right to impose sanctions.

Issues

1. Was the US calculation onanti-dumping duties in breach of WTO rules?
2. Was the US calculation on countervailing duties in breach of WTO rules?
3. Was the use of the zeroing by the US while applying the W-T methodology inconsistent with that of WTO rules?

Holding

The Appellate Body upheld the decision of the Panel and held that the USA's calculations of anti-dumping and countervailing duties were in breach of WTO rules. First, the panel held that anti-dumping measures did not comply with Article VI of the General Agreement on Tariffs and Trade **"GATT"** and the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade did not support Korea's arguments regarding the illegality of countervailing duties under the Agreement on Subsidies and Countervailing Measures. But when the appellate body examined, additionally it found that there was a breach of WTO rules by countervailing measures too. The Appellate Body said the same as the Panel regarding the use of zeroing by the United States while applying the W-T methodology and held that it was inconsistent with provisions such as ADA Arts. 2.4.2, 2.4, and 9.3 and GATT Art. VI: 2.

Obiter Dicta of the Case

With regarding applicable WTO rules, anti-dumping duties can be applied till it is necessary to eliminate dumping that can cause injury to domestic producers, and the countervailing duty has to be or can be applied in the amount necessary to offset subsidization. Valid grounds for imposition of duties and the rates are established according to the results derived from the relevant investigations, in which the relevant authorities establish that there is an existence of dumping or subsidy, injury to the country's domestic industry, and the causal relationship between them. Hence, the existence of dumping can be established by determining the dumping margin that is the percentage by which the normal value of the goods exceeds the export price. In comparing the normal value of the product and its export price investigation authorities may use a different kind of techniques. For which some countries like the USA use zeroing. WTO DSB in its decisions has repeatedly confirmed that the use of this Zeroing method increases the level of the dumping margin, due to which the rate of anti-dumping duty levied on imported goods. The Dispute Settlement Body for the first time in this case held that the practice of zeroing is unacceptable in establishing the targeted dumping as well. This decision prevents the US agencies from engaging in an anti-dumping investigations, which means the use of zeroing, as a result, reduces the possibility of the imposition of anti-dumping duties on imported goods.

Anti-Dumping Measures

According to Article 2.4.2 of the Agreement on Implementation of Article VI of the GATT[132], there are three methods for determining the dumping margin:

- The First one is Average-to-average comparison methodology (**A-A**),
- Second one Transaction-to-transaction comparison methodology(**T-T**),
- Final one is the Average-to-transaction methodology (**A-T**).

A-T methodology is used, if needed, to expose the targeted dumping, South Korea challenged the use of the A-T methodology by the US authorities. It was established that the US authorities failed to demonstrate that there was a pattern of export prices that was different from the others and that such differences could not be properly taken into account using other

[132] 2019. *THE PRODUCTION RELOCATION AND PRICE EFFECTS OF U.S. TRADE POLICY: THE CASE OF WASHING MACHINES*. [pdf] p.8. [Accessed 7 July 2021].

methods of determining the dumping margin (such as A-A or T-T). The Panel backed Korea's argument that the mere fact that there is a price difference cannot be said as target dumping and also it can't be the reason for the exclusion of prices of certain samples from the calculations. To establish the sample of export prices that differs from the others, certain factors have to be compared, they are, the prices for different purchasers, the prices in different regions, or the price at different periods.

The difference between the prices for different purchasers and prices in various regions usually don't form a specific pattern that would indicate the presence of target dumping. The Appellate Body and the WTO also backed the same. The Appellate Body differed from the Panel and told since in exceptional cases the procedure mentioned here is to be applied, the investigating authorities are the ones that need to establish that other methods do not allow them to properly determine the appropriate margin of dumping. And also both the Panel and the Appellate Body supported Korea's arguments on the inappropriate use of zeroing while using the A–T methodology. While applying this methodology, the authorities compare the prices of the goods in the exporting country in this case that is prices in Korea and the prices at which they were being imported that is the import prices in the USA). Yet, if at a certain point the price of goods in the exporting country is less than the price of the goods at which they were being imported that is a negative conclusion on the existence of dumping, this difference is referred to as zero. Hence, at the final step that is final calculations for all periods only the positive conclusion on the existence of dumping is taken into consideration, and this does not comply with Article 2.4.2 of the Agreement on Implementation of Article VI of the GATT[133], which is the one that provides for the implementation of a comparison based on the prices of all export transactions in a certain period, and this is not just used in cases where the prices of goods in the exporting country are higher than those at which they were imported which means a positive conclusion on the existence of dumping. This practice of using zeroing leads to a conclusion that the rate of the imposed anti-dumping duty is more than the margin of dumping and hence it violates Article 9.3 of the Agreement on Implementation of Article VI of the GATT.

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[133] 2019. *UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA*. [pdf] Available at: <https://www.wto.org/english/tratop_e/dispu_e/464arb_e.pdf> [Accessed 6 July 2021].

Countervailing Measures

The state may take various steps to boost its exports and one of them is, by providing subsidies to national producers. The provision of specific subsidies is prohibited by the WTO rules, these are provided to particular enterprises or groups of enterprises or industries or groups of industries. If those subsidies cause any serious injury or damage to the importing country's domestic industry, the importing country is authorized to take any appropriate counter-measures to neutralize their negative impact, it may suppose introduce a countervailing duty on imports of the products. Both the Panel and the Appellate Body agreed to the argument of Korea regarding the specific nature of subsidies given to Samsung in the form of tax credits. They found that the subsidy given to them can be considered as specific if that was given to a limited number of individual enterprises located in a particular geographical location. At the same time, it was noted that the said limited range of individual businesses does not only include legal persons, but also branches and representations that do not have such privilege, and also it was noted that in a given geographical area is not limited to the subsidies allocated for a certain region only, but also applies to cases where there is a subsidy which is deducible from the wording and structure of the subsidies. In contrast to the Panel's decision, the Appellate Body found that the authorities of the US who were conducting the investigation did not consider much pieces of evidence that determine if those subsidies were granted only to Samsung products of national origin or was also granted to its foreign subsidiaries. This itself explains that the investigating authorities were not able to calculate the number of subsidies in an appropriate manner to assure that the countervailing duties designed to neutralize their negative impact on the importing country producers are not more than the number of subsidies granted. At the same time, tax credits granted to Samsung violated Article 9.4 of the Agreement on Subsidies and Countervailing Measures. [134]

Case Analysis

In this case, the product at the issue is the residential washers that are being imported from Korea and the measure at issue is the Definitive anti-dumping and countervailing duties applied by the US Department of Commerce. The decision that was held was taken after a very detailed analysis of the provisions such as ADA Art. 2.4.2, second sentence regarding pattern, Art. 2.4.2 related to systemic disregarding, ADA Arts. 2.4.2, 2.4, and 9.3 and GATT Art. VI: 2 regarding zeroing under the W-T methodology, ASCM Art. 2.2 related to regional

[134] Wto.org. 2021. *WTO | dispute settlement - the disputes - DS464*. [online] Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds464_e.htm> [Accessed 5 July 2021].

specificity, ASCM Art. 19.4 and GATT Art. VI:3 regarding attribution of subsidies to certain products. This decision is taken in a manner that it can help solve issues regarding other matters too, when looked at a closer view it can be seen that the decision contains the answer for to what extent these measures can be used and when it should be stopped. This matter is brought before the panel or the appellate body today, even then this will stay the same because the body has taken that many matters into consideration only then they have come to the conclusion. This case acts as guidelines to matters regarding the issues relating to the dumping of dryers, coffee, and other products that are imported. The matter in hand was handled appropriately and the decision given was very good and detailed and need not be challenged again if challenged again, the decision even after the second round of analysis will stand the same.

Conclusion

This case of the US washing machine plays a significant role in the world of import and export, and the duties that are laid for that purposes, pricing, and other matters that are related to it. This case is very important because the decision taken in this case affects other similar cases too, it can affect other disputes, mainly those cases that involve the United States, in particular, those relating to the use of the controversial practices of calculation of trade defense duty rates by investigating agencies. While looking into the concepts of dumping, anti-dumping agreements, this case is very remarkable and this cannot be ignored.

CASE NO. 29

DS480 EU – BIODIESEL (INDONESIA)

-Reman G[135]

Introduction

DS480 is an issue that reviewed the Dumping of Biodiesel by Indonesia towards the European Union and whether the EU's action by implementing an Anti-Dumping tax against the exports was lawful under the jurisdiction and policies of the WTO.

Indonesia produces nearly 57% of the world's palm oil resources which employs around 3 million people and contributes 4.5% of the country's GDP. European Union imported palm oil and palm-based biodiesel in large quantities which made a share of 10% of Indonesia's palm-based exports for the year 2011. A dispute which emerged from imposing Anti-dumping tariffs took place as Indonesia (DS480) and Argentina (DS473) rebutted against the imposition of the new export tariffs by the EU after an investigation was organized by the EU comparing the Palm oil value in the home country with the value in the member states of the European Union which resulted in the cause of injuries to the European Biodiesel Industries for the producers as there was a difference in value when compared. Argentina and Indonesia contested against the imposition of the increased duties as they alleged that it was deemed unlawful towards their exports.[1]

Anti-Dumping Law

An Anti-Dumping tariff can be understood as a protection of the product's value and Industry from exports of the same product of a lesser value effectively injuring the domestic industries an injury in total volume of sales of their products all over the country.

It is said to be implemented only for a periodic time in order for the domestic industries to cope with their damages and again be stable enough to compete with International exports of the product and companies.[2]

Facts of the Case

The European Biodiesel board (EBB) requested the European Union committee to act against Indonesian palm oil exports allegedly coming to the conclusion that there was an on-going process of Dumping of palm oil and palm based biodiesel towards the country by increasing

[135] BBA LLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

the export value and expected the European Union to form a committee and investigate the claims. Accordingly, the investigation resulted in the finding- Indonesian companies benefited with an unfair advantage where they had ready availability of raw materials at a depreciable price compared to other markets compared to the producers of the same product in the EU.

To counter the inadvertent differentiation of value of product, The EU imposed anti-dumping tariffs against Indonesian biodiesel exports, which prompted Indonesia to file seven law-suits claims against the EU at WTO Headquarters, Geneva. There were various attempts by Indonesia to have consultations with the EU to revert the imposition and on 30/6/15, A panel was requested to overlook the dispute regarding the anti-dumping tariffs imposed which affected the Indonesian exports drastically and the allegations made by the EU was not valid which needed to be re-examined.

A panel was formulated which had Argentina, Australia, Canada, China, India, Japan, Norway, Russia, Singapore, Turkey and The United States reserved their third-party rights to participate in the panels proceedings.

Indonesia's arguments against the imposition of anti-dumping tax by EU were:

1. The measures made by the EU were inconsistent with the terms of following provisions

(i)Art IV of GATT, 1994(Anti-dumping and countervailing duties)

(ii)Art X of GATT, 1994(publication and administration of trade regulations) And improper interpretation of AR 2.3 and 2.4 of Anti-Dumping Agreement

(iii)Art 2.2 and 2.2.2(ii) an art 2.2.2(iii) of the Anti-Dumping Agreement

(iv)Article 9.3 (chapeau) of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

(v)Article 3.1 and 3.2 of the Anti-Dumping Agreement

(vi)Articles 7.1, Art 7.2 and Art 9. And 9.2 of the Anti-Dumping Agreement

2. EU's arguments stated that:

(i)The price of raw materials -soy bean oil(Argentina) and Palm oil(Indonesia) were much higher than the rates worldwide where there is a high amount of export tax imposed on them resulting in more goods in the worldwide market with higher rates than the domestic market.

(ii)The impositions of ‘lesser duty rule’ was in accordance with the policies of WTO’s anti-dumping law and was needed with the pretext of compensating the injury of the suffered by the biodiesel Industry, and the anti-dumping measures was a just a periodical contingency for just 5 years giving enough time for stimulating the domestic Industries.

(iii)EU commissioned and verified several documents relating about the exporters

*Indonesia claimed that the calculation of Anti-Dumping tariffs by the EU were incorrect after by failing to construct a proper import price of one of its producing industrial biodiesel , namely P.T Musim Mas ,which was sold to independent buyers in the EU failed to calculate the costs arising out of the first independent retail price/premium that was paid by the clients to the related importer to P.T Musim Mas. The EU stated against this fact: premium did not belong to any part of the price of which the imported biodiesel to the first independent buyer. Indonesia requested the appellate panel to postpone the panel proceedings until the circulation of DS473(Argentina; Biodiesel) reports.

The WTO formed a panel on 31st August ,2015.The panel observed and analysed the issues consisting of the claims made by Indonesia against EU.The findings and the final report was circulated on 25th January, 2018 in which it was briefly mentioned EU had violated or incorrectly analysed the required evidence for the allegation of Anti-Dumping Tariffs.it was concluded that Indonesia had won majority of the suits and was capable enough to resume the exports to the EU without the tariffs after the EU adopted the panel report on 28th February , 2018. [1]

Holdings

The panel gave their reasoning and reports about the following Suits filed by Indonesia:

- The Panel held that the European Union acted inconsistently with Art. 2.2.1.1 by failing to calculate the cost of production of the producers under investigation on the basis of the records kept by the producers. In addition, the Panel upheld Indonesia’s separate claims that the European Union acted inconsistently with Art. 2.2 of the and Art. VI:1(b)(ii) by using a “cost” that was not the cost prevailing “in the country of origin” in the construction of the normal value.
- The Panel identified that the European Union acted inconsistently with Arts. 2.2.2(iii) and 2.2 by failing to determine “the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of

the country of origin". The Panel rejected Indonesia's claim that the European Union additionally acted inconsistently with Art. 2.2.2(iii) because the European Union failed to determine the amount for profit based on a "reasonable method" within the meaning of Art. 2.2.2(iii).

- The Panel found that the European Union acted inconsistently with Art. 2.3 by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by that producer was first resold to independent buyers in the European Union.
- The Panel identified that the EU authorities acted inconsistently with Arts. 3.1 and 3.2 by failing to establish the existence of significant price undercutting while rejecting Indonesia's claim that the EU authorities failed to ensure price comparability through the calculation of a price adjustment for Indonesian imports.
- The Panel concluded that the European Union acted inconsistently with Art. 9.3 And Art. VI: 2 by imposing anti-dumping tariffs in excess of the margins of dumping that should have been established under ADA Art. 2 and GATT Art. VI: 1, respectively.
- The Panel also denied Indonesia's claim that Indonesia failed to establish a basis for its claims under Arts. 7.2 And 7.1(ii) regarding the definitive collection of provisional anti-dumping duties on imports from P.T. Musim Mas. The Panel further rejected Indonesia's claims that the European Union acted inconsistently with Art. 9.2 Or the chapeau of Art. 9.3.

Hence it could be concluded that Indonesia had won majority of the suits and was capable enough to resume the exports without any dumping duties.[1]

Issues Raised

1. Why the EU's Adjustment for comparison for its products and the imports were unfair?
2. Why was the EU unable to use a specific "cost" which was not affiliated with the country of origin?
3. What effect did the Dispute have on Indonesian and EU's biodiesel trade policies?

Findings

1. **Why the EU's Adjustment for comparison for its products and the imports were reasonable and Justifiable?**

- The European Union decided to separately calculate the price undercutting due to the product differences produced by both the countries, CFPP [cold filter plugging point] can be termed as the stage where the biodiesel transforms in fat and cannot be utilised as a source of fuel.
- The Biodiesel from Indonesia (palm methyl ester) had a CFPP of 7-17°., whereas the biodiesel produced by the Unions' producers had a bended CFPP of 0. The EU authorities excluded this from the list of blended (a mix of different biofuels derived from various sources and feedstock's in the EU) The Biodiesel varied at different CFPP's depending upon the location and season.
- EU used an incorrect means of calculation of by comparing the CFPP 0 biodiesel imports of its Blended CFPP 0 with Indonesia's CFPP 7-17, where an direct comparison cannot be deemed since there was lot of adjustments to be made and Indonesia's CFPP was adjusted even 17.35% more which included the volume of sales of both the products .
- While calculating it was found out that Indonesia's stock was compared with CFPP13° and The EU's domestic stock at CFPP 0 Which varied upon different blends not resulting in a fair comparison between the imported product and domestically produced product.
- EU were unable to explain whether the comparison between PME (palm methyl Ether) and European Union's CFPP 0 were not made at a proper comparison level and also failed to establish if there was any connection between the significance of price undercutting after investigating the sales of both the products comparatively in the union.

EU therefore failed to establish a direct link between the significant price cutting in their comparison between the two products and violated Article 3.1 and 3.2 of the Anti-Dumping Agreement.[1]

2. Why was the EU unable to use a specific "cost" which was not affiliated with the country of origin

EU authorities had taken an average market price instead of using the Home country's price for production costs and failed to act inconsistently with Art 2.2 of Anti-Dumping Agreement

and Article VI:1(b)(ii) of the GATT,1994 by failing to construct the normal value by cost of production by home country in the construction of normal value

- The EU authorities did not act accordingly by taking in the production of the producers under the investigation by authorities on the basis of their producer's records. The Authorities used the HPE (a reference price published by Indonesian authorities) instead of CPO(crude palm oil)price .HPE was selected in order to avoid distortions in the market(due to differential export tax) system by the European authorities in order to remove the consequences of calculating the price to remove distortions. But this was different from the price of product produced and recorded by the producer's as mentioned under their records.
- But this was against Art 2.2. Of the ADA (Anti-dumping Agreement) which mentions "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined 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. "So this price fixation policy was struck down by the panel as it dint involve the yield a cost of production for the normal value from the country of origin.
- These claims were also viable for DS473 where The EU used the cost of Soy beans was also taken from an average price system published by Argentina's Agricultural ministry hence violated the Article 2.2 of the Anti-Dumping Law since it must be apt or capable for yielding a cost of production in the country of origin can be identified that a different price system was selected rather than the required price to be utilized to compare and hence violating the provision.

3. What effect did the Dispute have on Indonesian and EU's biodiesel trade policies?

The case of imposition of ADD's (anti-dumping duties) managed to lessen the import of biodiesel form Indonesia and from other countries. This had injured Indonesia's export value as one of its largest import markets out rightly increasing the tax duties,

- This decline of imports was also feared by the Indonesian co-operative partners due to the dispute. Meanwhile, The EU was looking into other forms of sources of Energy for its development and functioning RED (Renewable Energy Directive) is an initiative by The EU to reduce the union's dependency on greenhouse gases and increase the renewable energy sector under the Paris Agreement. Then RED policy aims to make atleast 32%of Europe dependable only on renewable energy (or) strictly adhered products which are allowed for import (excluding palm oil), some countries have started imposing additional tariffs again over palm oil from Indonesia and Malaysia.
- The RED II (RED with certain amendments and regulations to comply with the outcome of the DS480) was also laid down which protects the EU industries against injuries and imposed increased tariffs against the imports of biodiesel.[2]
- This can bring a huge setback for Indonesia which has won the dispute over its claims has opened its market again in the EU for exports. The EU has stated that it wants to deviate from the biofuel market since it involves large amounts of deforestation and can further damage the ecosystem which EU attempted to avoid and hence goals in various years to reduce its dependency on biodiesel and encourage environment.
- The Indonesian exports of biodiesel (palm oil) decreased rapidly by the EU after the imposition of Anti-Dumping tariffs and with the implementation of RED II directive (where European Union starts looking at other forms of energy productive sources which are less harmful for the society) Indonesia's chances of being the lead exported of biodiesel might drop fast as its importers started looking at other markets as the decrease in imports can cause certain stigma all over the world. This issue can be addressed by Indonesia by proper action and implementation of decisions to sustain itself as a global biodiesel market and producer.[2]

Precedents

Indonesia wanted the panel to postpone the proceedings for the dispute till the appellate body circulated the final report for 473The legal implications of the panel for DS480 included the following precedents which were considered relevant for the Indonesia-EU dispute.

DS480's panels accepted the request since Indonesia, since they stated the claims of both the complainants were" indistinguishable"

1. DS473 (Argentina-Biofuel) (15/5/2013)

Argentina (soy bean) appealed against the implementation of the Anti-dumping agreement stating that the EU violated

(i) Article 2.2.1.1 of the Anti-Dumping Agreement

(ii) Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b) of the GATT 1994

(iii) 2.2.2 of the Anti-Dumping Agreement

(iv) Article 2.4 of the Anti-dumping Agreement

(v) Article 9.3 of the Anti-Dumping Agreement and Article VI :(2) of the GATT 1994

(vi)Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to the EU injury determination

(vii) Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the EU non-attribution analysis *The panel delivered a mixed conclusion which basically blamed both the parties of major inconsistencies in the findings and data when compared to articles of Anti-dumping Agreements.

*The panel also stated that the EU considered recording Argentina's export tax system (which was distorted) by the producers and exporters hence choosing to take surrogate prices instead. Surrogate prices and the panel then termed the proposition rejected as calculation under the difference between constructed normal value and export price was deemed to be unlawful under ART 2.4 of the Anti-dumping agreement. EU acted inconsistently by not using the cost of production of product in while constructing the normal value of biodiesel. The EU's analysis of Dumping assumption was not based on an "objective examination" of positive evidence under ADA Art9.3/GATT Art IV:2. The EU were also accused of incorrectly calculating the cost of production by the producers under Art 2.2.1.1*The panel rejected Argentina's appeal of EU violating ART 2.2 and 2.2.2(iii), the profits amount of profits components of the constructed normal value was inconsistent as with the. Article

as Argentina‘s claim that the EU's non attribution analysis was found to be invalid under Art 3.1 and 3.5 under Injury determination was rejected by the panel.

DS473's panel report circulated on 29 October 2016, after which the case DS480's proceedings resumed.

The panel report (DS473) dint act as much influence in deciding the judgement of DS480 but it added various different perceptions and comparison of the issues faced by both the complainants and their core issues[1]

Case Analysis

The Panel's decision on the case can be considered very much appropriate since it addresses the required issues with the needed applications of law and also verifying the same with practical and monetary instruments and investigations. The panel of this case has verified the claims with the Anti-Dumping. Law and also upholds its values, it also gave both the parties required time to formulate the needed verifiable documents and was flexible enough to listen to the requests of the parties.DS480 was different from its predecessor (DS473) regarding certain interpretations but still was able to deal with the issues similarly without many deviations from the issues from the precedents claims and the case is an important landmark judgement on the basis of trading Fuels and resources between nations for the near future.

The decision was held after inculcating whether; the EU had adjourned with all the required provisions of Anti-Dumping Agreement. Which they ultimately failed to comply with.

The findings of the panels shows that EU failed to productively calculate the necessary data(Price of product , profit caps) To showcase their claims under Articles IV of GATT, 1994(Anti-dumping and countervailing duties) ,Art X of GATT, 1994(publication and administration of trade regulations)And improper interpretation of AR 2.3 and 2.4 of Anti-Dumping Agreement and art 2.2.2(iii) of the Anti-Dumping Agreement Article 9.3 (chapeau) of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994,Articles 7.1, Art 7.2 and Art 9. And 9.2 of the Anti-Dumping Agreement.

Ratio Dicta

Reasons for the panel to estimate the solution for claims made by Indonesia against EU

1. Claim (i): The EU had failed to act accordingly towards calculating the cost of production of product by producers by not adhering the Art 2.2.1.1, Article 2.2 and the Article (IV) of the GATT, 1994 of the Anti-Dumping law since they did not use the required price value as mentioned in the Article but chose an alternate rate. Also the panel stated that an investigative authority cannot be excused if they fail to calculate the profit cap without any supporting evidence or documents to make its determination under Article 2.2.2(iii)

2. Claim (ii): The panel concluded that The EU authorities did not act inherently unreasonable while attempting to estimate the profit cap, disregarded the producers cost as in their records to prevent alleged distortion as the international prices were much higher than the domestic production and hence violated Article 2.2.1.1, EU assumed these that the prices published by the Indonesian Government.

The panel dismissed Indonesia claims against the method of EU comparing the maturity period of the industries in the EU and Indonesia from the year of operations and Indonesia's persistence for using Oleochemicals by the EU as for calculating the profit cap.The panel also stated that there was no particular methodology(as under article 2.2.2(iii)) in calculating the profit cap in comparison with short and medium term borrowings rates and the investigating authority has the choice of discretion in the approach it rakes for estimating profit cap but still the EU determined an amount which was not under the article 2.2.2(iii)

3.Claim (iii):The panel considered under article 2.3 of the Anti-Dumping law that the first Independent buyer is the starting price for the construction of export price where the member must begin by the determining the sum of money by which the imported products was bought or sold to an independent buyer and the EU also failed to include the Double-counting premium price of PFAD(palm fatty acid distillate) while importing and from P.T Musim Mas after it was sold to an independent buyer under Article 2.3 of Ant-dumping Agreement.

4. Claim (iv): The panel stated that imported and domestic products cannot be assumed to be alike (the competitive dynamicness between the Indonesian Imports of blended PME) The EU failed to establish a proper price undercutting between the imports and domestic products.

5. Claim (v): The panel stated that the EU's imposition of Anti-Dumping tariffs exceeded than the regulated value as mentioned under Article 2 of the Anti-Dumping Agreement

6. Claim (vi): The panel dismissed Indonesia's claim by stating that the EU acted in obligation of Article 10.3 by confirming the provisional measures and did not collect the difference between the amount estimated for the purpose of the security and the definitive duty that was determined to be higher and the security collected by the EU was equal to the margin of dumping made at the provisional stage of measures establishing that Indonesia's claim that EU violated articles Chapeau of Article 9.2 was to be rejected.[1]

Obiter Dicta

The panel observed in the following statements throughout the proceedings:

1. While pointing out the failure of the EU for not calculating the Profit cap The panel stated that there can be exceptions under Article 2.2.2(iii) for being unable to calculate the profit cap if the investigated companies do not provide information to the investigating authorities of sales in the same general category of product, or it is not possible to calculate a cap for some other reason. But the EU's arguments cannot come under this since they were already aware and had the data for calculating the profit cap required and hence the EU violated Article 2.2.2(iii).

2. The panel stated that it had doubts that the EU could have considered the data about sales of Diesel fuels and Marine fuel oil as it was falling into the same category as biodiesel Fuels and could have been used to determine the profit cap.

3. The panel observed that the EU could have used the same procedure for evaluating the profit margin for sales by biodiesel producers, domestic sales by Argentinian producers for approximating the profit cap value of the Indonesian products.[1]

Conclusion

The Dispute DS480 (Biodiesel Indonesia) will act as precedent for other cases which can likely emerge in the upcoming years. With the emergence in globalization, population, capitalism and Sustainable environmental policies across the world there can be certainly place for disputes between multiple parties and this case can be assumed as a behemoth of misunderstanding between both the parties and was just incorrect assumptions. The case explains the different parameters where one country could potentially violate the Anti-dumping Law during the process of imposing an Anti-dumping tariff over another party. This case brings the need for a much more flexible and robust system for comparison of products and required relevant details to be analysed before implementing the Act or tax. Biofuel markets are one of the most volatile markets due to the assumption that any party or organization can change their stance within a short span of time and has the ability to cause losses without any prediction.

Indonesia was nearly successful in fulfilling their claims and duties by contesting it against with required data. This case can be concluded as a case where the complainants (The EU) were in fault regarding "mistake of fact" and violated the article in the passage of

construction of Data required for estimating whether their allegations of "Dumping of Biodiesel by Indonesia" was estimated said to be true.

CASE NO. 30

C/SCA/4462/2019 NOCIL LIMITED V. UNION OF INDIA

- SivapuramV.L. Thejaswini[136]

Introduction

This case was decided on 3rd of July, 2019 in Gujarat High Court by a Bench consisting of S.R.Brahmbhatt, A. P. Thaker.

It mainly focuses on the anti-dumping duties that are imposed on foreign imports by the domestic government mainly to protect their economy and when such domestic government believes that imports are priced below the fair market value.

