The Jurisprudence of WTO Dispute Resolution (2004/2005)

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Inhaltsübersicht

I. Introduction

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) of the WTO has celebrated its tenth anniversary this year. Since its entry into force in 1995, the DSU has been applied to more than 300 complaints and resulted in more than 100 panel reports and 70 Appellate Body reports-more dispute settlement cases than the GATT of 1947 dealt with in nearly 50 years. Dispute settlement in the WTO has become an important and *judicialized* process which operates independently from the dynamics of the political process in the ongoing multilateral trade negotiations. The first years of the new dispute settlement system have produced important cases, many of which have attained the status of *causes célèbres* and are known well beyond the governmental and international trade communities. Albeit formally binding only between the parties to a dispute, many panel and Appellate Body reports have further significant implications in that their reasoning clarifies the legal disciplines, resolves systemic uncertainties and brings the full dimension of substantive WTO law to the attention of a wider public. Moreover, the outcome of many disputes may have repercussions on the ongoing negotiations in the

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all «similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the development, financial and trade needs to which the treatment in question is intended to respond» (para. 173). Most relevantly, the Appellate Body required that tariff preferences under the GSP must «respond positively» to «the needs of developing countries». Whether they do so must be assessed, according to the Appellate Body, on the basis of an «objective standard» (para. 163). However, the additional tariff preferences granted under the EC's «Drug Arrangement» were available only to a closed list of countries without a mechanism to add new beneficiaries to it. Other potentially interested developing countries similarly affected by drug problems (and thus «similarly-situated») were thus prevented from becoming beneficiaries. The Appellate Body determined that the EC's Drug Arrangement» was incompatible with the Enabling Clause because it lacked objective criteria that a developing country must meet in order to qualify for the preferential treatment. Accordingly, the EC repealed the special arrangement to combat drug protection and trafficking in July 2005 and adopted a new GSP scheme.[4]

The Appellate Body report in this case has significant practical implications. It acknowledges that WTO Members do not necessarily need to apply the very same GSP tariff preferences to all developing countries but may tailor their schemes to address specific needs of similarly-situated countries. This allows for a certain leeway in shaping the donor countries' development policies and adapting them to the special needs of particular developing countries. Moreover, the Appellate Body allows GSP tariff preferences to be linked to the pursuit of specific policy goals and, hence, granted on a conditional basis. However, such conditional GSP schemes are subject to review in WTO proceedings as to whether they pursue development objectives and «respond positively to the needs of the developing countries». These findings have broad implications for existing GSP schemes. The determination of whether tariff preferences granted under GSP schemes «respond positively» to «needs of developing countries» must, according to the Appellate Body, be assessed on the basis of an «objective standard»; GSP tariff preferences may *not* be based on subjective or unilateral decisions of donor countries. Moreover, «the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country», and «only if a preference-granting country acts in the ‹positive› manner in ‹response› to a widely-recognized development, financial [or] trade need» (para. 164), can such action satisfy the Enabling Clause. In addition, the Appellate Body found

[4] EC Regulation 980/2005, applicable from 1 January 2006 to 31 December 2008.

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be inconsistent with the national treatment obligation of Article III:4 of GATT 1994 because imported grain was accorded treatment less favourable than like domestic grain. This finding was not appealed.

The second category related to the exportation of wheat under the so-called Canadian Wheat Board (CWB) export regime, which has the exclusive authority to sell wheat grown in Western Canada on domestic and export markets. The principal US claim was that under the Canadian export regime the CWB did not act «in accordance with commercial considerations» as required by Article XVII:1(b) of GATT 1994. The Appellate Body disagreed with the US interpretation of this provision as requiring state trading enterprises «to act not only as commercial actors in the marketplace, but also as *virtuous* commercial actors, by tying their own hands» and noted that «state trading enterprises, like private enterprises, are entitled to exploit the advantages they may enjoy to their economic benefit» (para. 149). Accordingly, Article XVII:1(b) does not require state trading enterprises to refrain from using their privileges even if those privileges might disadvantage private enterprises. Moreover, the Appellate Body made it clear that the requirement to act «solely in accordance with commercial considerations» is not a separate *stand-alone requirement* disciplining the behaviour of state trading enterprises; rather, it is subsidiary to, and clarifies, the scope of the general non-discrimination provision in Article XVII:1(a). Finally, the Appellate Body clarified that the requirement to afford «an adequate opportunity to compete for participation in such purchases or sales ... must refer to the opportunity to become the state trading enterprise's counterpart in the transaction, *not* to an opportunity to replace the state trading enterprise as a participant in the transaction.» (para. 157). Thus, in transactions involving a state trading enterprise as a seller, the «enterprise» protected by the second clause of Article XVII:(b) refers only to buyers and not to competitors of the state trading enterprise.