Facts of the case

Petitioner No.1 being a company that is incorporated under the Companies Act, 1956 having its registered office Mumbai and one of its manufacturing facilities in the State of Gujarat. Petitioner no.2 is the director as well as shareholder of the company.
The contention was that the Designated Authority (respondent no.2) is functioning under the control of respondent no.1 (Ministry of Commerce, Government of India).
Notification was issued for imposition of Anti-Dumping Duty under the provisions of the Act and also under 2nd proviso to Section 9A (5) of the Customs (Tariff) Act, 1975 by Respondent no.3 (Ministry of Finance, Government of India) and the respondent no.4 is Central Board of Indirect Taxes and Customs.
In this case, petition is filed for the imports -

(a) That are originated in or exported from China PR such as MBT, CBS, TDQ, PVI and TMT

(b) that are originated in or exported from China PR and Korea RP such as PX-13 (6PPD)

In 2008, the petitioner filed an application for investigation and recommendation of anti-dumping duty on the import of such goods. Pursuant to the investigation, respondent no.2 issued preliminary final finding recommending for provisional anti-dumping duty on the import of such goods.

[136] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

- The Ministry of Finance, Government of India, issued Notification imposing provisional anti-dumping duty. Respondent no.3 issued notification for the implementation of recommendation of respondent no.2.
- In 2011, respondent no.2 conducted mid-term review investigation pursuant to the application filed by petitioner no.1 and the Central Government imposed anti-dumping duty by Customs Notification.
- In 2013, respondent no.2 initiated sunset review and respondent no.3 issued Customs Notification and revived the anti-dumping duty with retrospective effect and extended it up to 4th May 2014.
- In 2014, the final finding recommending continuation of anti-dumping duty on imports was issued by Respondent no.2. Respondent no.3 implemented Final Findings of respondent no.2 and issued Customs Notification imposing anti-dumping duty on the subject goods for five years.
- The Respondent No.2 has failed to appreciate and has not considered some essential facts such as

  (a) Surplus capacities in exporting countries,

  (b) Inventories that may be diverted to India from exporting Countries at

  Dumped prices etc.,

- Export data has been submitted by Petitioner no.1 that is collected from General Administration of Customs, Government of China which shows that volume of exports to third countries are very high when compared to volume of exports to India that were lower than the price at which exports are made to India.

Procedural History

In the year 2014, in the case of Forech India Limited and M/s.Kumho Petro Chemical Co. Ltd. filed Writ Petition challenging the Customs Notification of 2014 imposing anti-dumping duty on the subject goods before the High Court[137].

[137]M/S. Kumho Petrochemicals Co. ... vs Union Of India And Ors, W.P.(C) 1851/2014 (11.07.2014).

In 2018, by common judgment, the Delhi High Court allowed the petition and set aside the Custom Notification by which anti-dumping duty is imposed on the subject goods for five years. Against this order, the petitioners filed Special Leave Petition.

So in this case, Petitioner no.1 filed substantiated application in terms of Section 9A(5) read with Rule 23 of the Customs Tariff Act, 1995 justifying that there is a need for initiation of sunset review investigation and also for continuation of anti-dumping in force on imports of subject goods from subject countries for further period of five years.

Issues

a) Whether there is any need for the initiation of sunset review investigation?
b) Whether it is necessary for continuation of anti-dumping in force on imports of goods for 5 years ?
c) Whether the court has jurisdiction with respect to the present petition?

Holding

Article 226(2) of the Constitution deals with the territorial jurisdiction of the High court. "The power for the issue of orders, directions or writs to any authority, Government or person may be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part occurs as per Article 226(1)[138].

- In one of the leading case, the expression "cause of action" is defined as the bundle of facts that must be proved by petitioner, if traversed, to entitle a judgment in his favour by the Court. The court must consider the facts that are pleaded in support of the cause of action to determine the objection of lack of territorial jurisdiction without setting up an enquiry about whether the said facts are correct[139].

[138] The Constitution of India, "Article 226(2)".
[139] Oil and Natural Gas Commission v. Utpal Kumar Basu, 1994 SCC (4) 711, The Supreme Court, (23.06.1994)

The expression cause of action is defined in Mulla's Code of Civil Procedure - which means every fact that, if traversed, would be necessary for the plaintiff to favour his right to a Judgment of the Court.

- The same definition of the expression 'cause of action' is found in Cooke v. Gill as observed by Lord Brett[140].

Section 9A deals with the Anti-dumping duty imposed on dumped articles -

When an article is exported by an exporter or producer from any country or territory at less than its normal value to India, then on such article being imported into India, the Central Government may impose an anti- dumping duty not exceeding the margin of dumping in relation to such article, by notification in the Official Gazette,

The difference between the export price and normal value of an article is known as "Margin of dumping"[141].

Dicta

- Initially in the Forech India case, it was observed by the Delhi HC that the initiation of sunset review investigation was illegal because the notifications were issued after the previous anti-dumping duty was expired.

- The HC has also observed that there were some gaps in the continuation of anti-dumping duty with respect to sunset review.

- The HC has also observed that the assumption of designated authority for sunset review is not proper as they have considered that there is no current injury instead of the impact of likelihood of injury.

- It was also considered that the gap between supply and demand is not the basis for allowing imports to India at dumped and unfair prices.

[140] Cooke v. Gill, 1873 LR 8 CP 107, Appellate Division of the Supreme Court of New York, (1873)
[141] The Customs Tariff Act, Section 9A

Judgement

In the present case, though the sufficient prima facie information justifying initiation of investigation has been submitted by the petitioner but the authority has not considered it in proper perspective.

Further, it is necessary to appreciate the question as to whether the domestic industry is likely to be materially injured again, if duties are lifted. This was not carried out by the respondent where it has rejected the application of sunset review.

As there is substantive and sufficient material available for initiation of Sunset Review. The petition is allowed where the respondent-authority is directed to initiate sunset review and also to suitably extend anti-dumping duty in accordance to the provisions of law.[142]

Case analysis

In the Gujarat High Court (HC), the domestic industry has challenged the decision of Designated Authority and requested the HC that the Designated Authority has to initiate the sunset review investigation to extend the anti-dumping duty as the industry had provided all the relevant information.

When Section 9A(5) of the Customs Tariff Act read with Rule 23(1B) of the Anti-dumping Rules, 1995 it can be understood that the initiation of sunset review investigation can be done only when anti-dumping duty is in force.

If there is no such duty in force, then the domestic industry according to Section 9A(1) of the Customs Tariff Act read with Rule 5 of the Anti-dumping Rules, 1995 has to request for initiation of such investigation.

Thus in this case, the Gujarat High court has directed the Designated Authority to initiate the sunset review investigation which will be contrary to the decision in Forech India Limited and M/s.Kumho Petro Chemical Co. Ltd by Delhi High Court.

[142] Nocil Limited v. Union of India, C/SCA/4461/2019, The Hight Court of Gujarat, (03.07.2019)

Conclusion

Thus, we can conclude from this case that the decision of the Gujarat High court is not in consonance with the decision given by the Delhi High Court. And the High court also has jurisdiction to deal with the case.

This case is very important and also can have an impact also in the other similar cases that may arise. Because it has changed the decision of the previous Forech case also. It is very significant regarding the imports, their prices, any anti-dumping duties etc., The HC has rightly considered all the material facts in this case while delivering the decision.

CASE NO. 31

DS402 US – ZEROING (KOREA)

- Vaibhav.V[143]

Introduction

On November 24, 2009, Korea requested deliberation with the United States regarding their use of zeroing in three antidumping proceedings involving Korean items, notably stainless-steel plate in coils, stainless steel sheet and strip in coils, and diamond sawblades and parts. Later, Korea alleged that the US Department of Commerce's (USDOC) use of zeroing in these three situations had the effect of either artificially creating dumping margins when none would otherwise exist or inflating dumping margins.

Facts

1.Korea claimed in its consultation request that the USDOC's use of zeroing in final inferences, updated final decisions, and anti-dumping duty orders in the three cases in question was in violation of Article VI of GATT 1994 and Articles 1, 2.1, 2.4, 2.4.2, and 5.8 of the Anti-Dumping Agreement.

Procedural History -

The United States–Softwood Lumber V 13th September 2002 case set a high bar.

The Panel appears to have added an extra step for cases with strong precedents, requiring proof that the two measures are the same. If this method is followed in future cases, there will be a two-step process for cases with little precedent and a three-step one for instances with enough.

Issues

1. “United States” zeroing technique in the investigations was a violation of Article 2.4.2 of the Anti-Dumping Agreement?
2. Why didn’t U.S contest about the factual assertions made by Korea?
3. Why did U.S. not contest for the Legal Relevance cited by Korea?

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[143] BBALLB, 2nd Year Student, Alliance School of Law, Alliance University, Bengaluru.

Holdings

Korea's claim was sustained by the Panel. The Panel specifically held that the USDOC's "zeroing" technique for computing dumping margins in the three anti-dumping investigations at issue was incompatible with Article 2.4.2 of the Anti-Dumping Agreement, and so concluded that the US had violated its responsibilities under this provision. The DSB approved the panel report on February 24, 2011.

Considerations

Since the US did not oppose Korea's claim, the Panel assessed its responsibility under Article 11 of the DSU. The role of Panels in DSB proceedings is described in Article 11 of the DSU, which states that the Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making recommendations or in issuing rulings.

The Panel Considered another issue was that the lack of any denial by the US and the above-mentioned evidence established that Korea had demonstrated that the USDOC's methodology for calculating dumping margins that were not based on all facts available was the same as the methodology found to be inconsistent with Article 2.4.2 of the Agreement. The Panel than had its wording in which it said that the complaining party still must demonstrate a prima facie case in the absence of adequate response by the defending party. As a result, the Panel could only find in Korea's favor if it were satisfied that Korea had established a prima facie basis for its zeroing claim.

Critical Analysis

Yes, the court’s decision was appropriate.

The US had announced that it intends to adopt the DSB recommendations and findings in accordance with its WTO Obligations where this decision confirms the existing law.

The Reasoning was not consistent with the Previous reasoning in similar cases like in the case of US-Softwood Lumber where the panel's first decision was that the United States had violated the Anti-Dumping Agreement by calculating dumping margins using a methodology that included the practice of "zeroing."

The panel's decision was that the US did not act inconsistently with the Anti-Dumping Agreement when determining the amount of financial expense attributable to the production of softwood lumber for Abitibi, one of the Canadian businesses under examination, has been reversed.

Where the Appellate Body overturned the panel's decision on this point, it was not compelled to pronounce on whether the US had violated its WTO duties in this regard.

When determining the amount for by-product revenue from the "sale" of wood chips for Tembec, another Canadian business under investigation, the body had known that the Respondent did not act according to the rules of the Anti-Dumping Agreement.

The Appellate Body upheld the panel's conclusion that the US had not acted in a prejudiced, non-objective, or less than even-handed manner.

The DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report, at its meeting on August 31, 2004.

Yes, the decisions will Significantly influence the Existing Law.

Court had adequately Justified its reasoning by saying that -USDOC's "zeroing" technique for computing dumping margins in the three anti-dumping investigations at issue was incompatible with Article 2.4.2 of the Anti-Dumping Agreement, it ruled that the US had violated its responsibilities under this provision.

The Interpretation of Law was appropriate.

In this case, the decision of the panel was appropriate and justified because as they found out that the anti-dumping duty orders in the three cases in question was inconsistent with the United States' obligations of GATT 1994 and Articles 1, 2.1, 2.4, 2.4.2, and 5.8 of the Anti-Dumping Agreement, the panel report was circulated to members and then the Korea's claim was sustained by the Panel.

The United States had told that it had taken this issue seriously and has made measures to execute the DSB recommendations according to its WTO authority, but this needs a little amount of time to implement.

The Case Us Softwood Lumber V was similar and the decision was also appropriate, but the Reasoning of the Judgement was held differently in different level by the Panel, which was according to DSB rules and Regulations.

United States had violated the Anti-Dumping Agreement by calculating dumping margins using a methodology that included the practice of “zeroing”, but later the decision was revered and held that when determining the product which was the wood chips had to be sold, another Canadian business under investigation, the panel found that the US did not act inconsistently with specific articles of the Anti-Dumping Agreement.

Then there was a mutual Agreement between the Two countries Canada and United States,

In this case of DS 402, there was than a mutual agreement between Korea and United States where they both agreed Upon the time which was asked by the United States.

So, the decisions of the panel will be according to WTO’s Rules and Obligations, and they ensure that this happens between two countries properly and they also obey to the Rules of the Dispute Settlement Board and the Respective Panels.

Conclusion

When we analyze according to the case, we can easily find out that the Panel's decision in US–Zeroing (Korea) has no serious legal or economic implications for the zeroing issue. The Panel just stated various Appellate Body views on the incompatibility of zeroing with Article 2.4.2 of the ADA in its decision. Korea was guided by a strong precedent in its favor which came in handy as a complainant and was able to get a faster Panel process. It had some additional charges during the adjudication step. The costs do not appear to be significant in a simple case, but they could be burdensome for a complainant in a complex case. Finally, after two years of multilateral proceedings to annul three previous measures an evaluation of WTO legal remedies is required. The main thing which emerges clearly from this zeroing-litigation scenario is a broader analysis of the WTO DSU system's weaknesses and the capacity of countries to take advantage on them.

strictions are made for the favor of public health and safety of a nation? Will the packaging measures be valid then? What is WTO’s stance and preference between public health and free trade? All of these are questions can be answered in the given case where Australia was contested for establishing Tobacco Plain Packaging Measures of which objective was to improve public health by reducing the exposure and use of tobacco products.

CASE NO. 32

DS590 JAPAN – MEASURES RELATED TO THE EXPORTATION OF PRODUCTS AND TECHNOLOGY TO KOREA

-Madhav Goyal[144]

Introduction

The importance of this dispute is to analyze whether the unprecedented tariff applied by Japan on Korea comes under the ambit of National Security. Here, Japan is in violation of many provisions of the GATT, 1994 here Japan fails to comply ab initio, with relation of the export of the subject products and technologies when destined for Korea by adding an advantage, favour, privilege or immunity granted to the export of the like products when destined for certain other WTO Members. Also, the case of Saudi Arabia- IPRs,1 regarding the issue of the national security exception, is highly likely to have a major impact on this dispute between South Korea and Japan, where South Korea has accused Japan of imposing export restrictions resulting to affecting the product's trade is in violation of Japan's WTO obligations

Facts of the Case

Japan is a highly competitive supplier of semiconductor machinery and materials, and Korea is a highly competitive producer of semiconductors. This semiconductor industry supply chain is globalized in its production flow and concentrated among a few leading firms for various inputs.

In July 2019, the Japanese government-imposed export restrictions on various goods to South Korea, including key chemical materials and machinery used for semiconductor production. These materials include hydrogen fluoride, fluorinated polyamides, and photo resist, "and their relevant technologies"—are important inputs for Korea's semiconductor industry. So these export restrictions are causing a lot of issues to the semiconductors production in Korea.

The Korea International Trade Association (KITA) estimates that Japan for all three types of semiconductor related chemicals, is a major or leading supplier of these chemicals. So these import restrictions where Japanese companies must apply for a license for each shipment of

[144] BBALLB, 2nd Year Student, Alliance School of Law, Alliance University, Bengaluru.

exports of these listed items. The impact of these export controls of these specialized chemicals on Korea's semiconductor industry stands to be significant, placing unwanted risks for both supplying and purchasing firms in the supply chain. When the announcements were made, industry sources speculated that it might take upwards of three months to acquire such export licenses, which could lead to a supply shutdown during the interim for Korean firms that make use of these Japanese-origin materials.

On 11 September 2019, Korea requested consultations with Japan regarding certain measures, including licensing policies and procedures, adopted by Japan allegedly restricting exports of fluorinated polyimide, resist polymers and hydrogen fluoride, and their related technologies destined for Korea. The Panel for the same has been established but not yet composed in July. 2020.

Procedural History

Saudi Arabia - IPRs: The Saudi Arabia case concerns a set of the Saudi Arabian government's measures, actions, and omissions that Qatar claimed to have prevented be IN, a Qatari business, from obtaining legal representation in civil and administrative enforcement procedures. Qatar also claimed that Saudi Arabia failed to institute criminal procedures against the Saudi Arabian infringer. Saudi Arabia defended its action by invoking the security interest exception under Article 73(b) (iii) of the TRIPS Agreement. Thus, making it an important case, as this is the most recent judgment related to the issues in question in the present case.

Russia – Traffic in Transit: This is an important case to be taken as a precedent of the present case as this is the first case that enunciates the national security exception under Article XXI of GATT 1994.

Issues

1. Whether Japan is violating Articles I, VIII, X, XI:1, XIII:1 and XIII:5 of the GATT 1994,
2. Whether Japan is inconsistent with Articles 2, 6, 7, 8 and 10 of the Trade Facilitation Agreement,
3. Whether Japan is violating Article 2 of the TRIMS Agreement,
4. Whether Japan is violating Articles 3.1, 4.1 and 28.2 of the TRIPS Agreement,

5. Whether Japan is violating Articles VI:1 and VI:5 of the GATS

Case Analysis

In this case, Japan is in violation of Article I: 1, Article XI: 1, Articles XIII: 1 and XIII: 5 of the GATT 1994. This violation occurs when taking in consideration all the regulations and requirements in connection with exportation, here Japan fails to comply ab initio, with relation of the export of the subject products and technologies when destined for Korea by adding an advantage, favor, privilege, or immunity granted to the export of the like products when destined for certain other WTO Members.

As the measures applied by them on Korea is at essence a restriction, which is not amounting to a duty, tax, or other charge, that is made credible by the requirement of licensing regulations on the exportation or sale for export of the subject products and technologies, which is not the same that is applied on the other countries. Also, when Japan applies these unprecedented measures on Korea it establishes a measure for Investment with regards to trade in goods, which is clearly inconsistent with Article XI: 1 of the GATT 1994, thus violating Article 2 of the TRIPS Agreement.

Japan in my opinion is also in violation of the Protection of Intellectual Property Rights provided under Articles 3.1 and 4 of the TRIPS Agreement. This can be substantiated by the fact that Japan fails to provide the Korean workers the appropriate treatment which is at par to that provided to the Japanese workers and the workers of certain other WTO Members. In the sense where, Japan has created unfair constraints for the transfer of the technologies of semiconductors and other related products concerning the Korean workers.

Finally, Japan is also in violation Articles VI:1 and VI:5 of the GATS, since the Country has failed to impose the laws and regulations based on the prior decisions and rulings of general application affecting trade in services in a appropriate and unbiased process.

I believe the analysis of the Panel of the Saudi Arabia case, regarding the issue of the national security exception, is highly likely to have a major impact on this dispute between South Korea and Japan, where South Korea has accused Japan of imposing export restrictions resulting to affecting the product’s trade is in violation of Japan’s WTO obligations.

Conclusion

In the present case, Korea argues that the measures applied by Japan on the subject products and technologies diminishes or voids the benefits arising to Korea directly or indirectly under the covered agreements or disrupts the objectives of these agreements. I believe the Panel and the Appellate Body, when they pass a ruling, it would be in favour of Korea on most of the issues if not all, as Japan is clearly in violation of the Articles in question.

CASE NO. 33

CHINA- CERTAIN MEASURES CONCERNING THE PROTECTION OF IPR

WT/DS542

- Priyadarshini. P[145]

Introduction

Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) is an international legal agreement between all WTO members. It provides minimal requirements for national governments to regulate various forms of intellectual property (IP) as they apply to citizens of other WTO member countries. TRIPS was negotiated between 1989 and 1990 at the close of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) and is administered by the World Trade Organization (WTO).

Copyright and related rights, trademarks, including service marks; geographical indications, including appellations of origin; industrial designs; patents, including the protection of new varieties of plants; integrated circuit layout designs; and undisclosed information, such as trade secrets and test data are among the areas of intellectual property covered under the TRIPS.

The TRIPS Agreement's strategic objectives are laid out in the Preamble, which recalls the main Uruguay Round negotiating objectives outlined in the TRIPS subject by the Punta del Este Declaration of 1986 and the Mid-Term Review of 1988/89. These objectives include reducing trade distortions and obstructions, promoting accurate and comprehensive intellectual property rights protection, and ensuring that measures and procedures for enforcing intellectual property rights do not become hurdles to legitimate trade.[146]

In this particular case, USA is the complainant and China being the respondent. The USA requested for consultations with China on 23rd March 2018 regarding certain measures relating to protection of intellectual property rights and how China's actions were against the provisions of TRIPS.

[145] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

[146] Wto.org. n.d. *WTO | intellectual property - overview of TRIPS Agreement*. [online] Available. [Accessed 20 July 2021].

Facts of the Case

On 23rd of March 2018 requested for consultations with China relating to its provisions relating to Intellectual Property Rights and its establishment with the provisions of TRIPS. USA requested for consultations in accordance with Articles 1and 4 of Understanding Rules and Regulations under the DSU and Article 64 of the TRIPS Agreement in context with the GATTS agreement.

According to USA, after a technology transfer contract ends, China prohibits foreign patent holders the opportunity to defend their intellectual rights against a Chinese joint-venture party. China also has required adverse contract provisions that discriminate against and make imported foreign technology less desirable. As a result, China denies international intellectual property owners the opportunity to safeguard their rights in China as well as freely negotiate market-based terms in licensing and other technology-related transactions.

China uses several legal provisions to establish these measures, a mainly the Regulations of the People's Republic of China on the Administration of Import and Export of Technologies that were mainly inconsistent with the TRIPS agreement.

- The People's Republic of China's Regulations on the Administration of the Import and Export of Technologies appear to be incompatible with Article 3 of the TRIPS Agreement, either alone or in association with Article 28.2 of the TRIPS Agreement, because: Foreign intellectual property rights holders receive less favourable treatment under Article 24 of the Regulations than Chinese intellectual property rights holders. For example, licensors of imported technology contracts must indemnify licensees for all infringement liabilities arising from the use of the transferred technology, according to Article 24. E.g., Licensors of imported technology contracts, for example, must indemnify licensees for all infringement liabilities arising from the use of the transferred technology, according to Article 24.
- Foreign intellectual property rights holders receive less favourable treatment under Article 27 of the Regulations than Chinese intellectual property rights holders. Article 27 usually stipulates that any improvements in imported technology belong to the person who makes them.
- Foreign intellectual property rights holders receive less favourable treatment under Article 29 of the Regulations than Chinese intellectual property rights holders. Article

29(3), for instance, bans an imported technology licencing contract from limiting a Chinese party's ability to upgrade the technology or use the improved technology.

- Article 43 of The Regulations for Implementation of the Law of the People's Republic of China on Chinese Foreign Equity Joint Venture is also seen to be inconsistent with the above-mentioned TRIPS provisions.[147]

The Consultations did not lead to solutions that was accepted by both USA and China. So The USA requested the DSB to establish a panel to help in resolving the issue in question.

The DSB on 29th October decided to not establish a panel but later on 21st November, when requested again DSB established a panel.

Third-party rights were reserved by Australia, Brazil, Canada, Egypt, the European Union, India, Japan, Kazakhstan, Korea, New Zealand, Norway, the Russian Federation, Singapore, Switzerland, Chinese Taipei, Turkey, and Ukraine and stated that they wanted to join the consultations stating that they have interests relating to trade in this case.

China accepted the request of only European Union and Japan to join the consultation.

Issues

The issues in this case are as under:

1. Whether China's provisions relating to transfer and protection od intellectual property rights is inconsistent with the provisions mentioned in the agreement of TRIPS?
2. Whether China's home country provisions relating to IP is discriminatory or unfair to foreign technology rights holders compared to domestic holders of China.

Holding

The panel that was established upon the request of USA, the panel was established by the DSB to resolve the issue in accordance with Article 6 of the DSU. But the panel was declared to be lapsed since it was not asked to resume its work by the parties and hence as of 11th June 2021, the panel is terminated.[148]

[147] Docs.wto.org. n.d. [online] Available at: < [Accessed 20 July 2021].

[148] Docs.wto.org. n.d. [online] Available at: < [Accessed 20 July 2021].

Obiter Dicta

The main concern raised by USA was related to the laws of China being unfair or inconsistent towards the foreign importers and exporters of technologies in accordance with the TRIPS agreement.

The core reasons why the USA requested for the establishment of a panel are as follows in view with the violative provisions of China relating to IPR:

- Foreign Trade Law of the People's Republic of China (adopted by the Eighth Session of the Standing Committee of the Seventh National People's Congress on May 12, 1994, effective July 1, 1994, in Executive Order No. 22, amended by the Eighth Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, effective July 1, 2004, in Executive Order No. 15, further amended by the Tenth Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004,
- Regulations for the Administration of Import and Export of Technologies in the People's Republic of China (Order of the State Council No. 331, issued December 10, 2001, effective January 1, 2002, amended January 8, 2011, in Order of the State Council No. 588)
- Chinese-Foreign Equity Joint Ventures Law (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, effective July 8, 1979, in Order No. 7 of the Chairman of the Standing Committee, amended April 4, 1990, in Executive Order No. 27, further amended March 15, 2001, in Executive Order No. 48, and September 3, 2016.
- The People's Republic of China's Contract Law (adopted at the Ninth National People's Congress's Second Session on March 15, 1999, and effective October 1, 1999, in Executive Order No. 15), as well as the Supreme People's Court's Interpretation on Several Issues Concerning the Application of Law in the Trying of Cases of Disputes over Technology Contracts.

The particular articles of the above-mentioned provisions that are inconsistent with the TRIPS agreement are as follows:

- Foreign intellectual property rights holders receive less favourable treatment under Article 24 of the Regulations than Chinese intellectual property rights holders. Licensors of imported technology contracts must indemnify licensees

for all infringement liability arising from the usage of the transferred technology.

- Foreign intellectual property rights holders receive less favourable treatment under Article 27 of the Regulations than Chinese intellectual property rights holders. Article 27, for instance, stipulates that any improvements in imported technology belong to the party who makes them.
- Foreign intellectual property rights holders receive less favourable treatment under Article 29 of the Regulations than Chinese intellectual property rights holders. Article 29(3), for particular, bans an imported technology licencing contract from limiting a Chinese party's ability to upgrade the technology or use the improved technology.
- Regulations for the Implementation of the People's Republic of China's Law on Chinese-Foreign Equity Joint Ventures Foreign intellectual property rights holders receive less favourable treatment under Article 43 of the Regulations than Chinese intellectual property rights holders. Article 43(4), for instance, gives a Chinese joint-venture party the ability to exploit technology given under a technology transfer contract after the contract has expired.
- Article 43(4) gives a Chinese joint venture partner the ability to exploit technology given under a technology transfer contract even after the contract has expired.[149]

These were the contentions made by the USA against China. EU and Japan were allowed to join the consultations by China. The United States asked the Director-General to put together the panel on December 12, 2018. The panel was put together by the Director-General on January 16, 2019.

The panel's Chair told the DSB on 12 June 2019 that the panel had approved the US' request of 3 June 2019, to which China had agreed on 4 June 2019, that the panel pause its proceedings until 31 December 2019. The parties responded in answer to a question from the panel that the panel should treat this request as one made according to Article 12.12 of the DSU. The panel's jurisdiction would lapse 12 months after its work is suspended, according to the panel's Chair.

[149] Docs.wto.org. n.d. [online] Available at: < [Accessed 20 July 2021].

The Chair of the panel informed the DSB of its decision on 8 January, 3 March, and 6 May 2020 to allow the United States' requests of 23 December 2019, 2 March, and 5 May 2020 to further postpone the panel's work until 29 February 2020, 1 May 2020, and 31 May 2020, respectively. The panel told the DSB on June 18, 2020, that following the commencement of its work on June 1, 2020, it had accepted a request from the US on June 8, 2020, to pause its work pursuant to Article 12.12 of the DSU with effect from June 8, 2020, which China agreed to.[150]

But USA and China failed to ask the panel to resume their work towards the case, hence on June 11th, 2021, the DSB declared the panel is terminated and lapsed.

Case Analysis

The main takeaway from this case is the importance of TRIPS in protecting the WTO member country's intellectual property rights from other countries. The role of TRIPS agreement's presence in preserving the WTO member's interest are very important while in connection with IP related trades.

Another important point highlighted is on how many countries wanted to join the consultations of USA and China. This is important to be noted because, if there had been a decision made by the panel in this case, it would have not only affected USA's trade but also other foreign countries technology trade.

If the panel had decided, this case would have been considered to be a very important precedent related to the understanding of TRIPS agreement in current time of the world since this is a new case (2018-21).

Conclusion

The authorization to constitute the panel lapsed because the panel had not been asked to restart its work, as stated in Article 12.12 of the DSU.

USA could in the future may be able to request the DSB to establish a new panel to help resolve if China and USA cannot mutually decide between themselves.