This decision will serve as an important precedent in determining the WTO-consistency of state trading operations. Although state trading enterprises appear in a variety of forms, the most prevalent type is marketing boards, typically for agricultural products. The only entity notified to the WTO by Switzerland is the Federal Alcohol Board.[8] It controls the manufacture, rectification and import of spirits and ethanol, and its actions are justified on public health reasons.

[8] According to Article XVII:4 of GATT 1994, state trading enterprises shall be notified to the WTO. For the notification in 2004, see WTO document G/STR/N/10/CHE; other monopolies and exclusivity arrangements affecting production or trade are listed in the Trade Policy Report on Switzerland and Liechtenstein, Report by the Secretariat of 17 November 2004, WT/TPR/S/141, pp. 77–79 and table III.5.

The Appellate Body has adopted a reading of Article XVII:1 of GATT 1994 that sets a relatively high threshold for successful challenges to actions by state trading enterprises. Such a reading requires that any additional disciplines applicable to state trading enterprises and operations will have to be introduced through negotiations in the ongoing *Doha Round*. In particular, competitive exporters of agricultural products (especially the US) advocate strengthened disciplines for state trading enterprises. The Framework Decision Establishing Modalities in Agriculture of July 2004 sets terms for negotiations to eliminate «trade distorting practices with respect to exporting state trading enterprises including eliminating export subsidies provided to or by them, government financing, and the underwriting of losses. The issue of the future use of monopoly powers will be subject to further negotiation.»[9]

IV. Services

The *US – Gambling* dispute resulted in a landmark decision for the interpretation of the *General Agreement on Trade in Services* («GATS») for a number of reasons.[10] This was the first WTO dispute dealing exclusively with claims under GATS. Certain issues raised in the appeal, in particular regarding the interpretation of GATS Schedules of WTO Members and of the scope of market access commitments under Article XVI, are likely to influence the ongoing negotiations on further liberalization of trade in services. The interpretation of the public morals exception and the «necessity» test for justifying measures which would otherwise be inconsistent with GATS under the exception clause will influence the jurisprudence relating to the exception clause of GATT 1994.

In *US – Gambling*, the Appellate Body upheld a complaint by Antigua & Barbuda (Antigua) that certain US federal laws prohibiting internet gambling are inconsistent with obligations under GATS. The Appellate Body ruled that under its Schedule of GATS commitments, the US must grant market access to the cross-border supply of gambling and betting services. Several Antiguan companies provide «remote» gambling and betting services – that is, offering consumers the opportunity to gamble from a location different from where the supplier of gambling services is located – especially over the internet.

9 Decision adopted by the General Council on 1 August 2004, Annex A: Framework for Establishing Modalities in Agriculture (WT/L/579), para. 18.

10 Panel and Appellate Body Reports in *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, adopted by the DSB on 20 April 2005 (WT/DS285/R and WT/DS285/AB/R).

The US GATS Schedule does not mention betting and gambling services. However, it contains a market access commitment with respect to «other recreational services (except sporting)». The US argued that the exception of «sporting» excludes gambling and betting services from its market access commitments. The panel and the Appellate Body ruled that a WTO Member could not determine unilaterally the scope of the market access commitments bound in its Schedule because such commitments represent a common agreement of all Members. The panel and the Appellate Body considered that-according to multilateral classifications of service transactions (such as the GATS Sectoral Services Classification List, GATS Scheduling Guidelines and the UN Central Product Classification)-the sector of «other recreational services» includes the sub-sector of «gambling services», and that the exception of «sporting» does not exclude gambling and betting services from the coverage of the US market access commitments. The Appellate Body agreed with the panel that the US GATS Schedule includes a commitment to grant full market access in gambling and betting services. These rulings highlight the need for WTO Members to be very careful and precise with regard to binding liberalization commitments as well as exceptions, limitations and conditions in their GATS Schedules – particularly in the current round of negotiations.

Antigua claimed that a total ban on internet gambling amounts to a zero quota constituting a quantitative market access restriction prohibited by Article XVI of GATS. The US contended that Article XVI(a) and (c) prohibit restrictions on market access for foreign services and service suppliers only when they are expressed in the form of numerical limitations. The panel and the Appellate Body found that the US acted inconsistently with its market access obligations under Article XVI by maintaining market access restrictions not permitted under its GATS Schedule. The Appellate Body somewhat narrowed the panel's interpretation of market access restrictions prohibited by Article XVI, but found that a total ban on gambling was a measure of equivalent effect to a numerical limitation and thus inconsistent with Article XVI.

This ruling has been criticized for failing to take into account the context provided by Articles VI and XVII of GATS on «domestic regulation» and «national treatment», and for unduly interfering with the regulatory autonomy of Members. Article VI recognizes the regulatory autonomy of Members, but also requires them to ensure that licensing and qualification requirements and technical standards are «no more burdensome than necessary to ensure the quality» of the service. However, it is important to note that the Appellate Body's finding of a violation of Article XVI is limited to measures of effect equivalent to a quantitative restriction on market access. The finding does not concern measures ensuring the quality of a service within the meaning of Article VI that may have incidental restrictive effects on market access. Therefore, these

rulings do not conclusively interpret the respective scope of application of Articles VI and XVI nor the scope of regulatory autonomy left to Members. Furthermore, given that Article XVII on «national treatment» prohibits discriminatory measures, the prohibition of market access restrictions in Article XVI cannot be interpreted as applying exclusively to the same measures. The fact that Article XVI may prohibit measures restricting market access even if they do not discriminate between foreign and like domestic services and suppliers illustrates the potentially wide reach of GATS market access disciplines. The Appellate Body will have to clarify in future cases how the regulatory autonomy of Members can be reconciled with their obligations to provide market access to foreign services and suppliers.

In the *US – Gambling* case, the panel and the Appellate Body ruled for the first time in GATT/WTO history on a «public morals» exception. Article XIV(a) of GATS authorizes Members to maintain otherwise GATS-inconsistent measures when they are «necessary to protect public morals or to maintain public order». The Appellate Body reversed the panel's finding that the US could not successfully invoke this exception without engaging in prior consultations with Antigua in order to find a mutually agreeable compromise solution. The Appellate Body found-contrary to the Panel-that the challenged US federal statutes banning internet gambling qualify as measures «necessary to protect public morals and to maintain public order» within the meaning of Article XIV(a), *inter alia*, because they had a «sufficient nexus» to the aims of combating organized crime, money laundering, fraud, and underage and pathological gambling. In discussing whether these measures were «necessary» to protect public morals, the Appellate Body clarified that the «necessity test» involved a process of «weighing and balancing» a number of factors including the importance of the objectives pursued for the Member concerned, the degree to which the measure chosen is linked and contributes to accomplishing these objectives and whether alternative measures are reasonably available to the Member concerned that are less trade-restrictive and capable of accomplishing the objectives pursued. Therefore, WTO Members are no longer required to adopt the least trade restrictive measure in order to pursue legitimate objectives within the meaning of Article XIV if the least restrictive measure would not sufficiently contribute to accomplishing that objective or if it is not reasonably available to the Member concerned. The recognition of such measures as «necessary» for the protection of public morals and the maintenance of public order is likely to have repercussions on the interpretation of the «public morals» exception under Article XX(a) of GATT 1994. To date, this exception from the GATT regime has not been invoked successfully, but could potentially be used to justify otherwise inconsistent measures under GATT for a variety of reasons, including the enforcement of core labour standards. Nonetheless, in *US – Gam-*