[150] Wto.org. n.d. *WTO | dispute settlement - DS542: China - Certain Measures Concerning the Protection of Intellectual Property Rights*. [online] [Accessed 20 July 2021].

CASE NO. 34

DS583 TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION, IMPORTATION, AND MARKETING OF PHARMACEUTICALS PRODUCTS

-Vaibhav V[151]

Introduction

The European Union had proposed meetings with Turkey on a number of issues relating to pharmaceutical product manufacture, imports, and marketing. The European Union has highlighted the following accused acts: a mandate for localization, a requirement for industrialization, an import ban on localised products, and a precedence measure

Facts of the Case

The European Union had requested consultations with Turkey on issues relating to pharmaceutical product manufacture, imports, and marketing. A localization requirement, a technology transfer requirement, an import restriction on specialized products, and a prioritizing measure are among the disputed acts listed by the European Union. The United States requested to participate in the consultations on April 18, 2019.

Procedural History

The European Union had requested consultations with the Russian Federation about pharmaceutical product manufacture, imports, and marketing. The European Union claims that the procedures tend to be in violation of GATT 1994 articles and the Import Licensing Agreements Articles 1 and 7, Ukraine requested to participate in the consultations in November 2014. Indonesia, Japan, and the United States also requested to join the consultations. The European Union suggested for the formation of a panel. The DSB postponed the establishment of a panel during its meeting in 2015.

Issues

1. The import ban on localised products, the localisation requirement, and the technology transfer requirement prioritization, is it inconsistent with Article 3 of the GATT 1994 as claimed by the European Union??

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[151] BBALLB, 2nd Year Student, Alliance School of Law, Alliance University, Bengaluru.

2. What was the Reason for the DSB to Postpone the establishment of Panel?
3. Why did European Union submit statement of evidence according to Article 4.2 of the SCM Agreement?

Other Considerations:

The European Union proposed for a formation of panel. The DSB adjourned the formation of a panel at its meeting on August 15, 2019.The DSB established a panel at its meeting in 2019. Third-party rights were reserved by Brazil, China, India, Japan, Russian Federation, Ukraine, and by the United States. The European Union requested the Director-General to put together the panel in March 2020. The panel was formed by the Director-General in March.

The chair of the panel informed the DSB that the panel did not expect to provide its final report to the parties until the second half of 2021, due to delays caused by the global COVID-19 pandemic. The Chair notified the DSB that the report would be made public once it has been circulated to all members in three official languages, and the timing of circulation would be dependent on translation completion.

Holding

In this case Particularly, the Decision has not yet arrived. But most Likely the Decision would be considering the Previous Decisions - like in the Previous case, where European Union had alleged against the Russian Federation. The Decision would be held according to the European Union's claims, as the same situation had happened in previous cases, the same decisions would be taken Appropriately. Then The European Union and Turkey would agree to the reasonable period to implement the DSB's recommendations and rulings.

At the End, Turkey would inform the DSB that it had complied with the DSB's recommendations and rulings which was according to the certain decisions of the Board.

So, This Decision can be held in the case of DS 583 Turkey – TRIPS case.

Case Analysis

Yes, the court's decision would be appropriate if it is given according to the Previous decisions.

If Turkey would be able to inform the DSB that it would comply with the DSB's recommendations and rulings according to the certain decisions of the Board than the decisions would certainly confirm with the existing law.

The Reasoning would be consistent with the Previous reasoning in similar cases if it is like in the case of the European Union where it had requested consultations with the Russian Federation about pharmaceutical product manufacture, imports, and marketing. The European Union claims that procedures tend to be in violation of GATT 1994 articles and the Import Licensing Agreements Articles 1 and 7. The Decision was held according to the European Union's claims. The Members received the panel report on August 12, 2016.Than the European Union and Russian Federation agreed to the DSB's decisions and verdicts which had to be followed within a given timeframe.

Through several decisions of the Board of the Eurasian Economic Union, the Russian Federation informed the DSB that it had complied with the DSB's recommendations and rulings.

Yes, the decisions will Significantly influence the Existing Law

The Court would adequately Justify its reasoning by saying that -The import ban on localised products, the localisation requirement, and the technology transfer requirement prioritization, is inconsistent with Article 3 of the GATT 1994 as claimed by the European Union, with the obligations under the WTO Agreement it would rule that the Turkey had violated its responsibilities under this provision.

The Interpretation of Law would be appropriate if the Decision is given according to the previous decisions of the cases and the court's decision would be properly justified if they follow according to the WTO's Guidelines and Obligations.

In this case, European Union claimed that the requirement for localization and the prioritising measure appear to be in violation of GATT 1994. Article 3 Articles 1 and 3(a) of the GATT 1994 appear to conflict with the localization requirement, the technology transfer requirement, and the prioritising measure. All four types of contested measures appear to be in violation of GATT 1994 Article 2. The import ban on domestic products appears to be in violation of GATT 1994 Article 1. The Articles of TRIMS and SCM Agreement of Specific sections appear to conflict with the necessity of localization.

As we can see it is inconsistent with Article 3 of the GATT 1994 as claimed by the European Union, with the obligations under the WTO Agreement it would rule that the Turkey had violated its responsibilities under this provision. Then, The European Union and Turkey would agree to the reasonable period to implement the DSB's recommendations and rulings

The court’s decision would be appropriate and justified if it is given according to the Previous decisions. So, the decisions of the panel will be according to WTO’s Rules and Obligations, and they ensure that this happens between two countries properly and they also obey to the Rules of the Dispute Settlement Board and the Respective Panels. The Appellate Body would uphold the panel's decision that the revised TRIMS Agreement is incompatible with GATT 1994 Article 1 and Article 2.1.

Conclusion

Trade Related Aspects of Intellectual Property (TRIPS) was established at the General Agreement on Tariffs and Trade (GATT) which is supervised by World Trade Organization (WTO). This mainly establishes minimal requirements for national governments to regulate numerous forms of intellectual property (IP) as they apply to nationals of other WTO member countries. The World Trade Organization's Framework on Business Aspects on TRIPS is a global legal binding agreement across all the countries WTO members (WTO). TRIPS provisions must be incorporated into domestic intellectual property legislation, such as the Patent Act and the Copyright Act.

The WTO promotes for required changes to national IPR legislation. The TRIPs agreement aims to integrate national legislation with international standards. TRIPS is remarkable for being more explicit and stringent when it comes to patents, the most essential type of intellectual property. Patents should be accessible for any discovery in any sector of technology, whether it is a product or a method or if it is new and involves an innovative step, that is industrially applicable.

CASE NO. 35

DS 176 UNITED STATES - SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1988

-Naman Jain[152]

Introduction

The TRIPS Agreement contains horizontal and cross-cutting obligations that apply to all intellectual property rights it protects. These include non-discrimination obligations to grant national and most-favoured-nation treatment, and obligations to provide national enforcement procedures and remedies in the event of alleged violations. Some of these rules have been reviewed by the United States Panel and Appellate Body - Section 211 of the General Appropriations Act of 1998 (WT / DS176) ("United States - Havana Club").

The case was in detail about certain trademark and trade name obligations. The case concerned a brand ("Havana Club" for rum) that the Cuban government had purchased from Cuban national owners after the revolution, and that was the subject of a Cuban French joint venture some 40 years later. The United States - Havana Club panel was established in 2000 to investigate a complaint by the European Communities and its member states regarding a provision of a 1998 United States Budget Act - Section 211 of the 'Omnibus Allocations Act[153] - Regarding the registration, renewal, and application in the United States of registered trademarks, trade names, or trade names used in connection with businesses or assets seized by the Cuban government as of January 1, 1959.

Facts of the Case

United States - Section 211 Omnibus Appropriations Act of 1998, WT / DS176, was a complaint by the EC against the United States alleging inconsistency of the TRIPS Agreement with the right of America in the owners of trademarks seized by the Government of Cuba without compensation have the right to assess the trademarks in the courts of the United States and to refuse authorization to register such marks with the patent and trademark office from United States.

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[152] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

[153] Section 211 addresses the ability to register or enforce, without the consent of previous owners, trademarks or trade names associated with businesses confiscated without compensation by the Cuban government.

The case concerned a brand ("Havana Club" for rum) that the Cuban government had purchased from Cuban national owners after the revolution, and that was the subject of a Cuban French joint venture some 40 years later. US federal courts had confirmed the validity of US law and its application to the Cuban French joint venture before the EC took the dispute to the WTO. The EC argued that US law was inconsistent with the Paris Convention trademark registration rules, violated the fundamental rights of trademark owners under the TRIPS Agreement, and violated national and most-favored-nation rules in the Agreement of TRIPS.

Issue

1. Whether section 211 of the OAA was in violation of the TRIPS Agreement or not?

Procedural History

India "Patent protection of agricultural chemicals and pharmaceuticals (" India "Patents (US)")[154] is even more important. We indicate, for the relevant part, that: In public international law, an international court can treat domestic law in different ways. Municipal law can serve as evidence of fact and can provide evidence of state practice. However, municipal law can also provide proof of compliance or non-compliance with international obligations.

EC measures relating to meat and meat products (hormones) ("EC - hormones")[155] those factual findings, contrary to legal interpretations or conclusions, are in principle not subject to review by the European Body. The appeal reviews in that case noted that the consistency or inconsistency of a particular fact or set of facts with the requirements of a particular treaty provision is a matter of legal qualification. It is a legal question.

Holding

The panel circulated its report in August 2001, in which it found only one violation of the TRIPS Agreement, namely the obligation to provide fair and equitable judicial proceedings because a paragraph in Section 211 limited effective access for holders of marks to such procedures. The European Communities and their member States appealed.

[154] India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (United States), WT/DS50
[155] European Communities - Measures Concerning Meat and Meat Products (Hormones) - Joint communication from the European Union and the United States
WT/DS26

The Appellate Body determined (affirming the Panel's view) that the obligation of Article 6d as is (or "as is") of the Paris Convention is to accept trademark registration in the same way and not to eliminate discretion of the Member states to apply rules regarding other trademark rights. It stated that Articles 15 and 16 of the TRIPS Agreement did not prevent each member from making their own decision on the ownership of trademarks within the limits established by the Paris Convention. It stated that Article 42 regarding procedural rights does not oblige a member to defend any substantive trademark rights claim that a party may enforce if that party was not reasonably the rights holder from the outset. brand affair.

In summary, the Appellate Body upheld the right of the United States to deny the registration and application of trademarks that it claims were seized in violation of the strict public policy of the forum State[156]. The Appellate Body analyzed the law of the United States with respect to the alleged seizure of trademarks by Cuba in light of the national treatment and most-favored-nation obligations. He noted that these obligations are fundamental under WTO law. It rejected the Panel's finding that even if some minor discriminatory aspects of US law could be identified, it was unlikely that these aspects would have practical effect and therefore would not violate WTO rules.

The Appellate Body, relying to some extent on a previous GATT panel report (US - Section 337), found that even discriminatory aspects that may not have effect in practice were nonetheless inconsistent with the United States national and MFN treatment- obligations. The Appellate Body further ruled, unlike the panel, that trade names fell within the scope of the TRIPS Agreement.

While the Appellate Body found what it considered to be a minor procedural error in the mechanism adopted by the United States Congress to enforce its decision on the seized mark, the Appellate Body as a whole affirmed the jurisdiction of Congress and the Executive Department to deny the validity of a Cuban French trademark property claim. On the general question of property, the Appellate Body has held that a WTO Member is free not to recognize intellectual property rights in its own territory in case of confiscation of rights in another territory, subject to the obligation of national treatment and most favored national treatment.

[156] WTO DISPUTE SETTLEMENT AND COPYRIGHT: THE FIRST SEVEN YEARS Matthew Kennedy and Hannu Wager1 (Accepted for Paul Brügger (ed.), ALAI Copyright – Internet World, Report on the Neuchâtel Study Session, 16/17, Lausanne/Berne, Group Suisse de l'Association Littéraire et Artistique Internationale 2003, 223-249)

Other Considerations

In the same case it can be noted that Under the DSU, a panel can examine the domestic law of a WTO member to determine whether that member has complied with its obligations under the WTO Agreement. Such an assessment is a legal qualification of a panel[157]. Therefore, a panel's assessment of domestic law as to its consistency with WTO obligations is subject to review on appeal under Article 17.6 of the DSU.

An assessment of the consistency of Article 211 with the articles of the TRIPS Agreement and the Paris Convention (1967) invoked by the European Communities necessarily requires an examination of the meaning of Article 211 by the panel. The examination also necessarily requires an examination by a panel. of the meaning of both the CACR and the Lanham Act, insofar as they are relevant to assessing the meaning of section 211.

This is an interpretation of the meaning of section 211 solely for the purpose of determining whether the United States has fulfilled its obligations under the TRIPS Agreement. Therefore, the meaning of Section 211 of the Panel is clearly within the scope of our assessment, as set out in Article 17.6 of the DSU.

Case Analysis

The Appellate Body's decision that § 211 violates the TRIPS Agreement presents a difficult challenge for the United States. Not only will the United States 'response led to internal disputes over the future of the Cuban embargo and the United States' responsibility to comply with treaty obligations, but it could also lead to large-scale international disputes.

Violations of the TRIPS Agreement, as determined by the Appellate Body, are based on a scenario involving the original owners of assets that were not forfeited to whom Section 211 does not apply, a potential for discrimination against foreign successors it was purely abstract and commercial protection of the name. The WTO rules on retaliation are not recognized as a WTO obligation.

Hypothetical scenario infringements open the door to a hypothetical application, undermining the credibility of the WTO system. These issues highlight the systemic deficiencies in the WTO dispute settlement practice. The DSU as drafted should already preclude review on

[157] Article 64 of the TRIPS Agreement

appeal of the meaning and application of national law, but it is not interpreted that way in practice.

The interpretation of the treaty will benefit from various contributions from the parties and in particular under the TRIPS framework since it is a specialized agreement within the WTO and an agreement that is normally the subject of an agreement. The full argumentation of the relevant questions should be treated with caution[158].

More generally, a clarification of the similarities and differences between TRIPS and the GATT 1994 is necessary to determine when GATT jurisprudence is relevant to the interpretation and application of TRIPS provisions and when it is not.

The WTO rulings do not address the fact that Section 211 excludes the merits of a trademark owner's claims38, nor that Section 211 can result in the cancellation of a registration by blocking payment of annual fees. The main finding was that the TRIPS Agreement does not determine who owns or does not own a trademark.39

The Appellate Body only found that Section 211 violated TRIPS because it believed that the measure could discriminate against Cubans and other foreigners. in certain scenarios The DSB's recommendation is based on six TRIPS-inconsistency findings, all of which were made in the first instance by an appellate body, not by the WTO panel.

All claims apply to Section 211 (a) (2), which excludes judicial enforcement of common law rights or trademarks already registered or renewed with the USPTO under the United States Intellectual Property Exception to the Cuban embargo.

The Appellate Body specifically noted that Article 211 (a) (2) violated the national treatment provision of Article 3.1 of the TRIPS Agreement and Article 2 (1) of the Paris Convention, as well as the provision on nation plus of Article 4 of the Paris Convention. TRIPS Agreement.

The Appellate Body reaffirmed that national treatment and MFN treatment are two of the most important principles of international agreements on intellectual property rights. These two elements are imposed to compel each country to comply.2

[158]DS176: United States — Section 211 Omnibus Appropriations Act of 1998
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds176_e.htm

While the panel disagreed with this statement in its ruling, the Appellate Body reversed this and found that Sections 211 (a) (2) and (b)) were prima facie discriminatory and contrary to the United States' obligations under the TRIPS Agreement, the interpretation of the Act was therefore substantially correct.

Conclusion

The reports on the United States - Section 211 of the Appropriations Act, adopted by the DSB in 2002, are binding on the parties to the dispute. The extended period of reasonable time to implement the DSB recommendation expired in 2005. The US Congress must take steps to comply without delay. The lack of a sense of urgency to resolve this dispute can be attributed to the lack of an effective remedy by the WTO to sanction non-compliance with this particular DSB recommendation.

The US embargo, which prevents the trade of Cuban products under the Havana Club brand, masks the problems derived from the conclusions on which the recommendation is based. The content of Section 211 escaped conviction, while claims that the measure is discriminatory were like squeezing out of a lemon. Violations of the TRIPS Agreement, as determined by the Appellate Body, are based on a scenario involving the original owners of assets that were not forfeited to whom Section 211 does not apply, a potential for discrimination against foreign successors it was purely abstract and commercial protection of the name.

The WTO rules on retaliation are not recognized as a WTO obligation. Hypothetical scenario infringements open the door to a hypothetical application, undermining the credibility of the WTO system. These issues highlight the systemic deficiencies in the WTO dispute settlement practice. The DSU as drafted should already preclude review on appeal of the meaning and application of national law, but it is not interpreted that way in practice.

The interpretation of the treaty will benefit from various contributions from the parties and in particular under the TRIPS framework since it is a specialized agreement within the WTO and an agreement that is normally the subject of an agreement. The full argumentation of the relevant questions should be treated with caution.

More generally, it is necessary to clarify the similarities and differences between TRIPS and the GATT 1994 to determine when GATT jurisprudence is relevant to the interpretation and

application of TRIPS provisions and when it does not comply with WTO decisions on trademarks and trade names.

CASE NO. 36

DS 476 EUROPEAN UNION AND ITS MEMBER STATES – CERTAIN MEASURES RELATING TO THE ENERGY SECTOR

-Ramya S.R[159]

Introduction

The case of "EU-Energy package" is regarding Russia's complaint against European Union violating certain measures of WTO. The third energy package established by EU entered into picture by September 2009. This cares about the functioning of the internal energy market and solving certain structural problems. This mainly covers certain important areas such as unbundling, independent regulators, ACER, cross-border cooperation, and open and fair retail markets of energy market, even now it is applicable for natural gas[160].

The case 'DS476: European Union and its Member States — Certain Measures Relating to the Energy Sector' is one of the important cases in the history of WTO because this was the first case in which a panel was concerned with deciding on the legalities of trading 'energy resources' supplied through fixed infrastructure, this is a good example of how international economic conflicts over politically controversial subjects like energy security may be settled rationally by adhering to WTO's multilateral trade rules. This case deals with some important measures like unbundling measure, LNG measure, third country certification measure and the TEN-E measure.

Facts of the Case

For a particular time period, the EU depended on Russia's natural gas. EU implemented the Third Energy Package in 2009 to address this issue and to improve the operation of the internal energy market. It contains laws regarding unbundling (separating energy supply and generation from transmission network operation), fair and equal access to energy infrastructure, and national energy regulators independence.

According to the European Commission, the most cost-effective method to assure secure and inexpensive supplies for EU people and give businesses a choice of energy source is to create an integrated and competitive EU energy market. The third Energy Package, on the other

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[159] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.
[160] 2019. Third energy package. [Blog] [Accessed 21 July 2021].

hand, created many issues for Gazprom, which has spent decades investing in trade, distribution, pipelines, and storage throughout the EU.

Because of the need to vertically unbundle integrated energy providers from network operators, Gazprom was forced to segregate its production and supply activities from transmission operations within the EU, as well as to grant other energy businesses access to its gas pipelines. In this regard, Russia filed a WTO complaint against the EU, contesting the EU's WTO-consistency of seven new measures.

Russia's panel request raises concerns about the WTO-compliance of various elements of the Third Energy Package and related implementing actions taken by some Member States, including:

- the unbundling of transmission system operators and transmission networks from natural gas and electricity production and distribution,
- the certification criteria for transmission system operators where the system operator or system owner is managed by a third-country entity or persons,
- certain infrastructure-related exemptions, which also apply to transmission service operator's need to grant access to natural gas network capacity that is third party access.
- the TEN-E Regulation No 347/2013's provisions on projects of common interest, which aim to improve the EU's energy security by diversifying sources, among other things was also challenged.[161]

The fundamental argument advanced by Russia is that the Third Energy Package and the TEN-E Regulation discriminate de jure and de facto against Russian services and service providers, as well as Russian gas.

Nine WTO members (including Ukraine) with significant energy interests have reserved their right to participate in the panel proceedings as third parties. On 20th July 2016 a panel was requested for this purpose, on 10th august 2018 the panel report was circulated and finally on 21st September 2018 a notification for appeal was made.

[161] 2017. [pdf] Available at: <https://trade.ec.europa.eu/wtodispute/show.cfm?id=644&code=2> [Accessed 22 July 2021].

Issues Concerned

Were the measures that regulate the natural gas sector and the development of natural gas infrastructure within the European Union, such as unbundling measure, public body measure, LNG measure, infrastructure exemption measure, upstream pipeline networks measure, third-country certification measure and TEN-E measure inconsistent with WTO agreements such as GATS Arts. II:1, VI:1, VI:5(a), XVI, XVII GATT Arts. I:1, III:4, XI:1, X:3(a)?

Holding

The Panel dismissed majority of Russia's claims about the EU's energy policy measures being inconsistent with WTO norms. At the same time, the Panel agreed with Russia that and ruled that the EU had actually violated some provisions of GATS and GATT 1994 regulations. The EU has been advised to review components of the Third Energy Package that are incompatible with the WTO and bring them into compliance with the GATS and the GATT 1994.

Obiter Dicta

The unbundling measure

The **unbundling measure** deals with the laws that regulate the separation of natural gas production and supply from natural gas transmission.

The unbundling measure under Directive 2009/73/EC (the Directive)

The directive requires each EU member state to implement the "separation of ownership" (OU) model, and allows EU member states to implement the "independent system operator" (ISO) and transmission operator model (ITO) in some cases. The OU model demands a structural separation between businesses involved in natural gas production and supply and those involved in natural gas transmission.

The ITO and ISO models have lower requirements for the degree of structural separation of such entities, but they impose requirements on their behaviour and relationships, and at the same time make them subject to additional supervision by relevant authorities.

Article II:1 of the GATS

Russia alleged that the unbundling measure treats Russian pipeline transport services and service providers unfairly by allowing EU Member-States to choose the unbundling model to

be implemented, which is in violation of the GATS' most-favourable nation principle (Article II:1).

The Panel found that different unbundling models alter the competitive conditions for pipeline transport service providers, as the OU model forces entities to choose between producing and supplying natural gas or providing pipeline transport services, but the ITO model does not.

The Panel also looked into Russia's claim that Gazprom was barred from supplying pipeline transport services to the EU through a commercial presence in Lithuania (which solely uses the OU model), despite the fact that certain other non-EU vertically integrated undertakings (VIUs) were able to do just that.

This approach was challenged by both the EU and the Panel since the treatment of the ‘group' of Russian pipeline transport services and service suppliers should be compared to the treatment of any other non-EU country's ‘group' of similar pipeline transport services and service suppliers.

The Panel concluded that there are more examples of Gazprom continuing to provide with pipeline transport services through the commercial presence of ITOs than VIUs from any other countries other than EU member countries continuing to provide pipeline transport services through the commercial presence of ITOs. The Panel found that the unbundling measure conforms with Article II:1 of the GATS on this ground.

Articles I:1 and III:4 of the GATT 1994

Russia used the same line of argument as it did with respect to Article II:1 of the GATS when arguing that the unbundling action breaches the non-discriminatory requirement under Articles I:1 and III:4 of the GATT 1994.

Similarly, the Panel did not accept that the various unbundling models alter natural gas competition circumstances because the relevant rules require operators to give access to natural gas from all suppliers to the transmission system on the same terms. As a result, the measure was found to be in compliance with GATT 1994 Articles I:1 and III:4.

The LNG Measure

The liquefied natural gas **(LNG) measure** deals with unbundling in the case of LNG facilities and LNG system operators.

Article I:1 of the GATT 1994

Because LNG system operators are not obligated to unbundle, but operators of transmission pipes are, Russia claims that LNG imported into the EU via LNG facilities obtains an advantage under Article I:1 of the GATT 1994 that Russian natural gas transported into the EU via pipelines does not. Because LNG and natural gas are not "similar" products, the Panel found no breach of Article I:1 of the GATT 1994.

The infrastructure exemption measure

The infrastructure exemption measure permits relevant authorities to omit certain categories of natural gas infrastructure from certain Third Energy Package requirements provided they meet certain conditions such as unbundling, third-party access, tariff regulation and specific infrastructure exemption decisions.

Articles I:1 of the GATT 1994 and II:1 of the GATS

Russia argued that the infrastructure exemption measure was being applied in an illogical and discriminatory manner. According to Russia, the European Commission and relevant national regulatory agencies applied different interpretations of certain infrastructure exemption requirements to a Russian pipeline transport service provider than to pipeline transport service providers from other non-EU nations.

Russia's primary concern was that the OPAL conditions are more trade limiting than those imposed in the Gazelle (owned by a European financial services company), TAP, Nabucco, and Poseidon pipeline exemption rulings (owned by German, Hungarian, Azerbaijani, Austrian companies etc).

The Panel examined the cited infrastructure exemption decisions and found no evidence that the European Commission had made such exemption decisions in relation to OPAL and other pipelines in a way that would be considered "inconsistent" or "discriminatory" in applying the infrastructure exemption measure. Hence, the Panel found that the measure is consistent with Articles I:1 of the GATT 1994 and II:1 of the GATS.

Article XI:1 of the GATT 1994

Russia alleged that two OPAL pipeline requirements (the 50% capacity cap and the gas release programme requiring Gazprom and allied firms to discharge 3 billion cubic metres of

gas per year to exceed the cap) lead to a de facto quantitative restriction on imported Russian natural gas.

As the sole user of the OPAL pipeline capacity and the only importer of natural gas from Russia via the Nord Stream pipeline, the Panel decided that Gazprom (and RWE Transgas) is the only firm subject to the 50 percent capacity cap. The Panel therefore determined that the challenged requirements limit Gazprom's ability to use the OPAL pipeline's transport capacity, irrespective of the fact that other options for Russian natural gas imports to the EU exist.

Even so, in order to support a finding of violation, Article XI:1 of the GATT 1994 does not require a demonstration that certain types of goods imported by one Member from another are restricted as a whole, but rather prohibits a Member from restricting competitive opportunities for importation from another Member.

As a result, the Panel determined that the policy disincentivizes Russian natural gas imports via Nord Stream pipeline and, eventually, the OPAL pipeline. This violates Article XI:1 of the GATT 1994 by limiting the competitive chances for Russian gas importation into the EU.

The third-country certification measure

The third-country certification measure needs natural gas transmission system owners and operators who are controlled by a person or individuals from a third country or countries to show that their certification will not jeopardise the EU's energy security.

Article XVII of the GATS

Both Russia and the EU agreed that the third-country certification measure in Croatian, Hungarian, and Lithuanian national legislation de jure violates the GATS's Article XVII national treatment obligation by requiring a security of energy supply assessment prior to certification of third-country transmission system operators but not domestic ones.

Article XIV(a) of the GATS

To justify a violation, the EU defence contended that the action is necessary to safeguard the EU's security of energy supply and, as a result, to maintain public order under Article XIV(a) of the GATS. The Panel determined that the action is important to safeguard the EU's security of energy supply from threats presented by third-country governments acting through third-country transmission system operators.

The Panel, however, rejected this defence since the measure does not meet the criteria of Article XIV of the GATS' chapeau and results in arbitrary and unjustified discrimination.

The TEN-E measure

The Trans-European Networks – Energy (TEN-E) measure specifies the conditions for designating certain infrastructure projects as projects of common interest (PCIs), establishes the legislative framework for their implementation, and provides specific benefits. An infrastructure project must meet the basic criteria and 'significantly contribute' to at least one of the particular criteria in order to be designated as a PCI.

Article I:1 and III:4 of the GATT 1994

Russia claimed that the TEN-E measure violates Articles I:1 and III:4 of the GATT 1994 since the criteria used to pick PCIs are biased against Russian natural gas. Russia was particularly dissatisfied with the "diversification of gas supply" criterion, which Russia claimed would result in a reduction in the supply and transportation of Russian natural gas imported into and within the EU.

The fundamental goal of the TEN-E initiative, according to the Panel, is to create infrastructure targeted at connecting specific EU Member-States with natural gas supply sources other than Russia, which will effectively end Estonia's, Finland's, Latvia's, and Lithuania's reliance on Russian natural gas. Because they create pipeline infrastructure to transport natural gas of non-Russian origin, some infrastructure projects will be recognised as PCIs and will obtain benefits associated with their PCI designation.