bling, the Appellate Body upheld the panel's ultimate finding that the relevant US federal statutes were not applied in a non-discriminatory manner because one statute seemed to permit the use of the internet by domestic suppliers of gambling services regarding horse racing. Therefore, these measures were not found to be justified under the introductory clause of Article XIV of GATS, which requires that such measures «are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade in services». However, this outcome represents only a minimal victory for Antigua in that the US does not even need to lift the ban and open market access for cross-border supply of gambling services over the internet in order to implement these rulings. The US only has to close the gap in the prohibition so as to ensure that an, indeed, total ban is applied in a non-discriminatory manner to all foreign and domestic suppliers of betting and gambling services.

V. Geographical Indications

The panel in *EC – Trademarks and Geographic Indications* is the first one to elaborate on the rules on geographical indications in Articles 22 through 24 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* («*TRIPS Agreement*») and their relationship to trademarks.[11] Australia and the US claimed that the EC regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs violated the *TRIPS Agreement* on various grounds.[12] First, Article 12:1 of the EC regulation provided that the availability of protection within the EC for geographical indications located in third countries was contingent on the third country giving «guarantees identical or equivalent» to those of the EC regime. Hence, a third country needed to prove the existence of an equivalent and reciprocal system of protection before geographical indications applicable to its own territory be granted registration in the EC. The panel concurred with the complainants' allegation that, by such equivalence and reciprocity requirements, the EC accorded to the nationals of other WTO Members treatment less favourable than to its own nationals. This «extra hurdle» for indications located outside the EC was clearly reflected in the fact that no third country-including Switzerland-has, to

[11] Panel Report in *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuff* (not appealed), adopted by the DSB on 20 April 2005 (WT/DS174/R and WT/DS290/R).

[12] EC Regulation 2081/92 of 14 July 1992 (with amendments).

date, satisfied the equivalence and reciprocity requirements. The panel thus concluded that the EC regulation violated Article 3.1 of the *TRIPS Agreement* and Article III:4 of GATT 1994.

Moreover, the regulation's procedures required foreign governments to process applications and objections in the same manner as did EC member States. However, whereas the respective EC member States' governments had an *obligation* to examine and transmit documents under the procedures, a third country government was obviously not obliged to do so. The panel found that this again amounted to an «extra hurdle» and was, hence, inconsistent with the national treatment obligations in Article 3.1 of the *TRIPS Agreement* and Article III:4 of GATT 1994 because it denied foreign individuals and companies guaranteed access to the EC's system for their geographical indications. The panel also considered the requirement for third countries to set up product inspection systems to be inconsistent with the national treatment obligations, but only insofar as it required third country governments to play a central role in establishing and monitoring the inspection authorities because this effectively denies some foreign individuals and companies the opportunity to satisfy the system and, thereby, qualify their geographical indications for protection. The panel did *not* find that the requirement of product inspections was inconsistent *per se* with WTO obligations because the EC is entitled to its own system and through other means applies the same requirements for domestic and foreign persons and products.

Furthermore, Articles 13 and 14 of the EC regulation conferred a positive right to assert a geographical indication in a manner from which a trademark owner was precluded, under certain circumstances; that is, from exercising its trademark rights against a registered geographical indication. However, Article 16 of the *TRIPS Agreement* explicitly provides for a trademark owner's exclusive right to use the trademark and further protects an owner against third parties using identical or similar signs for goods or services where such use would result in a likelihood of confusion. Therefore, the panel agreed with the complainants that the EC regulation might in certain cases violate the exclusive trademark rights with respect to the «coexistence of geographical indications with prior trademarks» (para. 7.625).

The panel then turned to Article 17 of the *TRIPS Agreement*, which permits exceptions to the exclusive rights of a trademark owner if, according to established case law, the exception is «narrow and permits only a small diminution of rights» (para. 7.650). The panel concluded that the possible coexistence of trademarks and geographical indications could, in fact, be justified as a limited exception to the rights conferred by Article 16 in that it curtailed «the trademark owner's right in respect of certain goods but not all goods», «against certain third parties, but not all third parties», and «in respect of certain signs,

but not all signs» (paras. 7.655-657). Therefore, the EC regulation was found to be justified, in this respect, under that exception of the *TRIPS Agreement*.

The particular significance of this panel report lies in the panel's rejection of the reciprocity and equivalence requirements for the protection of geographical indications for products originating in third countries. Given that different application, objection and inspection procedures were found to be inconsistent with WTO law, nationals from other WTO Members will be allowed to apply for registration of geographical indications directly before an EC authority. In implementing the panel report, it will be for the EC to indicate the competent body. Individual operators from non-EC countries including Switzerland will benefit from such direct access to the EC registration system in that they will be on an equal footing with competitors of products originating in the Community itself.

The Swiss regime for the protection of geographical indications is not based on reciprocity requirements, and application for registration has in principle been open to all products on a non-discriminatory basis ever since its enactment.[13] To date, 19 geographical indications (such as Vacherin-Mont d'Or, Bündnerfleisch, Abricotine du Valais and Gruyère) have been registered. Although each of these indications concern products originating in Switzerland, the application process is, nonetheless, open to products from any country.

Whereas the panel's reasoning regarding national treatment is in line with established WTO case law, the finding on the justified coexistence of geographical indications and prior trademarks is somewhat questionable. The panel was called upon to examine the EC regulation, itself, and not a *specific* geographical indication in relation to a specific prior trademark. In such a case, it is conceivable that the infringement of the exclusive right of a trademark owner through the use of a similar or identical geographical indication does not merely amount to «a small diminution of rights» in which case the burden to proof that the use of a specific geographical indication is only a «limited exception» within the meaning of Article 17 of the *TRIPS Agreement* might be more difficult to discharge. Apparently, the last word on the nature of the coexistence between trademarks and geographical indications under the *TRIPS Agreement* has yet to be formulated. The remaining uncertainty does not benefit Swiss interests because Switzerland is a signatory to many bilateral and plurilateral treaties on the mutual recognition and protection of geographical indications. Moreover, Switzerland intends to negotiate, based on the evolutionary clause in

[13] See Articles 47 through 50 of the Trademark Act (SR 232.11), Articles 14 and 16 of the Agricultural Act (SR 910.1) and Ordinance on the Protection of Designations of Origin and Geographical Indications for Agricultural and Derived Products (SR 910.12).

Article 13:3 of the *Agreement on Trade in Agricultural Products* of 1999, a bilateral agreement with the EC on the protection of geographical indications for products (in particular cheeses) other than the already mutually protected wines and spirits; exploratory talks are currently under way. In the *Doha Round*, Switzerland advocates-together with various allies (in particular the EC), but against significant exporters of agricultural products (such as Australia, Canada and the US)-a stronger and more comprehensive protection of geographical indications under the *TRIPS Agreement*.

VI. Agriculture

The *US – Upland Cotton* dispute is probably the most complex case in WTO history-in view of the great number of legal issues raised, subsidy programs challenged and evidence submitted.[14] Brazil challenged as actionable or prohibited subsidies payments to US producers, users and exporters of upland cotton under a dozen US subsidy programs. Most of Brazil's claims were limited to subsidies paid on upland cotton; the challenges of US export credit guarantee programs extended also to other eligible agricultural commodities. Brazil alleged that the challenged US measures are inconsistent with the *Agreement on Agriculture*, the *Agreement on Subsidies and Countervailing Measures* (the «*SCM Agreement*») and GATT 1994. The US contended that the subsidies and underlying programs challenged by Brazil were non-actionable *green box subsidies*, or protected from challenge under the «peace clause», or not covered by the export subsidy disciplines of the *Agreement on Agriculture* and the *SCM Agreement*. In sum, the panel and the Appellate Body found that the challenged US measures supporting agricultural products including upland cotton were inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*.