As a result, the Panel determined that the TEN-E measure, contrary to Articles I:1 and III:4 of the GATT 1994, creates more favourable conditions for the transit of natural gas from any source other than Russia.

Article XX(j) of the GATT 1994

The EU contended that the infringement was justified under GATT 1994 Article XX(j). The EU claimed that there is a genuine and substantial risk of natural gas supply interruption as a product or local short supply in the EU. The Panel, on the other hand, found that the EU had failed to show that natural gas is currently "in low supply"[162] and dismissed its position.[163]

[162] 2021. *EU – ENERGY PACKAGE*. [pdf] [Accessed 21 July 2021].

Case Analysis

The measures at issue in this case are Measures that regulate the natural gas sector and the development of natural gas infrastructure within the European Union, such as, unbundling measure, public body measure, LNG measure, infrastructure exemption measure, upstream pipeline networks measure, third-country certification measure and TEN-E measure. The decision that was taken by the panel was taken after a detailed analysis of GATS Arts. II:1, VI:1, VI:5(a), XVI, XVII GATT Arts. I:1, III:4, XI:1, X:3(a) with accordance with the previously mentioned measures. Since this case is the first of its kind, this decision acts as guidelines to matters regarding the issues relating to energy resources. When looked at a closer view it can be seen that this decision contains the answer for to what extent these measures can be used and when it can be considered as violation. The matter in hand was handled in an appropriate manner and the decision given was very good and detailed and need not be challenged again, if challenged again, the decision even after a second round of analysis will stand the same.

Conclusion

This case not only talks about the measures such as unbundling measure, public body measure, LNG measure, infrastructure exemption measure, upstream pipeline networks measure, third-country certification measure and TEN-E measure, WTO agreements such as GATS Arts. II:1, VI:1, XVI, XVII GATT Arts. I:1, III:4, XI:1 but also addresses other issues like relationship between consultations and panel requests, DSU Art. 6.2 (panel's terms of reference), level for assessing the WTO consistency of a measure (EU-wide or EU member State-specific), GATT Art. X:3 (administration of trade regulations), GATS Arts. VI and VI:5(a). The European Union notified the DSB of its decision to appeal to the Appellate Body certain legal concerns and legal interpretations in the panel report on September 21, 2018. The Russian Federation notified the DSB of its decision to cross-appeal on September 26, 2018.On November 20, 2018, the Appellate Body informed the DSB that it would not be able to circulate the Appellate Body report in this appeal within the 60-day timeframe allowed for in Article 17.5 of the DSU, nor within the 90-day term provided for in Article 17.5 of the DSU. The Appellate Body notified the DSB that once it knew more precisely when the Division might schedule the hearing in this appeal, it will communicate with

[163] 2018. *DS476: European Union and its Member States — Certain Measures Relating to the Energy Sector.* > [Accessed 22 July 2021].

participants and DSB Members properly. But even now the measures are there for natural gas.

CASE NO. 37

DS 453 ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

- Sivapuram VL Thejaswini[164]

Introduction

The creation of **General Agreement on Trade in Services (GATS)** was mainly to maintain the reliability and credibility in the rules of International Trade. It is also to stimulate economic activity, to ensure equitable & fair treatment to all the participants by progressive liberalization and guaranteed policy bindings.

All the members of **WTO (World Trade Organisation)** are also the members of GATS. Thus, GATS is a WTO Agreement and is also the **1st Multilateral Agreement which covers trade in services.**

In this case, an earlier ruling of WTO Panel was reversed by the Appellate Body. In the earlier ruling, it was decided by WTO Panel that these measures violated Argentina's obligations under GATS. But here the claims made by Panama against Argentina's "tax transparency" regulations have been dismissed by the Appellate Body.

Facts of the Case

This is the **1st case to interpret the "prudential carve-out"** since the emergence of WTO.

- It was argued by Argentina that their regulations were designed to protect the tax base of Argentina by preventing tax avoidance, fraud, and tax evasion. So, they were defensive tax measures.
- It was asserted by Argentina these measures serve in order to prevent laundering of money which is of criminal origin and concealment. These measures protect the investors and also soundness of financial system of Argentina.
- The law of Argentina distinguished between the countries on the grounds of cooperating for tax transparency. The requirements were also imposed for registration of branches of foreign companies. It has also adopted measures that relate to reinsurance sector access, foreign exchange market, capital market and also four separate tax measures.

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[164] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, VIth Semester

- The Appellate Body has overturned the decision of the Panel on the grounds that "likeness test" was used by the Panel erroneously. The Appellate Body also has not determined regarding whether the services at issue were "like".
- The scope of prudential carve-out is very significant and it has been defined mainly after and also during the financial crisis of 2008 by the National Regulators.
- In this case, USA being the third party has argued that "precautionary measures" were also included in the term "prudential measures". It was argued by USA that broad discretion of National authorities is preserved by the prudential exception to protect the financial system. It also includes measures to promote systematic stability, to direct cross border financial services suppliers/individual financial institutions.

Procedural History

In order to designate a country to be "cooperative", the country has too either

- Sign an agreement with Argentina with respect to exchange of double taxation treaty/exchange of tax information and it should also include information exchange clause broadly. It should also provide that there is an exchange of information effectively.
- Necessarily initiate negotiations with Argentina to conclude such convention/agreement.

Since many years, Panama was not classified as a Cooperative country, it was done by Argentina only after the Panel in this dispute was established. Though the Appellate Body stated that Panama did not have convention on double taxation or agreement related to Information exchange with Argentina and was also not negotiating any such convention/agreement with Argentina.

Issues

1. Whether there is any flaw by the Panel regarding the likeness analysis?
2. Whether the concept of "treatment more favorable" is focused?
3. Whether the scope of Prudential carve-out has wider application?

Holding

- The concept of Prudential carve-out could be imposed mainly to justify the inconsistencies with that of the obligations of the members under GATS as found by the Appellate Body.
- It was observed however that the meaning of the term "prudential reasons" was not appealed.
- It was found by the Panel decision of **September 2015** that MFN Obligations of **GATS Article II** have been violated by measures of Argentina.
- Argentina measures also did not immediately accord to service suppliers and services of non-cooperative countries treatment than that of cooperative countries suppliers.
- In this case, Appellate Body found that the Panel was erroneous in its decision and overturned its ruling regarding the "likeness test".
- But the Appellate Body did not determine regarding the services whether they are like or not. But instead has only reversed the decision of Panel.

Dicta

- An appeal was made by Argentina that the findings of Panel about the issue of service suppliers and services are "like" according to **Article XVII & Article II** of GATS.
- **Article II** of GATS provides for **MFN Obligation** that "each member shall immediately accord to service suppliers and services of treatment of any other member which is more favorable than that it would accord to some like service suppliers and services of any other country.
- **Article XVII** is for **National treatment** where the service commitments in sectors have been scheduled.
- The Appellate Body has stressed here that fundamental reason for comparison was mainly to ascertain the competitive relationship between of the services and service suppliers.
- According to the Appellate Body, there was an error made by the Panel where it was stated:
    - "the Panel has classified country not on the basis of origin only but on the basis of regulatory framework".
- It was found by the Appellate Body that the errors were committed by the Panel in the application of legal standards and **Articles II & XVII** to the facts of the case.

- It was also found by the Appellate Body that there was lack of proper basis in the decisions of the Panel.

Judgment

- Thus, in this dispute it was said by the Appellate Body that measures in order to be compliant to laws and regulations then they need to comply with specific obligations, rules, and requirements with absolute certainty. It was also held that there is no measure that cannot be complied with laws or regulations of Members as per **Article XIV(c).**
- Even **Article XIV(c)** also provides an exception that is similar to **Article XX(d).** Thus, here ensuring a secure compliance with consistent laws/regulations becomes important.
- In this case, the Appellate Body also overturned the ruling of Panel on less favorable treatment and also the "additional step analysis".
- Here the presumption of likeness was also examined where the services & service suppliers have to be the same, only then accordingly likeness can be presumed[165].

Case Analysis

- The findings of this dispute confirms that there is a broad margin given to GATS. Defensive and Anti-abusive measures have to be maintained in order to bring about the transparency, protect public revenue.
- Thus, the findings in this case are of utmost significance where Argentina also expresses its satisfaction. This is the case for the first time where the standards have been established by the Appellate Body in order to determine "likeness" according to **Articles XVII & II** of GATS.
- It was also ruled that "likeness" of services cannot be made separately about service providers. It is only through this decision the Appellate Body has corrected the decision of the Panel. Where the ruling of Panel regarding the discrimination in trade is services was corrected.
- It can be seen that there is no complete analysis made by the Appellate Body where it did not support a discriminatory system which violates the basic principles of trading systems multilaterally[166].

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[165] WTO Appellate Body Report: Argentina - Financial Services, White & Case LLP,
[166] Appellate Body Report, WT/DS453/AB/R and WT/DS453/AB/R/Add.1

Conclusion

This is a very significant and important decision where it would address many issues which were previously not clear. Guidance also has been provided about the extent to which the members of WTO may take measures to address tax transparency issues.

But this decision cannot be called to be complete as the Appellate Body has only thrown light on few substantial issues in the dispute.

When we consider the ruling of the Appellate Body, it is still not clear that whether measures can be taken by the members of WTO against those countries which are considered to be "non-cooperative for the purpose of tax transparency".

Thus, this unclear aspect has to be again resolved by the litigating parties in any future disputes. We can here conclude that though this decision is of prima facie importance, but it is not very clear and in future it has to be solved if there is any dispute between the parties[167].

[167] Responses of the United States to the Panel's Advance Questions Before the Third-Party Session, September 24, 2014.

CASE NO. 38

DS 567 SAUDI ARABIA – MEASURES CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

- Reman G[168]

Introduction

DS567 is revolves around the dispute between Qatar and Saudi Arabia regarding the suspension of trade and imposition of blockade of sea, land and air routes against Qatar by various Middle Eastern Nations (Saudi Arabia, United Arab Emirates, Bahraini and Egypt) under the context that Qatar was responsible for sponsoring acts of terrorism and helping Iran .This led to several disputes and disruptions for the Qatari companies operating in the region of Saudi Arabia and resulted in a dispute between Saudi Arabia and Qatar which involved broadcasting channels and piracy issues.[169]

TRIPS AGREEMENT: The TRIPS agreement is a set of provisions available for the WTO member which cover following copyrights and related rights, this agreement is main features include

1. Standard – a collection of Berne and Paris convention articles (which were said to be weak in enforcement mechanisms) which gives relevant obligations for the members minimum requirement of standards
2. Enforcement – Address requirements regarding the general principle applicable to IPR enforcement procedures
3. Dispute Settlement – The TRIPS Agreements applies itself valid under the WTO mechanisms and procedures for dealing disputes.[170]

Facts of the Case

beIN Media Group LLC (beIN) owned the broad casting rights for certain sports events (European football leagues, the US open Tennis Championships, FIFA World Cup)which was telecasted in its website all over Saudi Arabia had its access blocked after the announcement of the blockade by Saudi Arabia. Subsequently an Entity named beoutQ

[168] BBA LLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.
[169] WTO.org.2020-Saudi Arabia Measures concerning the Protection of Intellectual Property Rights.:<//www.wto.org/english/tratop_e/dispu_e/cases_e/ds567>[Accessed_on16_Jul2021].
[170] WTO|intellectual_property-overview_of_TRIPS_Agreement,Wto.org(2021), <https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm> (Accessed on Jul 20, 2021).

unauthorizedly started streaming and distribution of sports events whose broadcasting licenses were held by beIN previously in Saudi Arabia.

beoutQ also distributed set-up boxes which telecasted the major sports events and also were able to bring in revenue through the sale. Since there was a blockade of communication between the two nations, Qatar was unable to contest against the infringement of their company's rights since Saudi Arabia blocked the act of appointing Lawyers for assisting Qatar or its nationals.

This led to Qatar filing a WTO complaint against Saudi Arabia alleging violations of the TRIPS Agreement. A panel was formed on 18th December 2018, with the countries: Australia, Bahrain, Brazil, Canada, China, the European Union, India, Japan, Korea, Mexico, Norway, Russia, Singapore, Chinese Taipei, Turkey, Ukraine, the United Arab Emirates, the United States and Yemen reserving their third-party rights.

There were certain allegations against Saudi Arabia by Qatar was under ought to be under violations of:

(i) Article 41.1 of TRIPS Agreement

(ii) Article 42 of the TRIPS Agreement

(iii) Article 61 of the TRIPS Agreement

The panel reported their conclusion based on their following findings:

1.Qatar established that Saudi Arabia have been preventing beIN from obtaining Saudi legal counsel to enforce its IP rights through civil enforcement procedures before Saudi, and thus Saudi Arabia has acted in a manner inconsistent with Article 42 and Article 41.1 of the TRIPS Agreement; and

2. Qatar established that Saudi Arabia had not provided for proceedings against to be applied to beoutQ despite the evidence that beoutQ is operated by individuals or entities under the jurisdiction of Saudi Arabia, and thus Saudi Arabia has acted inconsistently with Article 61 of the TRIPS Agreement.

3. The panel did not err in its findings against the claims of interpreting the findings as claimed by Saudi Arabia under Article 3.4 , 3.7 and 11 of the DSU.

Holding

The Panel held that Saudi Arabia had the intention to restrict beIN from contesting in Saudi Arabia's jurisdiction and also avoided for enforcing legal action against beoutQ citing the blockade as a measure. Thus, the panel supported Qatar's claims that Saudi Arabia acted inconsistent with the Article 41.1 and 42.

The panels established that even though Qatar had the necessary evidence to prove that Saudi Arabia acted inconsistently by not proceeding with criminal procedure and penalties and penalties resulting in violation of Article 61 of the TRIPS agreement , it was unnecessary to consider Qatar's claims under Articles I, II and III of the TRIPS agreements.

Under Security exceptions claims by Saudi Arabia: The panel established that the provision under Article 73(b) (iii) was consistent with Articles 41.1 and 42 but it was in violation of article 61 of the TRIPS agreement reasoning that they failed to apply criminal procedures against beoutQ .

The panel held that Saudi Arabia could not establish its claim that panel erred under Articles 3.4 , 3.7 and 11 of the DSU mentioning to decline the findings in the dispute.

Procedural History

1. Russia – Traffic in Transit (DS512)[171]

In the DS567, the panel agreed that the interpretation of Security measures under Article 73(b) (iii) was similar to DS512's panels interpretation of Article XXI (b)(iii) of the GATT 1994 as most of the party's viewpoints relating to the analyzing it was same in process of comparison of both the disputes . The report of the panel held in DS512 explained that the panel must determine for itself whether the invoking Member's actions were "taken in time of war or other emergency in international relations" and the implementation of such measures require a minimum plausibility in relation to essential security.

Article 73 (b) (iii) of the TRIPS agreement expands about:

(b) Preventing a member from taking any action which it considers necessary for the protection of its essential security interests,

[171] WTO|dispute_settlement-DS512:Russia–Measures_Concerning-Traffic in_Transit.Docs.wto.org.2020: <www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm > [Accessed on 17 July 2021]

(iii). taken in time of war or other emergency in international relations,

The Arguments between the parties regarding referencing report of DS512 Russia-Traffic in Transit was

1. “Obligation of good faith” which can be understood as "crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests”.
2. Interpretation of essential Article 73 (b) “essential security interests”[172]

The DS512 case directly influences the interpretation of Article 73 (b) (iii) as analyzed by the panel in DS567 which regulates the requirements for enforcement of Security measures.

2. China – Intellectual Property rights (DS362)[173]

The panel in DS362 China – Intellectual Property rights findings included “under Article 5(1) of the Berne convention that whoever denied copyright protection to works whose publication and/or dissemination is said to be prohibited by law, The panel also interpreted part III of the TRIPS agreement as: Part III of the TRIPS Agreement distinguishes between the treatment of wilful trademark counterfeiting and copyright piracy on a commercial scale, on the one hand, and all other infringements of intellectual property rights, on the other hand, in that only the former are subject to an obligation regarding criminal procedures. This indicates a shared view of the negotiators that the former are the blatant acts of infringement. This view must inform the interpretation of Article 61.

This interpretation was considered to be consistent while establishing to prove Qatar established a prima facie case that beoutQ was run by individuals in the jurisdiction of Saudi Arabia.[174]

Issues

1. Why was there no initiation of civil and criminal procedures against beoutQ by Saudi Arabia?

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[172] WTO|intellectual_property-overview_of_TRIPS_Agreement,Wto.org(2021), <https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm> (Accessed on Jul 20, 2021)

[173] WTO.|China- Measures Affecting the Protection and Enforcement of Intellectual Property Rights_-DS362,Wto.org(2010), <www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm>(Accessed on Jul_21/2021)

[174] Docs.wto.org(2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q/WT/DS/567R.pdf>(Acessed on Jul 17, 2021)

2. Was Saudi Arabia Intention of not allowing Qatar hire lawyers to contest against the case based upon TRIPS Agreement appropriate?
3. Was the claims under part I, II and III of the TRIPS agreement by Qatar which was deemed unnecessary by the panel in violation of Article 10 (1) and Article 12 of the DSU?

Findings

1. **Why was there no initiation of civil and criminal procedures against beoutQ by Saudi Arabia?**

The license for broadcasting was still held by beIN and the IP was still not yet transferred lawfully towards any other streaming networks after their blockades, but Influential Saudi Nationals had started promoting beoutQ through their social media handles. BeIN also showcased photographic evidence of STB being sold in the stores of Saudi Arabia and the adjustment of frequency of telecasting the sports events through Arabsat (Saudi Arabia's Dish network), majority of Arabsat's shares were held by the Saudi Arabian officials.

Saudi Arabia could not contest against the allegation that there was no evidence for the infringement by BeoutQ, even though there were evidence submitted by Qatar about the operations of beoutQ in the territory of Saudi Arabia. Saudi Arabia did not contest against the allegations of promotion of beoutQ in public gatherings and also had distributors who broadcasted different sports events in their Jurisdiction.

This can be considered as an inappropriate statement as there were evidence of setup boxes being sold which had the ability to broadcast the sports events in Saudi Arabia which included the world cup 2018 as acts and omissions attributable to Saudi Arabia.

This shows that Saudi Arabia had no intention of taking any action thus conducting Acts of omissions against taking criminal action against beoutQ even after having necessary evidence of it operating in their Jurisdiction.[175]

2. **Was Saudi Arabia Intention of not allowing Qatar hire lawyers to contest against the case based upon TRIPS Agreement appropriate?**

[175] Docs.wto.org(2020),DS567
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspxfilename=q:/WT/DS/567R.pdf (accessed on Jul 17, 2021)

Saudi Arabia implemented their restrictions of contact between beIN and Saudi Arabian law firms under the pretext of "security measures" which made a situation plausible for the Saudi Arabia to implement the measures out of emergency.[176]

According to Saudi Arabia, they implemented the measures in order to protect its principles and citizens from the threats of extremism and terrorism form the region surrounding hence they introduced "Anti Sympathy measures" enfaced against Qatar.

Qatar presented several evidence which were identified in the social media claiming to announce punishments for individuals attempting to communicate with Qatari entities.

This is under total violations of Articles 41.2 and 42 of the TRIPS agreements: both which mentions about the fair and equitable procedures to be presented for the parties in cases of infringements of their rights.[177]

Hence it can be understood that Saudi Arabia under its power restricted Qatar from contesting their infringement of IP rights with an unreasonable intent.

3. **Were the claims under part I, II and III of the TRIPS agreements by Qatar which was deemed unnecessary by the panel in violation of Article 10 (1) and Article 12 of the DSU?**

Qatar raised multiple issues in implementation of[178]

1. Part I of TRIPS Agreement which mentions about :(i)Article 3.1- National treatment, presenting evidence of discriminating among the Qatari nationals with respect to "essential security measures" , "anti-sympathy measures" and (ii) Article 4 expanding about the unequal treatment sought to Qatari Nationals compared to other nationals in Saudi Arabia.

2. Part II of the TRIPS Agreement where Saudi Arabia failed to provide the broadcasting organizations with accusative rights (by failing to provide the necessary actions regarding copyrights act of Saudi Arabia) which were entirely stripped for beIN for contesting in Saudi Arabia.

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[176] Docs.wto.org(2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspxfilename=/WT/DS/567R.pdf>(Acessed on Jul 17, 2021)
[177] WTO|intellectual_property-overview_of_TRIPS_Agreement, WTO.org(2021), <https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm> (accessed on Jul 20, 2021)
[178] Docs.wto.org(2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename/WT/DS/567R.pdf>(Accessed on Jul 17, 2021)

3. part II of TRIPS Agreement which includes non-imposition of select enforcement of law (civil and criminal) against the perpetuators .Qatar supported European Union's statement under Article 61 that proven that the Saudi Arabia promoted the alleged piracy, it could be said that de facto Saudi violates its duties by not providing criminal procedures and penalties in the case of the piracy of beIN's content and also include the violations of Saud Arabia under Article 61 of the panels statement

However, the panel deemed it unnecessary to add that statement under their report. This act of the panel contradicts Article 10 of the DSU[179] which states that the interests of the parties should be fully considered by a panel, and Article 12 (2)[180] says That there must be sufficient flexibility for the working procedures of the panel.

By not withstanding with Qatar's opinions and agreement's by deeming it unnecessary for it to be included in the panel report, the panel has violated Articles 10(1) and articles 12(2) of the DSU.

Case Analysis

This dispute displays the arguments regarding the protection of an entity which was committing the act of infringement against another company reserving its rights but still deprived of their representative rights in the jurisdiction by the Party. The panel correctly interpreted the Articles 73(b)(iii) invoked by Saudi Arabia and also held the evidence submitted by Qatar , The decision was in lieu with the provisions of TRIPS Agreement and DSU articles. This dispute's report can act as a landmark conclusion as the panel strike down and interpreted the "security measures" in a non-discriminatory sense. This dispute also acts as guidelines on how a party must be allowed to collect or contest data in its rival's jurisdiction.

Conclusion

The TRIPS agreement is a set of provisions available for the WTO member which cover following copyrights and related rights, this agreement is main features include Standard – a collection of Berne and Paris convention articles (which were said to be weak in enforcement

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[179] (Article10) WTO.org|DisputeSettlementUnderstanding_legaltext,Wto.org(2021),Available_at:<https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> (Accessed on Jul 20, 2021)

[180] (Article 12) WTO.o|DisputeSettlementUnderstanding_legaltext,Wto.org(2021),Available_at:<https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> (Accessed on Jul 20, 2021)

mechanisms) which gives relevant obligations for the members minimum requirement of standards, Enforcement – Address requirements regarding the general principle applicable to IPR enforcement procedures, Dispute Settlement – The TRIPS Agreements applies itself valid under the WTO mechanisms and procedures for dealing disputes.

CASE NO. 39

DS237 TURKEY- CERTAIN IMPORT PROCEDURES OR FRESH FRUITS

- Priyadarshini. P[181]

Introduction

The Sanitary and Phytosanitary Measures (SPS) was introduced in order to food safety and animal and plant health regulations. The Agreement on Application of Sanitary and Phytosanitary Measures was established under the WTO on 1st January 1995.

The Sanitary and Phytosanitary Measures Agreement lays down the groundwork for food safety as well as animal and plant health standards. SPS allows member countries the freedom to establish their own standards. SPS states that regulations must be founded on scientific evidence and should only be used to the degree that they are required to protect human, animal, or plant life or health. The independently established SPS of various countries must not discriminate arbitrarily or unjustifiably across countries with comparable or similar conditions. It is mandatory for all the countries to take steps to guarantee that food is safe for consumers and to keep pests and diseases from spreading to animals and plants. SPS can take several forms, including mandating products to come from a disease-free area, inspecting products, demanding certain treatment or processing of products, establishing maximum pesticide residue levels, or allowing the use of only specified additives in food. SPS measures apply to both domestically produced foods and local animal and plant illnesses, as well as imported goods. The SPS Agreement expands on prior GATT provisions to limit the use of unjustifiable sanitary and phytosan itary measures to protect trade. The SPS Agreement's major goal is to preserve every government's sovereign right to offer whatever level of health protection it considers essential, while also ensuring that these sovereign rights are not utilised for competitive objectives or to impose unnecessary trade barriers.[182]

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[181] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

[182] Wto.org. 1998. *WTO | Understanding the Sanitary and Phytosanitary Measures Agreement*. [online] [Accessed 13 July 2021].

In this case, the complainant is Ecuador and the respondent is Turkey, where Ecuador claimed that the terms and regulations set by Turkey's SPS is unreasonable and inconsistent with regards to WTO.

Facts of the Case

Ecuador approached Turkey for consultations on specific import procedures for fresh fruits, particularly bananas, on August 31, 2001. Ecuador claims that the method entails the issue of a document known as "Kontrol Belgesi" by the Turkish Ministry of Agriculture. Ecuador indicated that this approach is outlined in the "Communiqué for Standardization in Foreign Trade," which was published in the Official Journal 24271 on December 25, 2000, by the Under-Secretariat of Foreign Trade. Ecuador contended that the Turkish authorities' application of this procedure is a trade barrier that violates Turkey's obligations under GATT 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Import Licensing Procedures, the Agreement on Agriculture, and the GATS. The conflict includes the implementation of Turkey's fresh fruit import procedures to banana imports. According to these standards, an importer must first get a Control Certificate known as Kontrol Belgesi from the Turkish Ministry of Agriculture and Rural Affairs in order to apply for the SPS clearance certificate, which is required for the products to be presented for customs clearance. The Control Certificate is an administrative document that authorises products to be submitted to SPS control. It is not an SPS clearance certificate.

Prior to November 1999, banana importers could obtain Control Certificates for any quantity of bananas at any time, and the Certificates were provided promptly. After November 1999, nonetheless, Control Certificates have been issued in limited quantities, for short periods of time, and with significant delays. A Control Certificate is only valid for one shipment at a time. It is deemed exhausted if a quantity less than that specified in the Certificate is imported. Furthermore, a new Control Certificate is only granted when the prior Certificate's shipment has been cleared by customs. Since it can take up to two months between submitting an application for a Control Certificate and receiving clearance from customs, an importer may only be able to request a Control Certificate six times each year. Although the quantities for which Control Certificates are granted are not made public, importers are told orally what quantities would be allowed. Turkey claimed before the Committee on Sanitary and Phytosanitary Measures that due to a lack of laboratory resources, it could only issue Control Certificates for restricted quantities.

The maximum quantities for which Control Certificates were issued and the periods for which they were valid, on the other hand, did not vary with Turkey's laboratory capacity, and

Turkey was unable to affirm that it enforces similar requirements and limitations on domestic production in its responses to Ecuador's questions.[183]

Ecuador thus stated in their complaint that Turkey's actions were violating the following WTO provisions that Turkey is obligated under:

- Article 1 of the Agreement on Import Licensing Procedures, paragraphs 2, 3, 5, and 6
- Article 4 of the Agriculture Agreement
- Articles 2.3 and 8 of the Agreement on the Application of Sanitary and Phytosanitary Measures, as well as Annexes B and C
- GATT 1994 Articles II, III, VIII, X, and XI
- The General Agreement on Trade in Services, Articles VI and XVII (GATS).[184]

The consultations between both the parties were not successful and hence, Ecuador requested twice to the DSB for establishing a panel to help in deciding the right course of action for the issue on 13th June 2002. The panel was finally established on 29th July 2002.

Issues

The main issues that were to be considered in this case are:

1. Whether the introduction of the document Kontrol Belgesi is inconsistent with the provision of WTO.
2. Whether the new standards laid down in the said document is causing trade barrier for the members of the WTO for importing goods.
3. Whether there is discrimination caused between domestic producers and the WTO members due to the existence of this document.

Holding

The DSB finally established a panel for resolving the issue at hand upon the requests from Ecuador on 29th July 2002.

Once the panel was established, US and EC reserved third party rights and Columbia also later requested for third party rights.

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[183] Docs.wto.org. n.d. [online] > [Accessed 14 July 2021].

[184] Wto.org. n.d. *WTO | dispute settlement - the disputes - DS237*. [online] [Accessed 13 July 2021].

But before the panel could make a decision and their report, Ecuador requested for the suspension of the panel, because Ecuador and Turkey began new consultation between each other to find a mutual satisfactory decision between them. Thus the panel was suspended and the parties both mutually agreed on certain terms to resolve the dispute between them on 22nd November 2002.