This is the only WTO case interpreting the conditions for the applicability of the recently expired *peace clause* in Article 13 of the *Agreement on Agriculture*. While the peace clause was still in force, certain types of complaints could not be raised in WTO dispute settlement proceedings provided that the defendant had granted support during the implementation period of the Uruguay Round agreements (in this case between 1999 and 2002) to a specific product (such as upland cotton) *not in excess* of «that decided during a 1992 benchmark period». This comparison raised intricate calculation issues with respect to the

[14] Panel and Appellate Body Reports in *United States – Subsidies on Upland Cotton*, adopted by the DSB on 21 March 2005 (WT/DS267/R and WT/DS267/AB/R).

measurement of support and its attribution to a specific commodity. The complexity of the calculation exercise should alert negotiators in the current round of trade talks that the conditions for the applicability of the Uruguay Round peace clause were excessively complicated. If a new peace clause is to be negotiated at all in the current round, it should be significantly simplified to ensure its workability in practice.

The panel and Appellate Body reports in *US – Cotton* give guidance on the interpretation of so-called *decoupled payments*. This is a question of fundamental importance for countries (like Switzerland) that support their farmers with such payments. The Appellate Body defined under what circumstances income support payments may be deemed «*decoupled*» from the type of production after the base period and thus qualify as *green box* support exempt from challenge under subsidy disciplines of the *SCM Agreement* and GATT 1994. The Appellate Body *upheld* the panel's rejection of the US defence that certain of its subsidy programs' measures qualified as green box support. While the challenged programs did not compel farmers to produce particular products (for example upland cotton), they prohibited farmers from growing others (in this case, fruits and vegetables). The Appellate Body found that the prohibition from producing certain crops rendered the payments *not decoupled* because it created an incentive for farmers to produce other permitted crops.

This case is also a landmark decision because it deals for the first time with «significant price suppression» and «serious prejudice», two concepts under Part III of the *SCM Agreement*, entitled «actionable subsidies». The concept of «serious prejudice» covers situations where the imposition of countervailing duties would not remedy the problem in that subsidized products are not imported to the country whose domestic industry producing the like product is injured; rather, it addresses the situation where the subsidizing country (in this case, the US) exports subsidized products to third countries and displaces exports from the injured country (in this case, Brazil) on those markets or the world market at large. In resolving Brazil's claims, it was necessary to address economic questions such as defining the relevant geographic market and determining whether a world market and world price existed for upland cotton. The panel had to decide which factors it considered relevant for measuring «price suppression» and establishing causation of «serious prejudice» to the interests of Brazil, and it had to *carry out* an investigation-which in contingent trade remedy cases is usually done by national authorities of WTO Members and is subsequently merely *reviewed* by WTO panels. The Appellate Body further had to address the questions of how to define and measure significant price suppression, how to establish whether the *effect* of challenged subsidies is significant price suppression, and how to *separate* effects caused by factors other than the challenged subsidies. The Appellate Body *upheld* the panel's conclusion

that the US subsidy payments that were contingent on the *price* of upland cotton had caused significant price suppression in the world market for that product and thus constituted serious prejudice to the interests of Brazil. The difficulties that the panel faced in investigating price suppression and serious prejudice highlight the limits of the institutional capacity and fact-finding powers of WTO dispute settlement panels. The reasoning of the panel and the Appellate Body demonstrate that market definition, price suppression, serious prejudice and causation raise essentially economic questions and require a significant extent of economic analysis of contingent trade remedy law.

Finally, the Appellate Body dealt with the question of whether *export credit guarantees* are covered by, or excluded from, the export subsidy disciplines of the *Agreement on Agriculture*. It is undisputed that export subsidies are in principle prohibited under that agreement, but that Members have the right to maintain particular export subsidies with respect to specific agricultural products if they have bound product-specific maximum levels of budgetary outlays and subsidized quantities in their Schedules. However, Article 10.2 of the *Agreement on Agriculture*, entitled «prevention of circumvention of export subsidy commitments» provides that «Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programs and, after agreement on such disciplines, to provide [them] only in conformity therewith». The *majority* of the Appellate Body Division agreed with the panel that this provision means that export credit guarantees are *already now subject* to the disciplines against circumvention of export subsidy commitments and that the current negotiations on agriculture will lead to additional disciplines applicable to those guarantees. One Appellate Body Member expressed a *separate opinion*, concluding that until international disciplines are agreed upon, export credit guarantees remain *exempt* from coverage of the prohibitions against export subsidies.

It is worth noting that the majority opinion does not outlaw export credits, export credit guarantees or insurance programs as such, but concerns only the subsidy component, if any, of such programs. The panel and the Appellate Body developed benchmarks for measuring the subsidy component of export credit guarantees and interpreted the disciplines against circumvention and threat of circumvention of export subsidy disciplines. The Appellate Body's majority opinion that export credit guarantees are now already subject to export subsidy disciplines will give a boost to the current agricultural negotiations on additional disciplines regarding export credits, export credit guarantees and insurance programs. According to current drafts, such programs with repayment periods exceeding 180 days would be prohibited. Additional disciplines are important because negotiators have already agreed, in principle, in the *Doha Round* that export subsidies maintained since the Uruguay Round will be

phased out. Once export subsidies *per se* are eliminated, there would be an additional incentive to circumvent this prohibition through the use of export credits, export credit guarantees and insurance programs unless specific disciplines are adopted against the abuse of these measures for purposes of export subsidization. The US is the greatest user of export credit guarantees, but the EC and some other OECD countries also use them to a more limited extent.

Although there has been one *concurrent* opinion in the *EC – Asbestos* case[15], this is the first time that an Appellate Body Member has actually *dissented*. Under Article 17.11 of the DSU, separate opinions are permitted but remain anonymous. The majority opinion is adopted by the DSB and binding upon the parties to the dispute.

The other major agricultural dispute in 2004/2005 is the *EC – Sugar* dispute, which arises from a complaint by Australia, Brazil and Thailand (the «complaining parties») regarding export subsidies for sugar and sugar-containing products accorded under the EC sugar market regime.[16] For certain quantities of so-called «A and B sugar» (quota sugar), the EC provides «export refunds» (export subsidies) to its sugar exporters. These «refunds» cover the difference between the EC's internal market price and the prevailing world market price for sugar. The EC's internal market price is approximately three times higher than the world market price. European sugar producers and processors export additional quantities of a category of sugar referred to as «C sugar» for which no «export refunds» are provided. This «over-quota sugar» must be exported unless it is carried forward into A and B quotas of the next marketing year.[17]

At the conclusion of the Uruguay Round, WTO Members wishing to maintain export subsidies with respect to particular agricultural products specified in their product Schedules the maximum budgetary outlays, as well as the maximum quantities, for those agricultural products that may benefit from export subsidies. In any given year, WTO Members may not exceed those maximum levels when providing export subsidies to the relevant agricultural products. The complaining parties claimed that the EC sugar regime was incon-

[15] Appellate Body Report in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, adopted by the DSB on 5 April 2001 (WT/DS135/AB/R).

[16] Panel and Appellate Body Reports in *European Communities – Export Subsidies on Sugar*, adopted by the DSB on 19 May 2005 (WT/DS265/R and WT/DS265/AB/R).

[17] It should be noted that C sugar is not physically distinct from A and B sugar under the EC sugar regime; rather, C sugar is sugar produced in excess of quotas determined by EC and Member States' authorities.

sistent with the EC's export subsidy reduction commitments under the *Agreement on Agriculture* and with the disciplines against export subsidies under the *SCM Agreement.* The EC responded that its subsidies on exports of A and B sugar did not exceed its export subsidy commitments, that it did not provide subsidies to exports of C sugar, and that a farmer's or processor's financing of the cost of production of its C beets or sugar production with payments received for its A and B beet or sugar production was not subject to export subsidy disciplines under WTO law.