Obiter Dicta

The main reason for Ecuador to request for the consultation with Turkey was because , it felt that the Turkish's Control Certificate system was in a nature that restricted importing of bananas, which was inconsistent with the WTO provisions.

According to Ecuador, the manner in which the actions of Turkey were violating the WTO provisions are as follows:

- ⇨ The quotas on banana imports imposed by the Control Certificates are in violation of Article 4.2 of the Agriculture Agreement and Article XI:1 of the GATT 1994.
- ⇨ The administration of the Control Certificate system – specifically, the delays in granting Control Certificates, its lack of regularity in the quantities and time periods for which Certificates are authorised, and the requirement that a Certificate be used before a new one is issued – cannot be reconciled with the requirements set forth in Articles 1:2, 1:3, and 1:6 of the Agreement on Import Licensing Procedures, as well as Article 2:3 of the SPS Agreement, including the requirements that import licence application procedures be "as simple as possible" and that sanitary and phytosanitary measures not be "applied in a manner that would constitute a disguise."[185]
- ⇨ When Turkey failed to apply a testing and certification procedure to domestic bananas that is comparable to that applied to bananas from other WTO Members, and also to appropriately allocate access to its laboratory capacity between importers and domestic producers, is in violation of its obligations under Article 8 and paragraph 1 of Annex C of the SPS Agreement and Article III:4 of the GATT 1994.
- ⇨ Also when Turkey neglected and failed to publicise the amounts of local and imported bananas that its laboratories accept for inspection and for which Control Certificates are obtained is a violation of the SPS Agreement's Article 7 and paragraph 1 duties.

[185] Docs.wto.org. n.d. [online] > [Accessed 13 July 2021].

These were according to Ecuador were violating the WTO provisions and Turkey’s obligation towards Ecuador being failed.

When bot the parties could not come to a solution, Ecuador had requested to the DSB for establishing a panel to resolve all its doubts and objections for the Turkey’s Kontrol Belgesi document.

But soon, both the parties wanted the DSB to suspend the panel, as they were later able to come to a mutually satisfactory agreement in accordance to Article 3.6 of the DSU.

In this mutually satisfactory agreement, Ecuador was informed that the application of the control certificate system has been modified as a result of the Amending Communiqué, Number 2002/21, which was published in the Official Gazette on July 20, 2002, and that, as a result, control certificates for the importation of bananas are being issued by the Ministry of Agriculture and Rural Affairs upon submission of the necessary documents. Turkey also committed not to repeat the activities that had raised Ecuador's worries. Due to the changes and modification made by Turkey, Ecuador decided to withdraw its request for the panel made towards the DSB.

Both the parties stated that the terms mutually agreed between them for this dispute is in no way violating the existing provisions of the WTO.[186]

Case Analysis

This particular case in consideration will be acting as a positive precedent in the future for a long time. This is because, this case highlights the importance of the presence of SPS in every country as it helps in maintaining good standards of food and plant and animal health.

But it also points out the abusive behaviour of various countries that might try to extort the provision of SPS, like how Turkey behaved in this particular case.

Here Turkey interpreted the provision of SPS for its country in rather different manner than how it must have actually acted as. The action of Turkey showed discrimination and pen support for domestic producers and creating a difficult trading position of WTO member countries.

[186] Docs.wto.org. n.d. [online] > [Accessed 14 July 2021].

But the WTO provisions that are in existence, helped in pointing out Turkey's overstepping of its obligation and thus finally, allowing Turkey to modify its Kontrol Belgesi that seemed fair towards importation from outside world.

Thus, this case is very important for understanding the role of SPS and how it must be interpreted and also to know the extent of its interpretation.

Conclusion

The case in question will act as precedent for future cases relating to the concept of SPS and the importance of the Agreement of SPS being adopted by every country. The case not only talks about the role of SPS but also states about how sometimes, the country interpreting it may step outside and misuse this provision to promote domestic market and thus creating trade barrier for outside importers to enter the country.

The case also highlights the importance of WTO's existence to act as a guardian and how it helps the member countries to follow their obligations given to them under WTO and how not to violate those procedures. Such was the position that Turkey was in and it changed its provisions relating to the Control Certificate system so that it no longer violated or was inconsistent with the provisions of the WTO.

CASE NO. 40

DS499 RUSSIA-MEASURES AFFECTING THE IMPORTATION OF RAILWAY EQUIPMENT AND PARTS THEREOF

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-Reman.G[187]

Introduction

The TBT (technical barriers to Trade Agreement-implemented in 1995) is a set of provisions which is implemented to create checks and balances for regulating the Technical Regulations, standards and conformity procedures and to ensure that there is no discrimination between two parties on the same basis.

The Agreement also recognises WTO's member's obligations and rights related to A parties policies which ensure there is no injury created in the Sectors of public Health, Safety and ensuring protection of the Environment.

DS499 (Russia- Railway Equipment and parts thereof) is a dispute contested in the WTO , where Ukraine contested against certain measures which involved of conformity assessment procedures for railway products against the suppliers from Ukraine under the Articles :

- GATT 1994 Articles: I:1, III:4, X:3(a), XI:1, XIII:1;
- TBT Agreement Articles 2.1, 2.2, 2.5, 5.1.1, 5.2.2, 5.2.3, 5.2.5, 5.2.6

Facts of the Case

On 10th November 2016, Ukraine requested the formation of a panel by the DSB to counter the issue of Russia ceasing to certify Conformity assessment certificates for Railway Stock, Road switches and other rail-related equipment. Ukraine claimed that Russia and attempted to ban imports of the rail equipment from Ukraine. Russia argued that there was not a proper access or ability for the Russian officials to check the standard of the railway product due to conflicts arising in the eastern part of Ukraine from where the regulations had to be done. The nations: Canada, China, the European Union, India, Indonesia, Japan, Singapore and the United States reserved their third party rights...

On 30th July 2018. The panel reported their finding:

[187] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

1. Russia failed to establish that Ukraine's panel request was inconsistent with Article 6.2 of the understanding of rules and procedures Governing Disputes.

2. Ukraine failed to establish a proper claim that Russia acted inconsistently under Articles 5.1.1 and 5.1.2 within the process of suspending certificates of conformity to the producers of railway equipment.

3. Ukraine failed to establish their claim against Russia that they acted inconsistently under the Articles 5.1.1. and 5.2.2 with regards of rejecting the applications for the certificates, where FDO (Federal Budgetary Organization) under CU technical Regulations 0003/2011.

4. Ukraine established its claims that Russia acted inconsistently under Articles I:1 and III:4 of GATT,1944

5. Ukraine had failed to establish its claims under articles I: 1, XI: 1 and XIII: 4 against Russia as it had not found non-discriminatory obligations.

On 27, August 2018, Ukraine appealed against the panel's reports with issues of law and filed a notice of appeal and an appellant's submission. The Russian Federation also gave its consent for cross-appeal and filed the notice of appeal and an appellant's submission.

On 4th February 2020, the appellate body circulated its findings and reversed most of the findings of the Dispute panel formed and established that Ukraine's claim under several Articles was to be considered relevant as Russia was inconsistent with their analyses and findings.

Holdings

The Appellate body report overturned the final decision of the dispute panel by finding that:[1]

- The Appellate Body considered that the Ukrainian suppliers of railway products were denied no less favourable access in a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other nations.
- The Appellate Body thus found that the Panel failed to make an objective assessment of the matter before it under DSU Art 11 in allocating the burden of proof in its analysis of this alternative measure.
- The Appellate Body found that Panel properly considered whether the individual components of the alleged unwritten measure formed part of a common plan to

prevent imports of Ukrainian products into Russia. The Panel also did not err in taking into consideration the rationale underlying these individual suspensions and rejections.

- The Appellate Body found that Ukraine had not established that the Panel failed to make an objective assessment of the matter in finding that Ukraine failed to demonstrate that Russia systematically prevented the importation of Ukrainian railway products.
- The Appellate Body rejected Russia's claim under ART 6.2 (which panel's terms of reference are defined by the measures and claims that have been identified in the request for establishment of a panel. Neither Article 7 of the DSU, which defines "the panel's terms of reference, nor the linked requirements of Article 6.2 of the DSU, make any reference to the title of the case.") Was inconsistent with Ukraine's panel request.

Issues Raised

1. Whether the Panel erred in its interpretation and application, and acted inconsistently with Article 11 of the DSU, in its analysis relating to the existence of a "comparable situation" under Article 5.1.1 of the TBT Agreement and in finding that Ukraine failed to establish that Russia acted inconsistently with its obligations under Article 5.1.1?

2. Whether Russia's claim against Ukraine's Panel request that it was inconsistent with Articles 11 of the DSU in finding that the third measure was affirmative?

3. Whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of the existence of systematic import prevention with respect to Ukraine's claims under Articles I:1, XI:1, and XIII:1 of the GATT 1994?

Findings for the Issues

1. Whether the Panel erred in its interpretation and application, and acted inconsistently with Article 11 of the DSU, in its analysis relating to the existence of a "comparable situation" under Article 5.1.1 of the TBT Agreement and in finding that Ukraine failed to establish that Russia acted inconsistently with its obligations under Article 5.1.1?

The Panel interpreted the Article 5.1.1 as stated that it recalls that the conformity assessment procedures obligations for the suppliers to access under conditions that weren't favorable. The panel outlined and erred a number of factors during its process of interpretation of the "a

comparable situation “The panel focused mainly upon the environments and the situation of Ukraine rather than the need for focusing on the supplier’s access towards the location of the supplier’s facilities.[1]

The panel erred in its application of Art 5.1.1 where the Ukrainian suppliers were denied inn a less favorable conditional access to the was granted to the Ukrainian suppliers that was not comparable to the situation the FBO rejected the applications of the suppliers under CU technical regulation 001/2011.

The panel noted about finding relevant data about the travel of Ukrainian citizens to Russia and Russian citizens to Ukraine, which contained evidence related to restrictions and risks of prosecution where it found 12 FBO officers refused to conduct their operations citing the risks for their health and safety as held by them, but this was unreasonable according to the appellate body. The panel failed to interpret the “comparable situation” with on the basis of evidence as it relied on generalized the risks for Russian citizens in Ukraine

The panel’s interpretation holding of the claim by Ukraine about suspension of certificates was inconsistent with the provisions, Hence the panel erred in its interpretation and application of Article 5.1.1

2. Whether Russia’s claim against Ukraine’s Panel request that it was inconsistent with Articles 11 of the DSU in finding that the third measure was affirmative?

The Article 6.2 of the DSU (dispute settlement understanding) elaborates about the identification about the specific measures and a brief summary of the complainants sufficient to present the issue clearly. The requirements are in pursuant to Articles 7 of the DSU, A panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will have the authority to make findings. The requirements for presenting the problem need not entail an obligation for the arguments of the complainant. [1]

The Article 11 of the DSU emphasizes that a panel must begin its analysis by thoroughly scrutinizing the measure before it, both in its design and in its operation, and identifies its principal characteristics.[2]

The panel analysed the elements of the third measure by explaining the elements and assessed the panel request as a whole. The Panel noted the content of the first measure as clear on the

face of the measure; the Panel elaborated inferences from the content of the second measure, and took into consideration contextual elements contained in other parts of the Panels analysis in order to determine the content of the third measure. The panel observed Ukraine's panel request that the identification of the 17 items in the final import risk analysis report (FIRA) was found to be sufficiently precise in identifying the specific measures at issue, pursuant to Article 6.2 of the DSU.3

Hence it can be stated that Russia's claim against Ukraine's panel request that it erred in determining the terms of reference in scope of the dispute, hence it can be told that Russia failed to establish the panels holding that Ukraine's request was inconsistent with Article 6.2 of the DSU.

As per the Appellate Body report, the Panels focus was on the rationale underlying the instructions and decisions instructions and decisions which formed an important part of its analysis as to the existence of the unwritten measure in the particular circumstances of the case.it was unreasonable for the panel to rely on evidences which determined the common policies and plans of import which prevented the elements of measures to be properly based on the impossibility to satisfy the required steps in conformity assessment procedures.

Ukraine had an issue with the burden of proof statement from the panel: they alleged that the panel erred in considering that the panel erred in characterizing the measure at issue as comprising only specific decisions suspending certificates, rejecting applications for new certificates, and not recognizing certificates from other CU countries individually.[1]

On the basis of Ukraine's allegations, it can be said that it can be nullified under The Article 11 of the DSU which mentions that

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with parties to the dispute and give them adequate opportunity to develop a mutual solution."[2]

In the Dispute DS499, the panel thoroughly examined the evidences of both the parties in order to achieve its conclusions .Ukraine failed to provide specific evidences of how the

result/conclusions of the panel would have differed if it had taken a different approach for estimating the its findings. Hence the claim mad e by Ukraine was bound to fail as the panel's findings were still adhering to the Article 11 of the DSU.

Obiter Dicta

(i)TBT Agreement[1]

1. Article 5.1.1 of the TBT agreement establishes a set of procedures to be followed by the governing body to assimilate if there is any conditions for granting access to conformity assessment and the ability of the regulating member to ensure compliance with the requirements in the underlying technical regulation or standard. In DS499, it can be understood that the interpretation of Article 5.1.1 by the panel was inconsistent with the provisions within it. The panel erred in finding that the Ukrainian railway products suppliers were denied the ability for less favourable access locations or conditions for verifications which was not comparable with the Russian producers of railway products and suppliers from other countries.

2.Article 5.1.2 and 5.2.2 of the TBT agreement elaborates on the suspension of the certificates by the FBO(Federal Budgetary organization) which specifies that the conforming member shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, It is for the complainant to make the *prima facie* case that a proposed alternative is readily available to the respondent , which are :

(i) is less strict

(ii) Makes an equivalent contribution to the objective of providing the importing Member with adequate confidence of conformity

(iii) is reasonably available to the importing Member.

The appellate body reversed the findings of the panel which ensured to conclude that Russia failed to act inconsistent with the Articles 5.1.2 regarding 14 certificates at issue.

(ii)DSU (Dispute Settlement Understanding)[2]

1. Article 11 : The Article 11 of the DSU mentions about the functions of a panel which revolves around the objective assessment of facts of the case which can help the DSB achieve its finding and also mutually communicate with the parties for better results.

The Appellate body in the case DS499 rejected claims by both the parties under the Article 11 of DSU which referred to inconsistent allegations by

- Ukraine Failed to prove whether Russia systematically prevented imports of railway products from Ukraine.
- Russia failed to prove the inconsistency of the panel under Article 11 with respect to a measure it had previously inconsistent when identified in its terms of reference.

Article 6.2: Article 6.2 was concerned with the formation of a panel which was in writing

(a) Whether consultations were held, identify the specific measures at issue and

(b) Provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference. The appellate body stated that the panel had properly explained about the infringement of provisions and analysed the measures challenged by Ukraine, after Russia claimed that the panel had erred in its preliminary ruling.

Case Analysis

This case addresses the errors committed by the panel in DS499 here the claims were reversed after an appeal was made to the appellate body., The Appellate body's report explains about important clarifications revolving around the topic "conformity assessment "which gives the suppliers more legal certainty across the markets under WTO seeking conformity access procedures , the final holding of the panel showcases how the Article 5.1.1 of the TBT agreement can be interpreted by the parties and panels. Contrastingly, this is one of the first disputes held under Article 5.1.1 by the appellate Body and may be a formal precedent for cases in the future.

Conclusion

This case can be understood as a significant land mark judgement within the topic : Technical Barriers to trade Agreement and how the necessary rules and provisions must be consented with by the party which is imposing the restriction. It can also be assumed that this dispute can also further fuel the political differences between the two nations

The case focused on granting obligatory access for the Suppliers of the railway product and played a very important role in affecting the market of the region. This case is important to showcase how restricting products under various implications can still further affect the parties claims and evidence.

CASE NO. 41

DS495 KOREA - IMPORT BANS, AND TESTING AND CERTIFICATION REQUIREMENTS FOR RADIONUCLIDES

- Madhav Goyal[188]

Introduction

The importance of this dispute is it highlights the important aspects of Article 5.7 of the SPS Agreement which are namely, burden of proof, insufficient scientific evidence, and review of the measure. This case plays a major role since, to date, panels and the Appellate Bodies with regards to the interpretation of Article 5.7 have always taken different approaches. Historically, Panels in almost all such issues aren't kind to countries that take provisional SPS measures. This case substantiates that, although the WTO seemingly acknowledges Sustainable Development as one of its extensive objectives, due to its constricted examination of Article 5.7 of the SPS Agreement, the organization remains wary of being able to ratify the object and purpose of the preamble of the WTO Agreement.

Facts of the Case

1. On 11 March 2011, a huge amount of radioactive materials was released into the atmosphere, land, and ocean from the Fukushima Dai-ichi Nuclear Power Plant, which was operated by the Tokyo Electric Power Company, as a result of a reactor accident resulted due to the Great East Japan Earthquake and a subsequent devastating tsunami.

2. The Korean government responded to this accident by imposing a variety of import control measures on certain Japanese fishery products.

3. On 21 May 2015, Japan requested consultations with Korea, but the two countries failed to solve their disputes; then, on 20 August 2015, Japan requested the establishment of a panel and challenged these measures by Korean Government.

4. Specifically, Japan challenged four sets of Korean measures, firstly, the additional testing requirements adopted in 2011 for non-fishery products; secondly, the product-specific import bans adopted in 2012 on Alaska Pollockand Pacific cod from specific prefectures; thirdly, the additional testing requirements adopted in 2013 for fishery and livestock

[188] BBALLB, 2nd Year Student, Alliance School of Law, Alliance University, Bengaluru.

products; and lastly, the “blanket import ban” adopted in 2013 on all fishery products from eight prefectures in relation to 28 fishery products.

5. The Panel was established on 28 September 2015 to consider a complaint by Japan with respect to the consistency of certain measures adopted by Korea on Japanese food products with the Agreement on the Application of Sanitary and Phytosanitary Measures.

Procedural History

India – Agricultural Products: This case was referred by the Appellate body under Article 5.6. In this case, it was established that a complainant must have an alternative measure which is reasonably available taking into account technical and economic feasibility; also that these measures achieves the Member's ALOP; and lastly, is significantly less restrictive to trade than the contested SPS measure. It was also held in this case that, Members adopting SPS measures must determine their appropriate level of protection with sufficient precision to enable the application of the relevant provisions of the SPS Agreement.

Australia – Apples: This case was referred by the Appellate body under Article 5.6.This case too discusses about the alternative measures that are to be set by the complainant which are reasonable and feasible. Along with this, it was held in this case where a Member is not required to set the appropriate level of protection in quantitative terms, a Member may not establish its level of protection with such vagueness or equivocation as to render impossible the application of the relevant disciplines of the SPS Agreement, including the obligation set out in Article 5.6.92.

Australia – Salmon: This case was referred by the Appellate Body with regards to the appropriate level of protection.In this case,The Appellate Body held that a Member's ALOP is an "objective" and that an SPS measure is the instrument chosen to attain or implement that objective. It is the "prerogative" of a Member to set the level of protection that it deems appropriate.

EC - Approval and Marketing of Biotech Products: This case was referred bythe Panel as it established that it was incumbent on the complaining party to demonstrate that the challenged SPS measures were inconsistent with at least one of the four requirements set forth in Article 5.7. However, once the complaining party established a prima facie case of inconsistency with Article 5.7, the burden of proof would shift to the defending party, which would then have to prove that the available scientific evidence was insufficient.

Issues

1) Whether Korea was violating Article 5.6 of the SPS Agreement for being more trade-restrictive than required.

2) Whether Korea was violating Article 2.3 of the SPS Agreement for arbitrarily or unjustifiably discriminating against Japanese food products and constituting a disguised restriction on international trade.

3) Whether Korea by failing to comply with transparency requirements was violating Article 7 and paragraphs 1 and 3 of Annex B to the SPS Agreement.

4) Whether the additional testing requirements by Korea are inconsistent with Article 8 and paragraphs 1(a), 1(c), 1(e), and 1(g) of Annex C to the SPS Agreement

Holding

Concerning the first issue of the appropriate level of protection. Under Article 5.6 the Panel identified Korea's ALOP as consisting of both qualitative aspects and a quantitative element of radiation dose limit. The Appellate Body reversed the Panel's findings of inconsistency with Article 5.6 based on the Panel's failure to then consider all elements of the identified ALOP. The Appellate Body found that the Panel erred by focusing on the quantitative element as a decisive indicator of whether Japan's proposed alternative measure would achieve Korea's ALOP, contrary to its articulation of the ALOP as containing multiple elements.

For the second issue of discrimination of Japanese products by the Korean Government. Under Article 2.3, The Appellate Body reversed the Panel's findings of inconsistency under Article 2.3 due to the Panel's error in finding that "similar conditions" prevail between Japan and other Members. According to the Appellate Body, the Panel did not consider all relevant conditions, including territorial conditions with the potential to affect products that have not manifested in products but "are relevant in light of the regulatory objective and specific SPS risk at issue". Consequently, the Panel erred by focusing on product test data to the exclusion of territorial conditions that could differently affect the potential for contamination.

With regard to SPS Article 5.7 the Appellate Body found that the Panel exceeded its mandate, contrary to DSU Articles 7.1 And 11, in making findings as to the consistency of Korea's measures with SPS Article 5.7. The Appellate Body considered that Japan had not claimed SPS Article 5.7, and Korea did not invoke it as an exception but relied on the

provisional nature of the measures as context as part of its rebuttal arguments under certain other provisions. The Appellate Body declared the Panel's findings that Korea's measures did not fall within the scope of SPS Article 5.7 as moot and of no legal effect.

Concerning the third issue of Korea failing to comply with the transparency requirements. The Appellate Body under Art. 7 and Annex B(1) agreed with the Panel that the publication of the measure must contain sufficient content that the importing Member would know the conditions that apply to its goods. However, the Appellate body modified the Panel's finding to the extent that Annex B(1) requires, in all cases, publication to include the "specific principles and methods" applicable to the products, considering instead that this requires a case-by-case determination. The Appellate Body upheld the Panel's findings that Korea acted inconsistently with Annex B(1) and Art. 7 by, not publishing the full product scope of the blanket import ban; secondly, by not publishing sufficient information to enable Japan to become acquainted with the requirements of the additional testing requirements; and lastly, by not showing that interested Members would have known to look to the websites indicated by Korea for information of the SPS measures at issue.

Concerning SPS Annex B(3), the Appellate body while agreeing with the Panel that it is not a mere formality of establishing an enquiry point, the Appellate Body disagreed that a single failure of an enquiry point to respond to a request would result in an inconsistency with Annex B(3) and reversed the Panel's finding, which was based on two instances.

Lastly for the fourth issue of presumption of likeness. Under SPS Article 8the Appellate Body considered that the distinction of applying Korea's additional testing requirements only to Japan was not based solely on origin as it could not be separated from the public health concerns underpinning the measures. The Appellate Body upheld the Panel's finding that, in this case, the Japanese and Korean products could not be presumed to be "like" but expressed no general conclusion on whether likeness may be presumed under Annex C(1)(a).

Other Considerations

For such cases concerning the issue ALOP and SPS, the Appellate Body uses a case-by-case analytical approach when trying to find the institutional balance between ensuring a fair trial through proper disclosure and leaving the discretion to the investigating authority. The Appellate Body found serious flaws in the Korean Government and the measures set by it towards the Japanese fishery products to have violated various obligations of the SPS Agreement.

Case Analysis

This case highlights most essential aspects of Article 5.7. These aspects are namely, burden of proof, insufficient scientific evidence, and review of the measure. Primarily, this dispute shed light over an evident strain inherent in the SPS Agreement when discussing about the application of the burden of proof. Moving on, Korea, provided numerous reports and articles that speculated on the premise that the radioactively contaminated water which was leaking was much higher than disclosed, the country also argued against conducting an RA, since the scientific evidence regarding the extent of existing contamination was insufficient. Lastly, the major point of issue in this case was the inability of the Korean government to provide a final report of the results post complete research and review, thus failing to satisfy its obligation to review the measure within a reasonable period of time. In the text of the SPS Agreement, there exists no explicit definition of what constitutes "a reasonable period of time", so for the same the Panel referred to the interpretations set by the precedents.

This case plays a major role since, to date, panels and the Appellate Bodies with regards to the interpretation of Article 5.7 they have always taken different approaches. Historically, Panels in almost all such issues aren't kind to countries that take provisional SPS measures. This is another reason why, the countries that have tried to implement Article 5.7 with the motive to explain their provisional measures have always failed to succeed in their claims. Primarily, this could be due to the lack of clear support for the PP in the SPS Agreement. Other than this, it could also be the effect of the precedents set by the Panels. Even though previous Panels and Appellate bodies' decisions are given significant persuasive authority, future disputes are not bound by precedents. Due to the strict examination of the four requirements by previous panels and Appellate bodies, it has become very difficult, if not impossible, for countries to adopt and maintain provisional measures based on the regulations of Article 5.7.

Conclusion

The Appellate Body for this case was in favour of the Japan on most of the issues related to Sanitary and Phytosanitary measures that were taken up. Given the shortcomings of the Korea, the decisions of the panel, were justified. This case substantiates that, although the WTO seemingly acknowledges Sustainable Development as one of its extensive objectives, due to its constricted examination of Article 5.7 of the SPS Agreement, the organization remains wary of being able to ratify the object and purpose of the preamble of the WTO Agreement.

CASE NO. 42

DS386 UNITED STATES-CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

-Vaibhav. V[189]

Introduction

Mexico entered into negotiations with the US on the legally required country of origin labelling (COOL) provisions of the Agricultural Marketing Act of 1946, as amended by the Farm, Security and Rural Investment Act of 2002 and the Food, Conservation and Energy Act of 2008, and as implemented by 7 CFR Parts 60 and 65 regulations

Facts of the Case

1. Mexico had requested consultations with the US on the Agricultural Marketing Act of 1946's necessary country of origin (COOL) marking guidelines, as revised by the Farm, Security, and Rural Investment Act of 2002 and the Food, Conservation, and Energy Act of 2008, on December 17, 2008. As per Mexico, the assessment of nationality for certain products deviates significantly from international country of origin labeling rules, a condition which has not been explained as required to achieve a good goal.
2. As per Mexico, the mandatory COOL rules appear to be conflicting with the US' WTO requirements. Later, Canada requested to participate in the consultations on December 30, 2008. Following that, the US told the DSB that it had accepted Canada's request to participate in the consultations. After that, the US told the DSB that it had agreed to Canada's and Peru's requests to participate in the consultations.
3. Mexico proposed for the formation of a panel on October 9, 2009. The DSB postponed the formation of a panel during its meeting on October 23, 2009.

Procedural History

The Canada had originally requested for consultations, and Canada requested additional consultations on related changes and actions made by the United States. It also contains any

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changes or additions to the COOL measures, as well as any further implementing advice or other papers that may be issued in connection with them. The listed measures appear to be inconsistent with the United States' duties under the WTO Agreement, as per Canada.

Issues

1.Was the Mandatory COOL Provisions inconsistent with United states Obligations according to WTO agreement?

2.What was the Reason for the DSB to Postpone the establishment of Panel?

3.Does Mexico deviate from the rules of COOL Standards?

Holdings

The United States notified the DSB on November 28, 2014, that it had decided to appeal to the Appellate Body certain legal issues raised in the compliance panel report and certain legal interpretations reached by the panel. Mexico filed a new appeal in the same dispute on December 12, 2014.The Appellate Body told the DSB that the Panel Report would be distributed to WTO Members no later than May 18, 2015.Members received the compliance Appellate Body report on May 18, 2015.

Therefore, The Dispute Settlement Board approved the Administrative Body and panel reports from Article 21.5, as revised by the Arbitral Tribunal reports , at its meeting on May 29, 2015

Considerations

Mexico and the United States had requested the DSB to adopt a tentative judgement extending the 60-day time limit set forth in Article 16.4 of the DSU until March 23, 2012. Mexico notified council DSB of its determination to appeal some legal concerns raised in the panel's findings, as well as some of the panel's legal interpretations. The Appellate Body's Chair advised the DSB on May 21, 2012, that due to the nature of the appeal, the Appellate Body would not be able to distribute its findings within the 90-day deadline specified in Article 17.5 of the DSU.

Later, Mexico proposed that they wanted arbitrator to be appointed by the Director-General. Mr Giorgio Sacerdoti was appointed as arbitrator under Article 21.3(c) of the DSU by the Director-General on October 4, 2012. In letter October 5, 2012, Mr Sacerdoti accepted this post. The final rule, according to the United States, brought it into conformity with the DSB's recommendations and rulings. Mexico was not convinced with the revisions brought by the US into full compliance. According to them, the adjustments, it claimed, were more restrictive and caused greater harm. The US and Mexico informed the DSB of Agreed Procedures under Articles 21 and 22 of the DSU on June 10, 2013.

Critical Analysis

Yes, the court's decision was appropriate.

The US had announced that it intends to adopt the DSB recommendations and findings in accordance with its WTO Obligations where this decision confirms the existing law.

The Reasoning was consistent with the Previous reasoning in similar cases like in the case of DS-384 United States, where the Canada was the Complainant on the same issue of COOL standards and the DSB adopted the Article 21.5 Appellate Body reports and panel reports, as modified by the Appellate Body reports. The Appellate Body upholds the panel's decision that the revised COOL measure is incompatible with TBT 2.1 and of article 3.i

Regarding Canada's original request for consultations, Canada had proposed more consultations on the United States' associated reforms and measures. This also incorporates alterations to the COOL measures and further advise on their application or other documents. The activities

described here seems to be incompatible to the US' WTO Agreement obligations., according to Canada. Canada had requested for the creation of a panel. At its discussion, the DSB delayed the formation of a committee.

Yes, the decisions will Significantly influence the Existing Law-

The Court had adequately Justified its reasoning by saying that - the necessary COOL provisions, tend to be inconsistent with the United States obligations under the WTO Agreement, it ruled that the US had violated its responsibilities under this provision.

The Interpretation of Law was appropriate.

In this case, the decision of the panel was appropriate and justified because as they found out that the mandatory country of origin labelling (COOL) rules of the Agricultural Marketing Act of 1946 and the assessment of it for certain products was deviating significantly from international country of origin labelling rules, where this was a condition which has not been explained. The panel report also found the same thing and it was circulated to members. The Mexico’s claim was sustained by the Panel.

The United States had told that it had taken this issue seriously and has made measures to execute the DSB recommendations according to its WTO authority, but this needs a little amount of time to implement.

When we take in the case of DS-384 United States, where the Canada was the Complainant on the same issue of COOL standards, the case is similar and the decision is also appropriate, the Reasoning of the Judgement is held differently in different level by the Panel, which was according to DSB rules and Regulations. The Appellate Body modified the panel's findings on Article 2.2 TBT, but it was unable to finish the study and thus could not determine whether the provision was less trade restrictive than required.

Modifications to the COOL labelling was implemented by the United States. The adjustments did not bring the US into full conformity with the DSB's recommendations and findings, according to Canada and Mexico.

Then there was a mutual Agreement between the Two countries Canada and United States,

In this case DS 386, there was than a mutual agreement between Mexico and United States where they both agreed upon the time which was asked by the United States.

So, the decisions of the panel will be according to WTO’s Rules and Obligations, and they ensure that this happens between two countries properly and they also obey to the Rules of the Dispute Settlement Board and the Respective Panels. The Appellate Body upholds the panel’s decision that the revised COOL measure is incompatible with TBT 2.1 and of Article

Conclusion

The WTO Panel and Appellate Body Reports provide limited direct guidance on the applicability of Article 2.1 of the TBT Agreement. Meanwhile, Australia maintains that the Panel can be guided by the understanding of GATT Article III:4's phrases "similar item" and "treatment no

less fair." The goal of the no less favourable approach provision is to secure "equality of opportunity" for imported goods. It is required to determine that these same COOL policies affect the market competition parameters to the purchased cost items as part of the analysis. The COOL regulation has the potential to harm competitiveness by discriminating against imported items, resulting in less favourable treatment.

Besides, other countries believes that the COOL measure is incompatible with the TBT Agreement's Article 2.2 obligation, in that the COOL measure's trade restrictive existence, which is not required to achieve its goal of providing accurate consumer information, given less trade-restrictive and reasonable alternatives which are available.

CASE NO. 43

DS406 UNITED STATES - MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES

- Naman Jain [190]

Introduction

The United States' TBT Appeal - Clove Cigarette was the only dispute in which the meaning of "like products" in the non-discrimination clause of Section 2.1 TBT, so essential to the identification of protectionist measures, was a of the lawsuits. US - Clove Cigarettes was the only OTC dispute in which the analysis of "less favourable" treatment, the second part of Section 2.1 TBT, included an explicit examination of the product line for the required comparison between domestic products and imported products. It was also the only dispute in which the challenged measure was a product ban and not a labelling requirement.

Facts of the Case

In US - Clove Cigarettes, the WTO Appellate Body clarified the provisions of the Agreement on Technical Barriers to Trade ("TBT Agreement" or "TBT") that were not previously exposed. The dispute concerned Indonesia's challenge to the ban on cloves in cigarettes in the United States, introduced by the Family Smoking Prevention and Tobacco Control Act of 2009. This law amended section 907 (a) (1) (A) of the Federal Food, Drug, and Cosmetic Act[191], which prohibits cigarettes that contain "an artificial or natural flavour (other than tobacco or menthol) or any herb or spice, such as strawberry, grape, orange, cloves, cinnamon, pineapple, vanilla, coconut, poly rice, cocoa, chocolate, cherry or coffee. " Thus, the challenged measure excluded from the United States market a wide variety of flavoured cigarettes, including clove cigarettes, which were largely imported from Indonesia, while menthol cigarettes, which were produced primarily in the United States. . United States, that the United States' measure violated Articles 2.1, 2.2, 2.5, 2.8, 2.9, 2.12 and 2.13 of the TBT Agreement. Instead of its claim under Article 2.1 TBT, Indonesia argued that the measure did not comply with Article III of GATT: 4 and could not be justified under Article XX (b) of the GATT.

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[191] Federal Food, Drug, and Cosmetic Act, United States Code, Title 21 (FFDCA)

Procedural History (Precedent of the Case)

Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef WT/DS161: Korea-A number of beef measures for which the Appellate Body has stated that "whether or not imported products receive" less favourable "treatment than" like products "should be assessed by examining whether a measure modifies the conditions of trade the detriment of imported products..[192]

European Communities - Approval and Marketing of Biotech Products WT/DS291/R, WT/DS292/R, WT/DS293[193] : In Approval and Marketing of Biotech Products by the EC, the Panel noted that "Article 12.3 requires Members to take into account the special needs of developing country Members when developing and applying technical regulations, standards and procedures for conformity assessment.

European Communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27[194] : Product likeness under Article 2.1 of the TBT Agreement. The Appellate Body found that "the regulatory concerns underlying a measure, such as the health risks associated with a particular product" are only relevant to determining whether the products are "like" to the measure characteristics' or 'consumer preferences'.

Japan – Taxes on Alcoholic Beverages, WT/DS[195] : 1996 Japan Alcoholic Beverages Report, 7 in support of the conclusion that product definitions for national treatment under the TBT and the GATT can and should be different

Issues

1. Whether clove cigarettes and menthol cigarettes were "like products"?
2. Whether the measure, which ostensibly did not discriminate between products, de facto accorded "treatment less favourable" to Indonesian products?

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[192] WTO Appellate Body Report Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef WT/DS161, 169/AB/R (January 10, 2001) Para 137. See also WTO Panel Report US-Clove Cigarettes 82 Para 7.264

[193] WTO Panel Report European Communities - Approval and Marketing of Biotech Products WT/DS291/R, WT/DS292/R, WT/DS293/R (November 21, 2006) Para 7.47 sub-paras 75 and 77.

[194] WTO Appellate Body Report European Communities - Regime for the Importation, Sale and Distribution of Bananas WT/DS27/Ab/R (September 9, 1997) Para 216 and 241. Here, the WTO Appellate Body rejected the "intent and effect" test for establishing "likeness".

[195] Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 21

Holding

The WTO panel ruled that the ban on cloves, but not on menthol cigarettes, violates Article 2.1 of the TBT, which requires WTO members in their technical regulations to accord the products of other members "treatment no less favourable than like products "of national origin. "The Panel also found that the United States measure, which entered into force 90 days after its publication, violated Section 2.12, which requires members who adopt TBT measures harmful to foreign trade to grant a" reasonable period" Between publication and implementation found that the United States had violated Article 2.1 of the TBT Agreement, the Panel concluded that Indonesia had not demonstrated that the United States had violated Article 12.3 of the TBT Agreement , the Panel rejected (or decided not to examine) Indonesia's other claims.

The Appellate Body confirmed the Panel's findings, but significantly revised the reasoning developed. In doing so, the Appellate Body defined the general approach that WTO arbitrators should follow when assessing the consistency of technical regulations with Article 2.1 TBT. Furthermore, to determine whether the United States had taken its measure in violation of TBT Article 2.12, the Appellate Body had to assess the interpretative value of the Doha ruling under WTO law. The national treatment obligation: "like products" and "treatment no less favourable" in Article 2.1 of the TBT. Article 2.1 of the TBT Agreement provides:

"Members shall ensure that, with respect to technical regulations, products imported from a member's territory do not receive less favourable treatment than like products of national origin and like products originating in another country."

The Appellate Body noted that the TBT Agreement was a development of the GATT and should not be construed as an obstacle to any technical regulation affecting foreign trade. Rather, the TBT Agreement, and in particular Article 2.1 should be interpreted as a balance between trade liberalization and legitimate regulation such as Article III: 4 of the GATT, subject to the exceptions of Article XX. of the GATT.

In EC - Asbestos, the Appellate Body found that "likeness" to the GATT is a function of "competitiveness" between products. on the competitive relationship between the products in question, therefore, interpreters must assess "likeness" regardless of the objectives and effects of the TBT measure itself. The competitive relationship between two products, for its part, is

a function of the substitutability of the two products analysed, that is, of their ability to perform the same functions. Therefore, the fact that two products (in this case, clove cigarettes and menthol cigarettes) do not currently play the same role in certain markets is less relevant than whether they can play the same role. According to the Appellate Body, this is true even if substitutability exists for only one segment of the market, since, like GATT Article III: 4, TBT Article 2.1 "does not protect only certain cases or most cases, if not the opposite, protects all cases of direct competition. The Panel's finding that there is a certain degree of substitutability for young smokers between clove cigarettes and menthol cigarettes was therefore sufficient to support its finding of "likeness" under Article 2.1.The WTO panel ruled that the ban on cloves, but not on menthol cigarettes, violates Article 2.1 of the TBT, which requires WTO members in their technical regulations to accord the products of other members "treatment no less favourable than like products "of national origin. The Panel also found that the United States measure, which entered into force 90 days after its publication, violated Section 2.12, which requires members who adopt TBT measures harmful to foreign trade to grant a" reasonable period Between publication and implementation. found that the United States had violated Article 2.1 of the TBT Agreement, the Panel concluded that Indonesia had not demonstrated that the United States had violated Article 12.3 of the TBT Agreement, the Panel rejected (or decided not to examine) Indonesia's other claims.

The Appellate Body began by clarifying the meaning of the term "treatment no less favourable" in TBT Article 2.1, taking into account the context and the object and purpose. Article 2.2 of the TBT prohibits technical regulations that create “unnecessary obstacles to international trade”. The object and purpose of the TBT Agreement, specified in the preamble, is to allow legitimate technical regulation and to ensure that it does not constitute a means of arbitrary or unjustified discrimination between countries or a disguised restriction on international trade. In light of this, the Appellate Body concluded that Article 2.1 gives specific content to the overall GATT / TBT balance between the "objective of trade liberalization" and the "right to regulate". Therefore, the interpretation of TBT Article 2.1 must be guided by the overall objective of the TBT Agreement.

Taking into account the need to maintain a balance between the right to adopt legitimate regulations and the objective of preventing discrimination, technical measures may be taken that, de jure or de facto, "have a negative effect on competitiveness." legitimate regulatory differences "(paragraph 174). The adverse effect of the measure must be evaluated taking into account the" particular circumstances of the case ", including" the design, architecture,

revealing structure, operation and application of the relevant technical regulation and, in particular, if this technical regulation is impartial. Since Article 2.1 of the TBT prohibits treatment no less favourable to the products" of each member ", the analysis must be carried out by comparing non-domestic products with imported products in general, but with imported products from the complaining WTO member. Adding menthol to cigarettes has the same function as adding cloves: mask the harsh taste of tobacco and make the smoking experience more attractive and enjoyable for people. The option to include menthol cigarettes in the ban and exempt menthol cigarettes "strongly suggests that the negative influence on competitive opportunities of clove cigarettes reflects discrimination of cigarettes produced in Indonesia.

In conclusion, the Appellate Body noted that section 2.1 of the TBT does not prevent the United States from pursuing the legitimate objective of reducing and preventing youth smoking, including by prohibiting flavoured cigarettes. However, Article 2.1 requires that, when adopting and applying technical regulations that give effect to the legitimate health policy pursued, domestic and similar products of WTO Members receive equal treatment. Breach of the "reasonable period of time" obligation: the interpretative value of the Doha ministerial decision. The 2009 law was granted three months before the ban went into effect. The panel interpreted this as an unreasonable interval, taking into account paragraph 5.2 of the 2001 Doha decision, which denies this interval of at least six months.

Other Considerations (dicta)

The Panel attached great importance to the fact that Article 2.1 TBT applies only to technical regulations defined in the TBT Agreement, while Article III: 4 of the GATT apply to a much broader range of measures. In this regard, the Panel recalled the vivid image of an "accordion" given by the AB in its 19967 Japan - Alcoholic Beverages report, to support the finding that product definitions for national treatment under the TBT and the GATT should be different. The panel also attached importance to the recognition of the right of members to pursue legitimate and non-protectionist political objectives in their technical regulations, as reflected in the sixth recital of the preamble and Article 2.2 TBT, as a basis. 'Equality' or a product definition approach, as opposed to a competitive approach, which distinguishes national treatment under the TBT from approaches established by national treatment jurisprudence under Article III of the GATT.

Case Analysis

The Panel and AB's infringement discoveries in the dispute of Clove Cigarettes were centred on the idea that the elimination of menthol cigarettes (primarily US) from the law, while rival clove cigarettes (primarily Indonesian) were outlawed, set up protectionism[196]. Despite the fact that US law appears to be unbiased on origin and does not overtly differentiate between imports and domestic products, there was clear evidence of the law's discriminatory nature.

The Appellate Body and the Panel appeared to be unconcerned about this fact, rejecting Indonesia's claims under Article 12.3 of the TBT Agreement on the grounds that the possibility of unemployment was not a "special necessity." The Appellate Body and the Panel, on the other hand, may have done more by taking a more comprehensive approach that considers Indonesia's development interests as a whole and as a developing nation. The relationship between trade policy and social policy should have been considered in this regard. The Appellate Body and Panel reached a decision on Indonesia's claim that the US had breached TBT Agreement Article 12.3. Despite the fact that the Appellate Body and the Panel, after examining the competitive connection between clove and menthol cigarettes, determine whether imported clove cigarettes and menthol cigarettes made in the United States were "Like products" in terms of quality in the meaning of Article III: 4, this meant that the treatment of such "Like products" under the GATT was discriminatory, because the United States gives clove cigarettes dramatically uneven competitive possibilities compared to those offered with menthol cigarettes.

Because clove and peppermint cigarettes were "similar products," the Appellate Body and the Panel were justified in concluding that the US prohibition on clove cigarettes did not meet the obligations under Article III: 4 of the GATT 1994, and that the prohibition discriminated against clove cigarettes. Article III: 4 forbids WTO members from enacting laws, rules, or other requirements that treat imported goods less favourably than locally produced "Like" goods once they have cleared customs and entered the WTO member country[197]. However, evaluating whether the measures are protectionist is critical in defining the applicable trade and investment regulations, and hence must be carefully considered.

The only flaw in the challenged measure was that it was discriminatory. If the law had also prohibited the sale of menthol cigarettes, as health activists wanted, it would almost certainly have been deemed to be WTO compatible. The fact that the appeal body and panel findings

[196] Free Trade and Tobacco: Thank You for Not Smoking (Foreign) Cigarettes, Free Trade Bulletin No. 49, By Simon Lester, August 15, 2012.

[197] Regulatory Purpose and 'Like Products' in Article III:4 of the GATT

were anti-protectionism in the sense that they prohibited the US from enacting a trade-related action that went against WTO policy to restrict trade is important. International trade as a whole should be liberalised, and restrictive trade measures should only be used in rare circumstances. The statements merit credit in this regard.

Conclusion

The case of the United States- Clove Cigarettes is a significant step forward in the on-going effort to define what it means for two products to establish trade-distorting discrimination in the context of national treatment. Despite the fact that the AB, like the previous panel, concluded in favour of the claimant, it did so using a different argument. This resolved the case, at least for the time being, and clarified the meaning of national treatment in TBT Article 2.1, but also raised questions regarding the position of the dividing lines in future situations. In the instance of clove cigarettes in the United States, the Panel and the Appellate Body missed an opportunity to address the specific development needs of emerging member states. If the WTO wants to establish a credible reputation as an effective dispute resolution venue where trade and non-trade concerns are intertwined, it must adopt a direct approach to combating veiled protectionism targeting developing-country products.

CASE NO. 44

DS293 EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS

- Ramya.S.R[198]

Introduction

The SPS agreement otherwise known as Agreement on the Application of Sanitary and Phytosanitary Measures is one of many international treaties of WTO. This was first introduced in the Uruguay round of GATT and enforced by the year of 1995. This agreement talks about a wide range of topics which include, protection of animal, Human or plant life or of their health from certain risks. Using SPS agreement the WTO monitors the policies of its member states regarding food safety issues that may be created by any bacterial contaminants or pesticides or inspection or labelling, it also includes plants and animals health (photo sanitation) which be put at risk from imported pests and diseases. This agreement was mainly formed to deal with non-tariff-based issues. And then there is TBT agreement which can also be known as Agreement on Technical Barriers to Trade which is also an international treaty of WTO. There are many provisions regarding these issues. This case DS 293 is about an issue regarding this. When we are looking into DS 293 filed by Argentina, it is unavoidable to look into DS 291 and DS292, which were filed by US and Canada respectively because the panel was formed for these three states combinedly and this case is called the EC- Biotech case.

Case Background

The Government of Argentina at first requested a consultation with the European Communities according to,

- Article 4 - Understanding on Rules and Procedures Governing the Settlement of Disputes,
- Article 11.1 - Agreement on the Application of Sanitary and Phytosanitary Measures,
- Article 19 - Agreement on Agriculture,
- Article 14.1 - Agreement on Technical Barriers to Trade, and
- Article XXII.1 - GATT 1994

regarding to particular measures taken by the European Communities and their member States which affect biotechnology products. As it is well known that Argentina is a global producer and

[198] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, VIth Semester.

exporter of biotechnology products, hence for them the systemic and trade implications of the mentioned measures constitute a clear nullification or denial of its deserving rights under the WTO Agreements. From 1998, the European Communities have suspended considering applications for approval of biotechnology products. And in some cases some of their member States have prohibited infringement of Community rules for biotechnology products. [199]In effect, Argentina claimed that the actions that were taken by the European Communities was injurious to international trade in biotechnology products, which can be seen in the,

a. de facto measures that lead to the suspension of consideration or the non-consideration of different applications with no sufficient scientific evidence or a proper risk assessment; and
b. undue delay in finalising consideration of different applications for the approval of biotechnology products submitted by various WTO Members.

Because of this the biotechnology products that are approved for marketing in Argentina and those still being considered were affected. Argentina challenged the specific prohibitions that were introduced by the European Communities member states. They infringed Community legislation and affected the biotechnology products that were approved for marketing in Argentina. The measures regarding the same that was given by the European Communities and some of their member States infringe certain provisions of the WTO Agreements, those are,

a. Incidentally, Articles 2, 5, 7, 8, 10 and Annexes B and C of the Agreement on the Application of Sanitary and Phytosanitary Measures;
b. Article 4 of the Agreement on Agriculture;
c. Incidentally, Articles I, III, X and XI of the GATT 1994; and
d. Incidentally, Articles 2, 5 and 12 of the Agreement on Technical Barriers to Trade.

On 7th August 2003, a panel was requested, on 29th August 2003, the requested panel was established together for all three that is USA, Canada and Argentina. On 4th March 2004 the panel was composed and on 29th September 2006 the panel's report was circulated and finally on 21st November 2006, it was adopted. In 2010 both parties came to a mutually agreed solution and worked as per that.[200]

[199] 2003. *Request for Consultations by Argentina*. [pdf] Available at: <https://trade.ec.europa.eu/doclib/docs/2004/january/tradoc_114619.pdf> [Accessed 12 July 2021].
[200] n.d. DS293: European Communities — Measures Affecting the Approval and Marketing of Biotech Products. Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds293_e.htm> [Accessed 12 July 2021].

Issues

Were the measures at issue, which are,

1. Alleged general EC moratorium on approvals of biotech products,
2. EC measures allegedly affecting the approval of specific biotech products; and
3. EC member State safeguard measures prohibiting the import/marketing of specific biotech products within the territories of these member States,

Inconsistent with the obligation of EC under, Articles 2, 5, 7, 8 and 10, and Annexes B and C of the SPS Agreement, Article 4 of the Agriculture Agreement, Articles I, III, X and XI of the GATT 1994; and Articles 2, 5 and 12 of the TBT Agreement?

Holding and Obiter Dicta

In September 2006, the final Report on the EC Biotech case was issued by the Dispute Settlement Panel of the WTO. When the final report is compared with the interim report, submitted to the parties in February 2006, the panel made one important change from its previous ruling, saying that the said de facto moratorium towards genetically modified organisms (GMO) had not yet stopped to exist, it wanted the EU and its members to put its measure into conformity with the provisions of the SPS Agreement. Yet, in both the decisions, the Panel stressed that the report don't examine the safety of the biotech products and that it had not looked into the legitimacy of current EC legislation. The EC moratorium is a de facto measure which means a measure which wasn't adopted through a formal EC decision making process, since it is the by-product of the application of number of separate decisions by the group of five Member States and the Commission. It was found that the European moratorium was not in violation of substantive norms of the SPS Agreement i.e. art. 2.2, 2.3, 5.1, 5.2, 5.5, and 5.6 of the SPS agreement, rather it was considered illegal under the procedural standard of Art 8 and Annex C(1)(a), which requires it to complete the operational and approval procedures without any unduly delay. So, the Panel questioned the varied behaviour of the European institutions and of the Member States and it found that there was a violation of WTO law, through inaction and omissions. The judges of the EC-Biotech themselves found two more measures that were contested to be inconsistent with the WTO law, those are,

1. According to the Panel, a "products specific moratoria" against 24 GM products, entailed by all the single applications for the particular specific products, which, have been intentionally failed or unduly delayed (which is in violation of Art 8 and Annex C(1)(a)

of the SPS Agreement) so that they can avoid the products from entering into the European market;

2. Six EC members issued nine "national import bans" on GM products, which, in accordance with article 23 of the EC Directive 18/2001, the access to their market of certain specific GM products has been explicitly denied and thus restricted trade and violated Art 5.1 of the SPS Agreement.

This decision that was issued by the Panel has two main features that are in a rational relationship,

1) The discretional policies of national and regional administrative authorities in the regulation of risk concerning GMOs can be easily influenced by this.
2) the three measures that were contested were found not to be justified in accordance with the scientific requirements of the Agreement on the Application of Sanitary and Phytosanitary Measures and by the exclusion of the precautionary principle's application.

[201]GMO regulations usually denote various areas of society, which are, health, agriculture, environment, food safety, consumer protection, and trade. These sectors yet have a cross-border feature, hence they can be no longer be exclusively regulated. added to this, when regulations regarding trade harmonization is needed, for the purpose of developing interdependencies of the economies and in accordance with the agreements establishing the WTO, which intends to avoid any form of camouflaged protectionism, which has the ability to restrict global commercial transactions. While on the contrary the domestic public regulators deal with health or environmental issues that are trade-related, they have to act in regardance with global trade law. The multilateral system that was created along with the Marrakech Agreements are more inclined towards domestic policies. The heart place of trade and the openness of the markets are the ones that have had the effect to plant strong linkages between several sectors of society and trade in a way that the society's sectors are usually influenced by the trade sectors. As said in the Biotech decision, in spite of the lack of a substantive international standard when it comes to GMOs, public administrations have to run in accordance with global procedural rules, that is, they must adhere to global procedural constraints, which limit the exclusively national scope of administrative legislation and enhance the degree to which national administrations are subject to the rule of law, both

[201] 2006. *The Precautionary Principle in GMO Regulations: a vertical and horizontal comparison*. [ebook] Available at: <http://file:///C:/Users/HP/Downloads/The_International_Regulation_of_Genetica%20(1).pdf> [Accessed 13 July 2021].

national and global. The European mechanism of authorization was found to be unlawful under WTO law, despite being foreseen in EU general law and enacted in respect of the provisions of the Treaty establishing the European Community. It must have to be brought into compliance with the applicable international regulation. The said top-down rule of law doesn't look for only the external activities for which the States bound themselves with an international treaty, but also it directly affects the internal activities too, they are, global regulatory regimes, as the WTO and its court-like body (the DSB), constrain national authorities, determining or influencing, incidentally, national policies which had been established by representatives of the sovereign or some responsible national administrative bodies like parliaments, ministries or regulating authorities, which reduces the citizen's sovereignty and their accountability powers. The problem can be clearly seen in the case of the application of the SPS Agreement with regarding to national protection of health. It said that even though health and safety measures are not basically a trade issue, they have come to be regulated at the WTO since they can be used as a barrier to trade. The EU and many national States have adopted a precautionary, discretional and accountable approach to GM regulation. But, others like Argentina, Canada and USA, have, inclined towards a more permissive approach, looking at the advantages of bio-technology, rather on its risks. Since GM products are also considered as goods that can be traded, there was difficulty in agreeing to a common and harmonized framework of laws concerning their commerce. And this is the main reason which gave birth to the issue of the case. And another main feature of the Biotech decision is to be seen in the analysis of the three measures that has been contested, all three of the measures were found to be inconsistent with the requirements based on science of the SPS Agreement and for all of them the application of the precautionary principle has been excluded by the panel either through the Art 5.7 of the SPS Agreement, or through the application of the Cartagena Biosafety Protocol, with regarding to Art 31 (3)(c) of the Vienna Convention on the Law of the Treaties. The role of science and the absence of the precautionary principle are closely tied to the significant effect that WTO laws have over national or regional governments, and the problems of democratic deficit that this entails. The SPS Agreement's basic weakness has been its stringent scientific requirements for justifying health-related trade barriers. The latter can only be permitted if they are based on an international norm or, in the absence of an international standard or if the national state wishes to enact a stringent law, on scientific reasoning. As per this method, in the event of a dispute among WTO members, the DSB considers solely the scientific findings provided, rather than the reasonability or internal legitimacy of a country's stance. Till now, science has

appeared to be the most successful tool for ensuring objective oversight by international regulators and justifying national legislation. Science, on the other hand, has the consequence of reducing the discretion of national authorities and the sovereignty of the people. Moreover, it has repeatedly proved in a variety of disciplines that it is unable to provide an objective and unambiguous solution in order to validate a common uniform policy and resolve the conflict between safety and risk. In the absence of solidified law and science, the precautionary principle, interpreted as a general administrative rule influencing the scope of the rule of law, could be used as a legal tool to redistribute regulatory powers from the centre to the periphery in the event of scientific uncertainty, so that trying to bridge the gap between decision-makers and decision recipients, and a rise in diversity and democracy in certain segments of the "global arena".[202]

Case Analysis

The product at issue is the agricultural bio products from Argentina but as we have to include DS291 and DS292 then these said products from Canada and USA. The measures at issue are alleged general EC moratorium on approving biotech products, EC measures that are allegedly affecting the approval of particular biotech products and then the EC member State safeguard measures that prohibit the import or marketing of specific biotech products within the territories of these member States. First of all the major complaint in the case is the time period, the time taken by the panel to come to a conclusion was too long, but it has to be understood that the panel needed this much time to analyse all the provisions because all of the said provisions are very crucial when it comes to international trade and investment law. This case will act as a precedent for all the cases that come after. It has laid a pathway and established its stance in the history of WTO. But there are many flaws in the report given by the panel. the panel avoided to address many issues regarding GMO trade. For instance, the issue of whether biotech products are "like" their conventional equivalents was not addressed. It also didn't investigate whether the European Commission has the authority to need pre-market authorisation for biotech products, or whether the present EC approval procedures, which include a product-by-product evaluation, are compliant with WTO requirements. The link between the CBD and the Biosafety Protocol on the one hand, and WTO standards on the other, is one controversial issue on which the Panel did comment. The Panel concluded that neither of these treaties was applicable to its interpretation of WTO

[202] n.d. DS293: European Communities — Measures Affecting the Approval and Marketing of Biotech Products. Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds293_e.htm> [Accessed 12 July 2021].

rules but did not explain why. The Panel's response to the interrelationship between MEAs and the WTO did not take into account the principles of mutual support and the prevalent tendency for multilateral solutions to environmental issues. The WTO's attitude to MEAs is worrying because it ignores and dismisses the value and relevance of the sole comprehensive international agreement on GMOs, the Biosafety Protocol.