The panel and the Appellate Body shared the complaining parties' view that they were not «estopped» from initiating the dispute because the EC sugar regime had been applied for a significant period of time without having been challenged. The key issue in this case was whether the EC has exceeded its maximum permitted subsidy levels for exports of sugar. The panel and the Appellate Body had to determine: (1) the maximum permitted levels; and (2) whether the production and export of C sugar amount to export subsidization prohibited under the *Agreement on Agriculture.*

The Appellate Body agreed with the panel that the EC acted inconsistently with its obligations under the *Agreement on Agriculture* by granting export subsidies in excess of its maximum permitted levels of budgetary outlays and subsidized quantities. The panel had found that the EC exports of C sugar, which do not benefit from «export refunds», nevertheless involve export subsidies which are inconsistent with the *Agreement on Agriculture* in that sugar beet farmers sell C beets to sugar producers below the cost of production of the beets and cover their losses by using profits obtained by selling A and B beets. The Appellate Body agreed that below-cost sales of C beets were «financed by virtue of governmental action» because the beet growers were able to cover part of the cost of production of C beets by using the guaranteed profits generated by sales of A and B beets on the highly regulated domestic market. The Appellate Body also upheld the panel's finding that, in the particular circumstances of this dispute, there is a «payment» in the form of a transfer of financial resources from the high revenues resulting from sales of A and B sugar to the export production of C sugar, and that such payments were «on the export» because under EC law C sugar must be exported. On this basis, the panel and the Appellate Body concluded that the EC had acted inconsistently with the export subsidy disciplines of the *Agreement on Agriculture* by providing export subsidies in excess of the reduction commitment levels specified in its Schedule.

As a result of these findings, the EC will have to fundamentally reform its sugar market regime. The EC may have to prohibit exports of C (over-quota) sugar and, as a consequence, arguably also the production and domestic sale of C sugar in order to avoid the collapse of EC internal sugar prices. The panel's

and Appellate Body's reasoning is also significant for other reasons. They relied again on the controversial «total cost of production» benchmark for measuring subsidies. This benchmark had been developed in the *Canada – Dairy* disputes and was criticized by both economists and WTO Members alike. The panel and the Appellate Body also developed a broad interpretation of the concept of «payments» for purposes of showing the existence of a subsidy under the *Agreement on Agriculture*. Accordingly, a farmer's or processor's cross-subsidization of its own C beet or sugar production with revenues received for its production or processing of A and B beets or sugar may constitute a «payment» that is subject to the subsidy disciplines of the *Agreement on Agriculture* even though that «payment» may occur within the same entity.

The panel did not rule on the complaining parties' claims under the *SCM Agreement* because it had already found against the EC under the *Agreement on Agriculture*. The Appellate Body ruled that the panel had exercised *false* judicial economy in that its findings did not «resolve the dispute» in view of the fact that the remedies under the *SCM Agreement* were different and arguably stricter than those under the *Agreement on Agriculture*.

The *EC – Sugar* dispute is also very important to India and those African, Caribbean and Pacific («ACP») countries that enjoy preferential access to the EC sugar market. The EC and ACP countries argued that a footnote to the EC Schedule authorized the EC to export an amount of subsidized sugar equivalent to EC imports from India and ACP countries in addition to the budgetary outlays and export quantities permitted under the export subsidy reduction commitments in the EC Schedule. The panel and the Appellate Body did not *per se* rule on preferential access to the EC market under the sugar protocol to the *EC-ACP Cotonou Convention* and under other similar preferential arrangements. However, the Appellate Body agreed with the panel that the footnote at issue did not enlarge or otherwise modify the export subsidy reduction commitment levels as specified in the EC Schedule. They reached this conclusion because the footnote did not contain a budgetary outlay reduction commitment regarding EC exports equivalent to sugar imports from ACP countries and India although the *Agreement on Agriculture* required export subsidy reduction commitments to be expressed in terms of *both* subsidized volumes and budgetary outlays. The panel and the Appellate Body concluded that, by providing subsidies to sugar *exports* equivalent to the preferential sugar *imports* from certain ACP countries and India, the EC had exceeded the budgetary outlay and quantity commitment levels specified in its Schedule and, thereby, acted inconsistently with the *Agreement on Agriculture*. These rulings provide an incentive for the EC to continue with ongoing reforms of the preferential sugar market access regime for India and certain ACP countries. This could be done within the framework of the negotiations

between the EC and the ACP countries on substituting the *EC-ACP Cotonou Convention* with so-called Economic Partnership Agreements (EPAs) that comply with the requirements for regional integration agreements set out in Article XXIV of GATT 1994.