Conclusion

This case that was brought forward by Argentina is considered to be one of the important cases of WTO. On 19th March 2010, Argentina and the European Union announced the DSB of a mutually agreed solution under Article 3.6 of the DSU. The parties agreed to set up a bilateral dialogue on issues regarding the application of biotechnology to agriculture. As time goes on laws also have to put into various tests to prove its credibility. Id found that any law is restricting the room for growth of a field, it should always be reviewed only then any conclusion should be arrived. This case has given many points which should be followed and some that should be put into review again. Finally, this case has played a significant role in history of laws regarding GMO's.

CASE NO. 45

DS447 UNITED STATES - MEASURES AFFECTING THE IMPORTATION OF ANIMALS, MEAT AND OTHER ANIMAL PRODUCTS FROM ARGENTINA

- Sivapuram V.L. Thejaswini[203]

Introduction

There are some kind of protections that are allowed by WTO through various provisions.

- The General Agreement on Tariffs and Trade (GATT) allows governments with respect to trade so as to protect animal, plant, human, life or health under Article XX.

Proviso - That they do not use it as a way of disguised protectionism.

- Additionally, there are specifically two WTO agreements that deals with animal safety, food safety and plant health, animal health and their safety and also with product standards.
- Article XX(b) gives the measures that are necessary to protect animal, plant, human health (or) life", within the purview of SPS and TBT.

Thus the agreements of WTO on SPS and TBT measures are to bring about a balance in the use of standards in International Trade.

- SPS (Sanitary and Phytosanitary)
- TBT (Technical Barriers to Trade)

Sanitary measures are generally to protect the health of animal and human. Whereas the phytosanitary measures are for the protection of health of plant.

Facts of the case

In the first written submission made by Argentina, it was argued that the application of "US Measure against Argentine Beef" is not consistent with Article 3.1 as it is not based on international standards and is also not justified by the SPS agreement[204].

[203] BBALLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.
[204] Argentina's first written submission, paras 185-206 and 415-428.

Again the same argument is also made with respect to the United States' 2001 Regulations. This was also repeated in with respect to the prohibition on imports of meat, animals and other animal products from the Patagonia region[205].

- Article 3.1 of the SPS Agreement; states that

In order to harmonize the phytosanitary and sanitary measures on a wide possible range, members shall base their phytosanitary or sanitary measures on International guidelines, standards or recommendations, where they exist, except as provided in paragraph 3 and particularly in this Agreement.

USA prohibits the importation of animal products and animals from those regions that are not included in the list of FMD Free regions as maintained by APHIS (Animal and Plant Health Inspection Service).

It was alleged by Argentina that the delay was caused by USA with respect to review of requests from Argentina regarding the importation of fresh beef from Northern Argentina & animal products from Pantagonian region.

It was also alleged that USA measures are not based on the guidelines, standards and recommendations of the Terrestrial Code that is developed under OIE (World Organisation for Animal Health).

- SPS Agreement under Article 3.3 provides that:

Members may maintain or introduce phytosanitary or sanitary measures that results in a higher level of protection than that which would be achieved by measures that are based on the international guidelines, recommendations or standards, and there needs to be a scientific justification, or it can also be a consequence of the level of phytosanitary or sanitary protection. Only if a member determines it to be appropriate with respect to the provisions of paragraphs 1 to 8 of Article 5.

[205] Argentina's first written submission, paras 185-206 and 415-428.

Procedural History

- In the Appellate Body Report of *US/Canada – Continued Suspension*, the following statement was made by the Appellate Body about Article 3:
- "One of the major objectives of the *SPS Agreement* is to "extend the harmonized use of phytosanitary and sanitary measures between the Members. This objective is also reflected in Article 3 of the *SPS Agreement,* which also details about the harmonization of SPS measures based on International guidelines and standards and at the same time recognizing the rights of WTO Members to determine their appropriate level of protection[206]".

- *EC – Hormones* is also another case where the Appellate Body confirmed the WTO member's individual right in order to determine their appropriate level of protection.

"It is very clear that harmonization of SPS measures of Members based on international guidelines and standards is given in the Agreement, *to be* realized *in the future as a goal.* As per Article 3.1 the requiring Members may harmonize their SPS measures *if they are in line with international guidelines, standards* and recommendations which is in effect, with *obligatory* force. The *SPS Agreement merely by* itself gives no indication of intent of members[207]".

Further in the same case, it was also stated that,

The primary goal of the harmonization of SPS measures is also to prevent the restrictions on international trade and to prevent the use of these measures for unjustifiable and arbitrary discrimination between Members. It also mandates the members to adopt or enforce measures that are based on scientific principles and that are necessary to protect human health or life. It also does not require them to change their appropriate level of protection[208].

[206] Appellate Body Report, US/Canada - Continued Suspension, para. 692
[207] Appellate Body Report, EC Hormones, para. 165
[208] Appellate Body Report, EC Hormones, para. 177

Issues

1. Whether Article 3 of the SPS Agreement recognises the right of each WTO Member to determine their own appropriate level of protection?
2. Whether The meaning of the term "based on" which is used in Article 3 of the SPS Agreement is different from the term "conforms to" that imposes a higher level of standard?
3. Whether Article 5.4 of the SPS Agreement impose an affirmative obligation?

Holding

The distinction between the terms "based on" and "conform to" is explained here based on the ruling of the Appellate Body in EC-Hormones case.

- The later thing is said to be "based on" the former thing when it is supported or founded by the former thing.
- When there exists a compliance between two things, then they are said to be "conforming to" each other[209].

Dicta

It was observed that as per Article 5.4 of the SPS Agreement, in order to determine the appropriate level of phytosanitary or sanitary protection, members should consider the objective of minimisation of trade effects that are negative[210].

The words used in this Article 5.4 **- "**should and objective" clearly indicates that it is not an affirmative obligation. As the word "shall" is not used but instead the word "should" is used.

Thus, from the wordings it can be seen that there is no obligation[211].

Judgement

After considering the arguments made by both the parties, it was decided that USA has acted with discrimination against Argentina where USA has not allowed the importation of meat

[209] Appellate Body Report, EC Hormones, para. 163
[210] Argentina's first written submission, para. 293
[211] Panel Report, EC-Hormones, para.8.169.

products. Where USA has allowed the importation of meat products from Uruguay, that has similar conditions as that of Argentina.

Further USA also did not follow the measures on the basis of scientific justification or risk assessment. It followed the measures that are not necessary and trade restrictive.

It was also agreed by the Panel that USA has violated the Terrestrial Code recommendations on measures to be applied for imports.

Case Analysis

A report was issued by the WTO dispute settlement panel regarding the "Measures affecting the importation of Animals, Animal products and meat" from Argentina.

The Panel has concluded that USA was in violation of many provisions of SPS agreement by which Argentina can get no benefits. So, the panel in this case recommended that USA has to follow the measures in conformity with the SPS Agreement.

But here as already USA has lifted the ban on beef from Northern Argentina and USA has also recognised Pantagonia as FMD free region.

So in this case, we can conclude that the decision of Panel may not be very significant.

Conclusion

In this case, it was noted by the Panel that in order to determine the status of a region with respect to authorization of imports the approval and control of procedures as per Article 8 has to be followed.

Thus, the Panel said that;

"Lapse of time does not always amount to delay".

Necessary and certain period of time have to be granted for a member to complete the process of inspection, approval and control procedure.

In reference to Article 8, APHIS Policy and OIE Guidelines the panel came to a conclusion that USA has not acted in normal course and due to this an undue delay was caused to Argentina.

This case is very significant and may also influence the similar cases in the future times.

CASE NO. 46

DS568 CHINA-CERTAIN MEASURES CONCERNING IMPORT OF SUGAR

- Vaibhav.V[212]

Introduction

Brazil proposed negotiations with China on a safeguard measure imposed by China on imported sugar, China's sugar tariff-rate quota administration, and China's out-of-quota sugar import licensing system.

Facts of the Case

Complainant: Brazil

Respondent: China

The Brazil had requested consultations with China on issues relating to safeguard measure imposed by China on imported sugar even on China's sugar tariff-rate quota administration and on China's out-of-quota sugar import licensing process. In October 2018, The European Union, Thailand, and Guatemala had expressed an interest in participating in the discussions.

Procedural History (Precedent of the case)

The China had requested consultations with United States on the comprehensive safeguard measure imposed by the US on some crystalline silicon photovoltaic devices imported into the country. The China claims that there are possible contradictions with the Agreement in connection to the issues stated. Japan, Canada, and the European Communities requested to participate in the discussions in August 2017. Mexico also shows interest in participating in the consultations. Upon that, United States told DSB that it had approved Canada's, the European Communities', Japan's, and Mexico's requests to participate in the deliberations.

China requested the formation of a panel in August 2017, but the DSB postponed the appointment of a panel.

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[212] BBALLB, 2nd Year Student, Alliance School of Law, Alliance University, Bengaluru.

Issues

- Does the China's safeguard measure on imported sugar inconsistent as claimed by Brazil incompatible with the Articles?
- Does China's administration on sugar tariff-rate quota deviate from the China's Protocol of Accession?
- China's import licensing mechanism incompatible as per Import Licensing Procedures?

Other Considerations

The Brazil requested for a formation of a panel. The DSB adjourned the formation of a panel during its meeting on October 29, 2018.A panel was established by the DSB. Third-party rights have been retained by Canada, Egypt, Thailand, Turkey, and Ukraine. Brazil requested that the panel be composed by the Director-General. The panel was put together by the Director-General in January 2019. The panel's Chair informed the DSB that the panel planned to deliver its latest version to the parties by second half of 2020. The Chair further notified the DSB that the report would be made public once it had been circulated to Members in all three official languages, and the date of distribution would be determined by co-operation.

Held

In this instance, The Decision in particular, has yet to arrive. However, it is most likely that the decision will be based on previous decisions, such as in the previous instance, where the China had made allegations against United States. Just like in past cases, the decision would be made in accordance with Brazil's claims, and the same conclusions would be made appropriately. The two countries would next agree on a fair time frame for implementing the DSB's recommendations and rulings.

Finally, China would inform the DSB that it had followed the DSB's recommendations and findings, which were in accordance with the Board's specific decisions.

As a result, this decision can be used in the instance of DS 568 China – Sugar Imports.

Case Analysis

Yes, if the court's ruling is made in accordance with previous decisions, it will be appropriate.

If China would inform the DSB that it will follow the DSB's recommendations and verdicts based on specific Board decisions, the Board's actions will undoubtedly be consistent with existing law.

The Reasoning would be consistent with the Previous reasoning in similar cases like in the case of the China's request for relief from the US's comprehensive safeguard measure on select crystalline silicon photovoltaic equipment imported into the country, the reasoning would be consistent with previous reasoning in similar circumstances. Articles 2.1 and 2.2 of the Agreement on Safeguards, as well as Articles X:3 of the GATT 1994, were cited by China as being incompatible with the measures. According to China's allegations, the decision was made. The panel report was sent to the members in November of 2017. After that, China and the US agreed to abide by the DSB's findings and verdicts, which had to be implemented within a certain deadline.

Yes, the decisions will Significantly influence the Existing Law

The Court would adequately justify its reasoning by stating that - China's Articles 2.1 and 3.1 of the WTO Agreement appear to be incompatible with China's protection mechanism on imported sugar, its management of its tariff-rate limit for fructose, and China's import licensing system for out-of-quota sugar.

The Court's decision would be appropriately justified if it followed the WTO's Guidelines and Obligations, and the Interpretation of Law would be appropriate if it is made based on previous cases conclusions.

Analysis of the case

In this case, Brazil claimed that China's safeguard measure on imported sugar, China's administration of its tariff-rate quota for sugar, and China's import license system for out-of-quota sugar appear to be in violation of Articles 2.1 and 3.1 in this case. GATT 1994 Article 2 appears to be violated by all three categories of disputed measures. Without regard to the Brazil's conclusion that the October 2018 letter from China doesn't really follow international specifications of Article 4 of the DSU, China proposed DSB Chair to convey a communication to Representatives indicating that Brazil was likely to engage in talks with China.

As we can see, it is incompatible with Article 3 of the GATT 1994, as stated by Brazil, and with the WTO Agreement's commitments, implying that China has breached its obligations under this provision. The two countries would next agree on a fair time frame for implementing the DSB's recommendations and rulings.

If the court's ruling is based on previous decisions, it will be appropriate and justified. As a result, the panel's decisions will be based on WTO Rules and Obligations, and they will ensure that this occurs between two countries in a proper manner, as well as the Rules of the Dispute Settlement Board and the Respective Panels. The panel's finding that the amended Agreement is incompatible with GATT 1994 Article 2.1 and Article 3.1 would be upheld by the Appellate Body.

Conclusion

The United States, Indonesia, China, Italy, and Malaysia are the top five sugar importers. In 2020, these top sugar importers will account for 29.3 percent of worldwide sugar sales. While controlling on internationalization and general imports and exports, Purchases of refined sugars have a measurable and meaningful influence on growing average BMI in countries, according to our findings. Due to trade agreements and rising sugar and processed food imports, obesity has become more frequent.

The impact of international trade treaties established under the UR on sugar output, usage, trade, and pricing in the nation’s top sugar production and exportation are measured by sugar-producing and exporting countries. Since the method implemented in this analysis allows us to evaluate the consequences across a wide range of countries, as well as interpersonal effects and what impact would each adjustment have on global sugar industry, usage, and trade only if in case of total international trade liberalization, ASEAN member countries modernized their sugar Laws.

CASE NO. 47

DS562 - THE UNITED STATES — SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS

- Reman.G[213]

Introduction

DS562 United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products[214] is a dispute regarding the imposition of safeguard measures by US against China against the imports of Crystalline Silicon Photovoltaic Cells (CSPC) citing that import prices were lesser compared with the domestic industry causing significant losses to the producers of CSPC in the United States after a report prepared by the United Sates International Trade commission for investigating if there was any discrepancies regarding the price of Crystalized Silicon Cells and modules , laminates , panels and build integrated materials.[215]

The United States imposed Safeguard measures (Anti-Dumping and Countervailing measures) for a period of 4 years with a tax of 30% imposed on the imports for the first year in order to compensate the damages undergone by the CSPC producers and Industries in The United States. A different Quota was applied on imports of CSPC above 2.5 GW where there is a further inclusion of tariffs. The safeguard measures were impulsive to all nations exporting their CSPV modules to The United States except developing countries.

Facts of the Case (DS567)1

China requested for the opportunity for consultation on 14th, August 2018 with the United Sates under the Article 1 of DSU, Article 4 of DSU, Article XXII of GATT, 1994 and Article 14 of Safeguarding regarding the imposition of safeguard measures against CSPC products. European Union and Thailand requested to take part in the consultations. China claimed that the imposition of the measure by The United States was violating:

Articles 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 5.1, 7.1, 7.4, 8.1, 12.1, 12.2 and 12.3 of the Safeguard Agreement.

Articles X:3, XIII, XIX:1(a) and XIX:2 of the GATT,1994.

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[213] BBALLB, Alliance School of Law, Alliance University, Bengaluru.

[214] WTO.org.2020-United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products <//www.wto.org/english/tratop_e/dispu_e/cases_e/ds562> (Accessed on 23 July 2021).

[215] WTO.ORG| Request for consultations by China https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename/WT/DS/562 (Acessed_on-26, July,2021)

The United States accused China of bulk Manufacturing and utilization of subsidies allotted for the Chinese Industries by China and further cause injuries relating to the producers of not only PSPC industries but also other imports and sectors in the country.

The attempt for consultations failed, after which China requested for an establishment of Panel under Articles 4.7 and 6 of the DSU on 14th July 2019.

A panel was established on 15th August 2019 with Brazil, Canada, The EU, India Japan, Korea, Malaysia, Philippines, Russian Federation and Chinese Taipei reserving their third party rights.

The Panel postponed their report indefinitely after the emergence of the Pandemic (COVID-19) and the Report is expected to be published in the year 2021.[216]

Issues

- Was the United States estimation of Injuries in accordance with the Safeguard duties for imposing upon CSPC products from China appropriate according to Agreement on Safeguards as claimed by China?
- Was the Implementation of the Safeguard successful enough to recover the injuries faced by the CSPV industries in The United States?
  - Is China's claim that The United States violated Articles 2.1, 2.2, and 4.2 of the Agreement on Safeguards on selectively applying quotas and tariffs appropriate

Findings

1.Was the United States estimation of Injuries in accordance with the Safeguard duties for imposing upon CSPC products from China appropriate according to Agreement on Safeguards as claimed by China?

To understand whether there was any violation of safeguard measures, it is required to analyse the findings of the commission: China was one of the leading producers of PC across the world according to the year 2018, The production included 74% of Global CSPV cell production and 73% of CSPC modules. The Anti-dumping tariffs was imposed upon China which ranged from 27% to 48% which was a result of estimating the dumping margin which was from 26.1% from China and 11.45% to 27.55% from Taiwan, And the result by the Commission on the findings

[216] WTO.org.2020-United States — Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products <//www.wto.org/english/tratop_e/dispu_e/cases_e/ds562>(Accessed on 23 July 2021).

concluded with the motion that there were serious causes of injuries against the producers by the Chinese imports from China towards The United States market. The commission also analysed the visible effects of the Dumping of CSPV by China in accordance with The United States production, price and labour requirement regarding the same Industry.[217]

This imposition can be said that it was in accordance with the Article 4 of Safeguard measures, which mentions Serious Injury (A threat which is based on evidence which mentions the effects of injuries sustained by the producer in the domestic territory). It can be identified that The United States did not violate the safeguard agreement or Ant Dumping imposition has it had intentions and evidence of protecting their domestic Industry from serious threat.

Hence it could be concluded that China's claim and allegations cannot be established regarding Article 4 of the Safeguard measures.

2. Was the Implementation of the Safeguard successful enough to recover the injuries faced by the CSPV industries in The United States?

Most of the major Players in the Perspective Industry tend to argue that the impositions of the necessary Safeguard measures were very much required for them to survive and avoid bankruptcy. Yet as per prediction it was claimed that there the Damages would still exist even though the measures implemented as there was little scope to increase the domestic manufacturing for the Industries in The United States.

Most of the Manufacturers addressed the requirement that the safeguard measure stays for the applicable 4 years and the necessary quota for tariffs increased so to meet the required demands of supply and production of solar installations

The Safeguard measures overall resulted in positive effects for the United States manufacturers and producers of CSPV modules has it gave them the required breathing place to domestically increase the operations and labour to rejuvenate the industry from its previous years. With required suggestions being addressed from the manufacturers towards the Commission concerning the measure, the commission has stated it will do the necessary.[218]

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[217] WTO.ORG|Agreement on safeguards

<https://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm>(Accessed on 25 July 2021)

[218] U.S International Trade commission |Crystalline Silicon Photovoltaic Cells, Whether or not partially or fully assembled Into Other Products: Monitoring Developments in the Domestic Industry: <https://www.usitc.gov/publications/other/pub5021.pdf>(Accessed on 23 July 2021)

Hence it can be assumed that the safeguard measures have worked for some manufacturers of CSPV products, but they face different problems regarding the import and output, meeting demand, requirement of increased quota, supply from another nation affected due to the measures (Canada, Singapore)

3. Is the imposition of Tariffs above Quota from All countries by the United States appropriate?

The United States imposed tariffs on imports on all countries importing CSPV, but the study by the commission on determining that whether there were any dumping claims were estimated upon only China, It would have been appropriate for the United States to impose tariffs only on China and exclude other nations.[219]

The tariffs imposed on other countries can nevertheless be considered appropriate as The United States followed Article 2(2)[220] of safeguard measures which mentions "Safeguard measures shall be applied to a product being imported irrespective of its source"

This move has invited the statements from Canada and Singapore regarding the Dumping duties and tariffs imposed upon them as inappropriate. Canada claimed its production of CSPV products and imports were not even in the top 5 import source of PSPC products for the United States. Also, Singapore argued that their products had much higher quality hence justifiable for fixing a high value in regards of exports. Both the nations contended that their Quantity of exports do not present a threat to the United States producers.

Hence it can be told that the United States should have exempted from imposing tariffs above quota on Imports from Canada and Singapore since they have substantial claims and evidence of their imports not posing a threat.

Case Analysis

The case is one of the most important cases in the United States – China trade war which has been continuing for decades after the cold war. If The United States has not established the allegations made by China, then it can result in a decrease in hegemony and relationship of other

[219] U.S International Trade commission |Crystalline Silicon Photovoltaic Cells, Whether or not partially or fully assembled Into Other Products: Monitoring Developments in the Domestic Industry: <https://www.usitc.gov/publications/other/pub5021.pdf>(Accessed on 23 July 2021)

[220] WTO.ORG | Agreement on safeguards <https://www.wto.org/english/docs_e/legal_e/25-safeg> (Accessed on 25 July 2021)

nations with the United States and resulted in an upper hand for China regarding trade practices and relationships over the United States in the future.

The United States must start increasing its production in the PSPV product markets and in fact start exporting them for better revenue. The domestic industries as to replenish with required raw materials and look into larger markets like India and Japan for constant revenue and required R&D to expand the industry.

The parties have similar probability for winning the dispute as concerned since the United States and China has required evidence regarding imposition and injuries regarding the dispute, but contrastingly the Safeguarding Agreement has Article 91 which mentions developing countries have a special provision that the special measures cannot be applied to the products originating from them and this provision can cause a huge leverage against the United States in this dispute.

Conclusion

The DS562 has the ability for other nations to ensure the required development of Infra and domestic supply of Products relating to cells and modules. Required R&D must be promoted in order to recognize other alternatives in the energy producing and sharing sectors. The United States has the responsibility to ensure that the industries have the ability to satisfy the domestic demand with required policies and regulations.

CASE NO. 48

DS518: INDIA CERTAIN MEASURES ON IMPORTS OF IRON AND STEEL PRODUCTS

-Ramya. S. R[221]

Introduction

The Safeguards Agreement (the "SG Agreement") creates the framework for implementing GATT 1994 Article XIX safeguard measures. Safeguard measures are described as "emergency" procedures taken in response to increased imports of specific products that have caused or threaten to cause substantial injury to the domestic industry of the importing Member. Quantitative import limits or duty rises to higher-than-bound rates are examples of such policies, which in general take the form of suspension of concessions or obligations. The Agreement's major guiding principles on safeguard measures are that they must be temporary and that they may be imposed only when imports are found to cause or threaten serious injury to a competing domestic industry, and that they must be applied on a non-selective (i.e., most-favoured-nation, or "MFN") basis, that they be gradually liberalized while in effect, and that the Member imposing them have to pay the compensation to the Members whose trade is affected. The SG Agreement was developed in part because GATT Contracting Parties were increasingly using so-called "grey area" methods to limit imports of specific items (bilateral voluntary export restraints, orderly marketing agreements, and other similar measures). These measures were not applied in accordance with Article XIX, and hence were not subject to GATT multilateral discipline, and their legality under the GATT was questioned. The Agreement now expressly outlaws such restrictions, with specific provisions for repealing those in place at the time the WTO Agreement was signed. In its own words, the SG Agreement intends to:

(1) clarify and reinforce GATT disciplines, particularly those of Article XIX;

(2) re-establish multilateral control on safeguards and remove measures that escape those control; and

[221] BBA LLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

(3) encourage industries that are negatively affected by rising imports to make structural adjustments, therefore increasing competition in international marketplaces.222

On December 20, 2016, Japan requested consultations with India regarding certain measures or duties imposed by India on iron and steel imports. In March 2017, Japan requested the establishment of a panel to investigate the problem after the failure of bilateral negotiations. The panel's decision from November 2018 affirmed Japan's position on India's steel import safeguard duty.

Case Background

The WTO established the dispute resolution panel after India and Japan failed to address the problem through bilateral consultations. Japan, the world's second-largest steel manufacturer, claimed that India's steel import duties were in violation of WTO trade rules. In September 2015, India imposed a 20 percent provisional safeguard duty on certain categories of steel imports in order to support domestic producers. It was later decreased and extended until March. Since India and Japan signed a comprehensive free trade agreement in 2011, the controversy has grown significantly. It provided Japan with easy access to the Indian steel market. In 2017-18, the two countries' bilateral trade was worth $15.7 billion. Japan initiated dispute resolution proceedings against India, contesting the "definitive" safeguard duties imposed by the revenue department of the Indian finance ministry on imports of hot-rolled steel flat products between September 2015 and March 2018. It argued that the Indian revenue department's definitive safeguard duties of 20% ad valorem minus anti-dumping duty imposed from 14 September 2015 to 13 September 2016, 18% ad valorem from 14 September 2016 to 13 March 2017, 15% from 14 March 2017 to 13 September 2017, and 10% ad valorem from 14 September and 13 March 2018 are inconsistent with number of fundamental provisions of the WTO’s Safeguards Agreement. Japan claimed that India's definitive safeguard measures violated many terms of the World Trade Organization's Safeguards Agreement. Tokyo said that the Indian measures also breached the most-favored-nation agreement and quantitative-restriction rules. Countries, such as the US, Australia, China, the EU, Indonesia, Kazakhstan, South Korea, and Russia were included as third parties in the dispute.

[222] n.d. Agreements on Safeguard [Blog] Available at:
<https://www.wto.org/english/tratop_e/safeg_e/safeint.htm> [Accessed 24 July 2021].

Issues Concerned

Are the safeguard measures or duties imposed by India inconsistent with the following provisions, SA, Arts. 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 11.1(a), 12.1, 12.2, 12.3, 12.4 GATT Arts. I:1, II:1(b), XIX:1(a)?

Holding

According to the panel, India's safeguard duties violate numerous core rules of global trade because they failed to "show that unforeseen events and the effect of GATT (General Agreement on Tariffs and Trade) commitments resulted in an increase in imports" of steel products. According to the panel, India also violated several other conditions of the Safeguards Agreement. The panel, however, rejected some of Japan's claims.[223]

Obiter Dicta Of The Case

The panel report upheld most of Japan's claims, such as,

India's imposition of the safeguard measure violates Article XIX:1 (a) of the GATT 1994 because India failed to prove its determination that an increase in imports of the products in question was caused by "unforeseen developments" and a "effect of the obligations incurred under the GATT 1994."

India's imposition of the safeguard measure is not consistent with Articles 2.1, 4.2 (a) of the SG Agreement and Article XIX:1 (a) the GATT 1994, due to the failure of India to make rational findings in its determination that an increase in imports of the products in question was recognised as "increased imports," a prerequisite for the imposition of the safeguard measure under the SG Agreement, and the country also failed to analyse the "increased imports" based on any objective data.

India's imposition of the safeguard measure violates Article 4.2 (a) of the SG Agreement because India failed to properly examine the injury factors that is profits and profitability of the domestic industry in determining the "serious injury" to the domestic industry, and also failed to determine the injury using any objective data.

India's imposition of the safeguard measure violates Article 4.2 (b) of the SG Agreement as it failed to make reasoned findings in determining the causal link between increased imports and

[223] n.d. India — Certain Measures on Imports of Iron and Steel Products. Available at: < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds518_e.htm> [Accessed 27 July 2021].

serious injury to the domestic industry, and it also failed to show that factors other than increased imports did not cause "serious injury.

India's imposition of the safeguard measure is not consistent with Articles 12.2, 12.3, and 12.4 of the SG Agreement, as India has failed to comply with the SG Agreement's obligations in other procedures involving the same measure.

While the safeguard measure has already expired, the panel recommends India to make it compliant with the Agreements to the extent that it continues to have any effect.

Japan's concerns about the definition of domestic industry in India and the requirement of immediate notification to the Committee on Safeguards were not upheld by the panel. Furthermore, the panel did not rule on whether India's safety measure went beyond what was necessary to prevent or remedy serious injury and facilitate adjustment (Articles 5.1 and 7.1 of the SG Agreement).[224]

Case Analaysis

The measure at issue in the case is Safeguard measure imposed by India following a safeguard investigation. The Product at issue is Hot-rolled flat products of non-alloy and other alloy steel in coils of a width of 600 mm or more. The decision that was taken by the panel was taken after a detailed analysis of SA, Arts. 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c), 5.1, 7.1, 11.1(a), 12.1, 12.2, 12.3, 12.4 GATT Arts. I:1, II:1(b), XIX:1(a). the panel report discusses about unforeseen development, increase in imports, serious injury and threat thereof, causal link and evolution of the measure. These are all some important that had to be discussed in order to arrive to the conclusion. But even after a detailed analysis it can be seen that panel have not dealt properly certain matters, for instance, according to Japan, the Panel appears to have decided that a "conditional" recommendation would be suitable in cases when a measure has expired but still has "lingering effects." However, it has to be noted that a panel is required to make findings on the specific measure at issue as it existed on the date the DSB referred the matter to the panel for review under DSU Article 7.1. If a panel or the Appellate Body determines a measure to be WTO-inconsistent, it "shall recommend" that the Member bring the measure into compliance with the relevant covered agreement, according to DSU Article 19.1. Nothing in Article 7.1 contemplates or authorises a panel to look into a separate, later issue, such as whether a measure

[224] 2021. *INDIA- IRON AND STEEL PRODUCTS*. [pdf] Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds518sum_e.pdf> [Accessed 25 July 2021].

has “lingering effects” after the panel is established. Similarly, nothing in Article 19.1 envisions or allows a panel to offer a recommendation "to the extent" that a measure takes effect after the panel is established. As a result, the Panel's "conditional" recommendation is unsupported by the DSU. There are many issues like the same. There are certain things that has to be changed in the report.

Conclusion

This case of India — Certain Measures on Imports of Iron and Steel products plays a significant role in the world of import and export, and the safeguard measures or duties that are laid for that purposes. This case is very important because the decision taken in this case has an effect on other similar cases too. While looking into the concept of Safeguards Agreement (the "SG Agreement") this case is very remarkable and this cannot be ignored.

CASE NO. 49

DS573 TURKEY - ADDITIONAL DUTIES ON IMPORTS OF AIR CONDITIONING MACHINES FROM THAILAND

-Naman Jain[225]

Introduction

The measure in question is the 9.27% additional duty imposed by Turkey under HS 8415.10 (the "additional duty")226 on imports of air conditioners originating in Thailand. On August 3, 2017, Turkey notified the Council for Trade in Goods and the Committee on Safeguards (the "Committee") of the additional tariff as a proposal to suspend concessions and other obligations under Article 8: 2 of the Agreement on Safeguards. On September 5, 2017, the additional law entered into force for a period of three years. Turkey's notification clarifies that the Additional Law applies to "air conditioning machines (of a type designed to be installed in a window, wall, ceiling or floor, freestanding or" split system ")" (the “air conditioning machines") Turkey applies the additional duty only to imports of air conditioners from Thailand.

Facts

On February 14, 2019, Thailand requested the establishment of a panel. At its meeting on February 25, 2019, the DSB deferred the establishment of the panel.

During the meeting on April 11, 2019, the DSB established a panel. Brazil, Canada, China, European Union, India, Japan, Korea, Russian Federation, Singapore, Ukraine and the United States reserve their rights as third parties.

On June 18, 2019, Thailand requested the Director General to serve on the panel. On June 28, 2019, the CEO composed the panel.

On 7 October 2019, the chair of the panel informed the DSB that the start of the panel's work had been delayed due to the lack of experienced legal officers available in the secretariat. It is clear from the president's statement that the committee did not expect to deliver its final report to the parties before the second half of 2020.

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[225] BBA LLB, Alliance School of Law, Alliance, University, Bengaluru.
[226] WT/DS573/1 G/L/1288 G/SG/D63/1 10 December 2018 (18-7786) Page: 1/3
directdoc.aspx (wto.org)

On 4 December 2018, the Government of the Kingdom of Thailand ("Thailand") requested consultations with the Government of the Republic of Turkey ("Turkey") in accordance with Articles 1 and 4 of the Agreement on Rules and Procedures for Dispute. Agreement ("DSU"), Article XXII: 1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 14 of the Agreement on Safeguards with respect to the additional duty imposed by Turkey on imports of air conditioning machines from thailand

Consultations were held on January 8, 2019, to reach a mutually satisfactory solution. However, these inquiries did not result in a resolution of the dispute. Therefore, pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994 and Article 14 of the Agreement on Safeguards, Thailand requests that the Dispute Settlement Body establish a panel to investigate this matter, using item default reference established in article 7.1.of DSU.

Issue (and questions presented)

- Whether the additional duty imposed by Turkey on imports of air conditioning machines from Thailand is inconsistent with[227]:
  Articles 8.2 and 12.3 of the Agreement on Safeguards; and Articles I:1, II:1(a), II:1(b), XIX:2 and XIX:3 of the GATT 1994.

Holding (the applied rule of law)

On November 10, 2020, shortly before the Panel issued its final report to the parties on November 13, 2020, the Panel received a notice from Thailand requesting that it suspend its operations in Turkey - Additional Duties on Imports of Appliances Air Conditioner of Thailand (DS573) in accordance with Article 12.12 of the Agreement on Dispute Settlement Rules and Procedures (DSU). Turkey responded to Thailand's request in a communication dated November 11, 2020, requesting the panel not to accept Thailand's request. On November 12, 2020, Thailand responded to Turkey's communication of November 11, 2020 and reiterated its request to the panel to suspend its work. Given the date and nature of Thailand's request of 10 November 2020, the Panel notified the parties on 12 November 2020 that it would not publish its final report as previously scheduled, when considering Thailand's request. On November 13, 2020, Turkey reaffirmed its position that the panel does not accept Thailand's request. Article 12.12 of the DSU provides that the Panel may suspend its activities at any time for a period of

[227] DS573: Turkey -Additional duties on imports of air conditioning machines from Thailand
WTO dispute settlement - the disputes - DS573

up to 12 months at the request of the complainant. This provision also indicates that if the Panel's work is suspended for more than 12 months, the authority to establish the Panel will expire. The Panel carefully considered Thailand's request pursuant to Article 12.12 and the comments and questions raised therein. The President's statement indicated that the Panel did not plan to issue its final report to the parties before the second half of 2020[228]. The Panel hereby notifies the Dispute Settlement Body of its decision of November 19, 2020, to accede to Thailand's requests to suspend its proceedings. and issue its final report, unless the Panel is requested to resume its work within the period specified in Article 12.12 of the DSU finished. The panel also requests that this notice be distributed to members. An expert group has been established and convened, but no report has yet been published[229].

Conclusion

Thailand has filed its first protest with the World Trade Organization (WTO) regarding a 9.27% tariff imposed by Turkey on Thai air conditioner imports. The tariffs were implemented in reaction to Thailand's decision to extend for three years safeguard levies on non-alloy hot-rolled flat steel imports. Thailand told the DSB that it had attempted to resolve the disagreement by consulting Turkey in good faith, but the two parties were unable to reach an agreement, causing Thailand to turn to the panel. Thailand claimed that because Turkey was not an affected Member with a significant interest as an exporter of the products subject to the safeguard measure, it would not be affected, It has no authority under the WTO Agreement on Safeguards to suspend trade incentives in response to the safeguard action. Furthermore, while Turkey had the authority to suspend concessions, the level of additional duties imposed by Turkey and the duration of its measures were incompatible with the requirement that only "substantially equivalent" concessions be suspended.

Turkey expressed concern over Thailand's decision to request a panel, claiming that the proposal was premature because both sides had not yet exhausted all options for resolving the dispute in a mutually beneficial manner. Turkey has declared that it is willing to engage in a genuine and productive dialogue with Thailand on how to achieve this, and that it cannot accept the status quo establishment of a panel in these circumstances. The DSB took the statements into consideration and agreed to revisit the case.

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[228] WT/DS573/4 9 October 2019 (19-6530) Page: 1/1
directdoc.aspx (wto.org)

[229] Turkey – Additional Duties on Imports of Air Conditioning Machines from Thailand | United States Trade Representative (ustr.gov)

CASE NO. 50

DS468 UKRAINE - DEFINITIVE SAFEGUARD MEASURES ON CERTAIN PASSENGER CARS

- Sivapuram V.L. Thejaswini [230]

Introduction

Article XIX of the GATT (The General Agreement on Tariffs and Trade) always provides for safeguard measures. Thus a member of WTO may take an action to restrict the imports of a product on a temporary basis in order to protect the domestic industry from injury/serious threat.

In the year 2013, on October 30th there were initiations made by Japan regarding the dispute settlement proceedings of WTO (World Trade Organization). It was mainly about the safeguard measures imposed on the imports of certain passenger cars by Ukraine. The Panel Report with respect to this case got circulated in the year 2015.

Facts of the Case

In the year 2011, a safeguard investigation was initiated by Ukraine on certain passenger cars. Ukraine again in the year 2012, has imposed safeguard measures in the form of safeguard duty for three years with the rates of 12.95%, 6.46% according to the volume of engine.

But the notice was given a year after which such decision was taken i.e., in the year 2013 with respect to imposition of such measures. These measures were liberalized in the year 2014.

Basis of application of safeguard measures -

The imports got increased in Ukraine by 37,1% that is relative to consumption and by 37,9% that is relative to domestic production.

37,9% which is an increase in imports relative to production was considered to be a development that is unforeseen.

Some factors confirmed the negative impact of imports on the domestic industry in 2010 when compared to 2008 -

- Decrease in the volume of production
- Decrease in the utilization of capacity

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[230] BBA LLB, 3rd Year Student, Alliance School of Law, Alliance University, VIth Semester

- Decrease in the volume of sales
- Decrease in the profit from operating activity
- Decrease in the number of employees, labour efficiency and share of the domestic market.

The competent authorities of Ukraine determined that increase of imports by 37% compared to Ukraine's domestic consumption of passenger cars during the investigation period from 2008 to 2010. It constitutes reasonable grounds to impose such safeguard measures though there was a decrease by 71% in the volume of imports to Ukraine[231].

Procedural History

The report of the Panel in this case also relates to an old debate regarding the WTO and its safeguard measures. Before such safeguard investigation, there was a macroeconomic shock to the economy of Ukraine. This safeguard investigation was only three years after the accession of WTO in 2008 by Ukraine. This accession has liberalized the tariffs on imports of passenger cars to 25% from 10%.

After some months of the accession, there was a global economic crisis in the country. Due to this crisis, there was a sharp decrease in the consumers demand and credit availability of passenger cars. The safeguard measures generally rise due to market shocks followed by a new agreement on trade.

Issues

- Whether there is any causal link between increase in imports and position of National Industry deterioration?
- Whether there was any inconsistent act by Ukraine with respect to Article 4.2(a) of Agreement?
- Whether there has to be any demonstration of unforeseen developments for the application of safeguard measure?

Holding

It was indicated by the Panel primarily that mere coincidence between position of National Industry deterioration and increase in imports do not indicate the cause and effect relationship.

[231] WTO/dispute settlement - the disputes - DS468, World Trade Organization, www.wto.org

When there was a decrease in imports the injury factors also got reduced and they got improved when there was an increase in imports. But they are contrary to the causation's findings.

Further, there is no explanation in the notice regarding the causations. There is also no detailed explanation about how the National Industry played a role in the domestic market of Ukraine232.

The Panel has acknowledged in this report again that in order for a safeguard measure to be applied, as per Article XIX:1(a) of the GATT such unforeseen developments are the circumstances, and its existence has to be demonstrated. It was also underlined by the Panel that according to Article XIX:1(a) of the GATT, the increase in imports shall also be a result of an unforeseen development233.

It was also said that mere increase of imports cannot be considered to be an unforeseen development. Even the explanations provided by the Ukraine was not taken by the Panel into account as these were not published before the application of safeguard measures234.

Dicta

It was acknowledged by the Panel that as per Article 4.2(b), other factors should also be identified by the authorities due to which injurious effect was caused to domestic industry and it shall also be shown in the report published.

Some key factors have been identified during the process of investigation by the competent authorities about the injury factors with respect to increase in imports that causes damage to the Ukraine's domestic industry[235];

Financial, economic and global crisis

During the year 2009, there was a surcharge of 13% on imports for a period of 6 months.

A commitment towards reducing import duties to 10% from 25%

As there is no clarity in the given notice, the Panel has taken the findings of the of the investigation process to see about how the non-attribution analysis was being conducted. Thus, it was concluded by the Panel that there was no proper analysis conducted by the competent authorities of Ukraine.

[232] Para 7.304, Ukraine-Passenger Cars
[233] Para 7.83, Ukraine-Passenger Cars
[234] Para 7.55, Ukraine (DS468)
[235] Para 7.327, Ukraine (DS468)

Judgement

The competent authorities of Ukraine has not provided a demonstration of instances in the report published regarding the unforeseen developments and effects of the obligations of GATT which are needed to be satisfied in order to impose a safeguard measure.

A proper determination was also not made by about the threats and serious injuries to the domestic industry by Ukraine as per Article 4.2(a).

There were many inconsistent acts by Ukraine between themselves and the exporting countries. They have also not published a detailed analysis and a demonstration of the examined factors.

Ukraine also failed where they need to conduct a proper analysis and establish a cause & effect relationship.

Thus the claims of Japan got rejected by the Panel with respect to inconsistent acts of the Ukraine in regard of all these pertinent provisions.

Case Analysis

In the year 2013, a request was made by Japan about the consultations they need with Ukraine where the investigation that led to the definitive safeguard measures being imposed on the imports of certain passenger cars. A claim was also made by Japan that such safeguard measures are not consistent as per Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(c), 4.2(b), 7.1, 5.1, 8.1, 7.4, 12.1, 12.2, 12.3, 11.1(a) of the Safeguards Agreement and also Articles XIX:1(a) and II:1(b) of the GATT.

In the year 2013, it was requested by the European Union to join the consultations. The establishment of Panel was requested by Japan in the year 2014.

Thus, we can see that the Panel has set aside the claims made by Japan236.

Conclusion

In the year 2015, the WTO has adopted the report of the Panel. It is through this report where Ukraine decided to implement the recommendations of the DSB and also not to go for appeal on the findings of the Panel. In the year 2015, DSB was informed by Ukraine that decision has been adopted by the competent authorities on the imports of passenger cars to revoke such safeguard measures.

[236] WT/DS468 - Ukraine - Definitive Safeguard Measures on Certain Passenger Cars, European Commission, https://trade.ec.europa.eu/wtodispute/show.cfm?id=589&code=3

Thus, we can see that the Panel in its report has correctly pointed out the mistakes made by Ukraine and also that they have acted inconsistently regarding the circumstances in the published report also. There were some instances that need to be published in the report itself. Thus, the claims of Japan also got rejected. This case can have a high impact in future when there are some similar circumstances that exist with respect to the imports.

CASE NO. 51

DS 564 UNITED STATES — CERTAIN MEASURES ON STEEL AND ALUMINIUM PRODUCTS

- Madhav Goyal[237]

Facts of the Case

United States has been imposing a higher tariff on imported aluminium and steel products which are more than the rates set forth by the US schedule of concessions, defending itself under the Article XXI of the GATT 1994 claiming it to be for National Security.

Post the decision of the Panel in the Russia – Traffic in Transit case, several States and the European Union have requested the establishment of panels to challenge United States' tariffs on imported aluminium and steel products which are in excess of the rates set forth in the US schedule of concessions.

On 15 August 2018, Turkey requested consultations with the United States concerning certain measures imposed by the United States allegedly affecting imports of steel and aluminium into the United States.

Procedural History

Russia – Traffic in Transit: This is an important case to be taken as a precedent of the present case as this is the first case that enunciates the national security exception under Article XXI of GATT 1994. Which is an exception cited by the United States in many cases where the import tariffs imposed on the trade of steel and aluminium. The overall deterioration in relations between Ukraine and Russia gave rise to this case. In this case, Ukraine had claimed a violation of Articles V and X of the GATT and Russia's Accession Protocol. Russia asserted that the measures were among those it considered necessary for the protection of its essential security interests in view of the international relations crisis with Ukraine and justified them under Article XXI(b)(iii) of the GATT. Here, the panel found that Russia's national measures were permitted under GATT Article XXI, thus, The Russian Federation won the dispute.

[237] BBA LLB, 2nd Year Student, Alliance School of Law, Alliance University, Bengaluru.

Issues

- Whether United States is in violation of Articles 2, 3, 4, 5, 7, 8, 9, 11 and 12 of the Agreement on Safeguards;

- Whether United States is inconsistent with Articles I:1, II:1(a), II:1(b), X:3(a), XI:1, XIII:1, XIX:1(a) and XIX:2 of the GATT 1994.
- Whether United States is in violation of Article XVI: 4 of the WTO Agreement.

Case Analysis

The panel in the Russia case came to the conclusion that Article XXI was a justiciable rule and the panel in this case defined and elaborated on the scope of the provision. Particularly speaking, the Panel in this case strictly defined the notions of 'emergency in international relations' and 'necessity'. Along with this, the Panel of this case elaborated and elucidated whether the identification of United States' essential security interests was of exclusive competence of the Country invoking Article XXI, or whether WTO law limited United States' freedom to decide over them.

Now this rule plays a major role in the present case since, the US has imposed heavy taxes on imported aluminium and steel products from other countries, which are in excess of the rates set forth in the US schedule of concessions. For this excess tariff, The United States has always referred to GATT Article XXI to justify these excess tariffs. As the US states that, the domestic steel and aluminium market has been suffering due to the massive excess amounts which has been exported by other countries into the United States, this excess has highly reduced the prices for the domestic product, thus, crippling the ability of the domestic industries to attain profitability, hence, making it virtually impossible for them to remain operational over the long term. The United States defends the stance of "National Security" for these tariffs as from the point of view of the United States; this has consequences for national security, since the United States military forces rely on the funding backed by the United States steel and aluminium industries. Post the decision given by the Panel for the Russia case the United States has been claiming protesting against the decision stating that Article XXI is a not reviewable provision.

Based on the analysis of the Russia case, I believe the Panel in this case too would take a similar decision, since the United States is in their jurisdiction in claiming National Security under

Article XXI of the GATT 1994 for the excess tariff imposed by it. Since, the United States military is majorly funded by the domestic Steel and Aluminium industry, and the important goods are making it impossible for the domestic companies to last in the market, hence resulting in the downfall of the United States' domestic aluminium and steel industry. With which, the major funding of the military forces of the United States would also diminish, causing extreme threat to the National Security of the country. Thus, in all the current cases I believe the United States has a justiciable stand in claiming National Security for the tariffs imposed by it on the import of the steel and aluminium products.

Conclusion

Thus, in the present case by my analysis the panel of the WTO for this case when formed would reject the claims of Turkey, and would find United States as a clear winner, since the stand of National Security is justiciable here. The impact of the imported products is high on the domestic market causing issues with the military forces. Thus, the excess tariff imposed is justifiable in order to keep the domestic industry afloat. Hence, in my opinion the United States are in their boundaries of the Agreement of safeguards in applying the excess tariffs and I agree with them on their claim that article XXI of the GATT 1994 is not one of the articles that can be put on review, since National Security is a very dynamic aspect which may differ from the perspective of every country.

CASE NO. 52

DS490 INDONESIA- SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

- Priydharshini. P[238]

Introduction

The Safeguards Agreement (SG Agreement) establishes the framework for using safeguard measures under Article XIX of the GATT 1994. Safeguard measures are described as emergency procedures taken in response to increased imports of specific products that have caused or threaten to cause substantial injury to the domestic industry of the importing Member. Quantitative import restrictions or duty increases to higher-than-bound rates are examples of such measures, which in general take the form of suspension of concessions or obligations.

The SG Agreement aims to: (1) clarify and reinforce GATT disciplines, particularly those of Article XIX; (2) re-establish multilateral control over safeguards and eliminate measures that escape such control; and (3) encourage structural adjustment on the part of industries adversely affected by increased imports, thereby enhancing competition in inward markets.239

There are 14 articles and one annex in the Agreement. In general, it is divided into four sections:

(1) general provisions (Articles 1 and 2),

(2) rules governing Members' application of new safeguard measures (i.e., those implemented after the WTO Agreement entered into force (Articles 3-9)),

(3) rules governing pre-existing measures (Articles 10 and 11), and

(4) multilateral surveillance and institutions (Articles 12-14).

In this particular case, Chinese Taipei is the complainant and Indonesia is the respondent. On 12th February, the Chinese Taipei requested consultations with Indonesia, and later on 20th August requested for establishment of a panel to resolve the issue.

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[238] BBA LLB, 3rd Year Student, Alliance School of Law, Alliance University, Bengaluru.

[239] Wto.org. n.d. *WTO | Trade topics - The Agreement on Safeguards*. [online] Available at: < https://www.wto.org/english/tratop_e/safeg_e/safeint.htm > [Accessed 30 July 2021].

Facts of the Case

On February 12, 2015, Chinese Taipei sought meetings with Indonesia over a protective measure imposed by Indonesia on imports of certain flat-rolled iron and steel products, as well as the investigation and determinations that led to it.

According to Chinese Taipei, the measures are incompatible with:

GATT 1994 Articles I:1, XIX:1(a) and XIX:2; and The Agreement on Safeguards' articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 12.2 and 12.3.

Chinese Taipei requested the formation of a panel on August 20, 2015. The DSB postponed the formation of a panel during its meeting on August 31, 2015.

The DSB established a panel during its meeting on September 28, 2015.

Third-party rights have been reserved by Australia, Chile, China, the European Union, India, Japan, Korea, the Russian Federation, Ukraine, Viet Nam, and the United States.

The panel was created at the meeting on September 28, 2015, in line with Article 9.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). Members received the panel report on August 18, 2017.[240]

Indonesia notified the DSB of its decision to appeal to the Appellate Body certain legal problems and legal interpretations in the panel report on September 28, 2017. Chinese Taipei notified the DSB of its decision to cross-appeal on October 3, 2017.

Indonesia, Chinese Taipei, and Vietnam all appealed the Panel's decision that Indonesia's special tariff on galvalume imports is not a safeguard measure subject to WTO safeguard rules. The Panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994, according to all three participants. Furthermore, Indonesia contended that the Panel went beyond its mandate and failed to conduct an objective examination of the case at hand.

Members received the Appellate Body report on August 15, 2018. The following disputes are addressed in this Appellate Body Report:

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[240] Docs.wto.org. n.d. [online] Available at: < https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/490-10.pdf&Open=True > [Accessed 29 July 2021].

The Appellate Body dismissed the complainants' assertions that Indonesia had violated Rules 20 and 21 of the Working Procedures for Appellate Review because Indonesia had failed to adequately describe the errors that it claimed the Panel had made in its Notice of Appeal and its appellant's reply.

The Appellate Body report and the panel report, as modified by the Appellate Body report, were approved by the DSB at its meeting on August 27, 2018.

Issues

The issues brought forward in the case by Chinese Taipei that the following provisions by Indonesia:

GATT 1994 Articles I:1, XIX:1(a), and XIX:2; and The Agreement on Safeguards Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.1(c), 4.2(a), 4.2(b), 4.2(c), 12.2 and 12.3.

Holding

Upon the DSB panel report recommendations, both the parties agreed to it and on 15th April 2018, Indonesia told the DSB that it had implemented a regulation that removed the safeguard measure challenged in this dispute and that it believed ensured complete compliance of the DSB recommendations and findings in this case.

Orbiter Dicta of the Case

Panel's obligation to determine applicability of the covered Agreements

On appeal, Indonesia asserted that the Panel went beyond its mandate by deciding "whether the measure at issue constituted a safeguard measure" on its own motion, notwithstanding the parties' "concurring viewpoints" on the issues. "A panel is not only entitled, but indeed required, under Article 11 of the DSU to carry out an independent and objective assessment of the applicability of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute," the Appellate Body reasoned. The Appellate Body also upheld its earlier decision that "a party's description of a measure" and the label assigned to it under domestic law are "not dispositive" of the "proper legal characterization of that measure under the covered agreements."

Indonesian duty "does not constitute a safeguard measure"

The Appellate Body then considered whether the Panel had made an error in deciding that the Indonesian duty was not a safeguard measure under the Agreement. "All parties have repeatedly claimed that the duty at issue is a safeguard mechanism," it stated. The Appellate Body looked into Article 1 of the Safeguards Agreement, which states that "safeguard measures" are "measures provided for in GATT 1994 Article XIX." it says that "The action envisioned by Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession," We don't see how a measure could be classified as a safeguard measure without such a suspension, withdrawal, or modification." "The suspension of a GATT requirement, or the removal or modification of a GATT concession, must be structured to achieve a defined goal, namely preventing or remedying substantial injury to the Member's domestic industry," it added. The Appellate Body found the Panel's reasoning "problematic" because it "conflated the constituent aspects of a safeguard measure with the prerequisites for a safeguard measure's conformity with the Agreement on Safeguards." "The imposition of the specific duty does not suspend any of Indonesia's GATT commitments, nor does it withdraw or amend any of Indonesia's GATT concessions," the Appellate Body said, upholding the Panel's decision. It upheld the Panel's conclusion that Indonesia "has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions" and is thus "free to apply any level of duty it deems appropriate" on the product. Indonesia further noted that, as required by Article 9.1 of the Safeguards Agreement, it has exempted a vast number of developing nations from the measure. The Appellate Body did not believe that this supported the claim that the Indonesian duty was a safety mechanism. It concluded that "that exemption appears to be an auxiliary feature of the proposal" intended at giving poor countries "special and unequal treatment." "The disciplines of Article 9.1 set out prerequisites for the application of safeguard measures in a WTO-consistent manner," it continued. ... do not address the question of whether a measure is a safeguard measure for the purposes of the WTO safeguard disciplines' application". As a result, the Appellate Body concluded that "the measure in question does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards."

"Stand alone" MFN challenge – Indonesia violated GATT Article I:

"The imposition of a specific duty on galvalume imports from all save the exempt developing countries is inconsistent with Indonesia's responsibility to provide MFN treatment under Article I:1 of the GATT 1994, the Panel stated. Indonesia asserted on appeal that the MFN claim was outside the Panel’s limits of reference, which the Appellate Body rejected. The

Appellate Body upheld the violation since Indonesia did not question the Panel's substantive analysis or findings under Article I:1 of the GATT 1994.

Case Analysis

This case is a very important landmark judgement as it helps in shedding light upon the Safeguards Agreement.

The case in specific helped in protecting the GATT provisions by controlling other countries from violating the Safeguards Agreements.

Indonesia's specific duty on imports were found to be unreasonable by the appellate body and hence they upheld the panel's verdict.

Conclusion

This case will act as one of a major precedent case for future cases relating to safeguard agreements. Indonesia notified the DSB on April 15, 2019, that it had implemented a rule eliminating the safeguard measure challenged in this dispute, which it believed ensured complete implementation of the DSB recommendations and judgements in this dispute.

The panel report highlighted the importance of WTO provisions in ensuring the safeguards of the agreement not being misused or violated by any of the member countries. This case also focused on the GATT provisions and the importance of WTO to act as its protector.

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2. DS 384: UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

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3. DS 597: UNITED STATES - ORIGIN MARKING REQUIREMENT

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4. DS 386: UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

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7. DS 413: CHINA - CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

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8. DS 467: AUSTRALIA – CERTAIN MEASURES CONCERNING TRADEMARKS, GEOGRAPHICAL INDICATIONS, AND OTHER PLAIN PACKAGING REQUIREMENTS APPLICABLE TO TOBACCO PRODUCTS AND PACKAGING

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17. DS 406: UNITED STATES-MEASURES AFFECTING THE PRODUCTION AND SALE OF CLOVE CIGARETTES

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