SZIER RSDIE

Schweizerische Zeitschrift
für internationales
und europäisches Recht

Revue suisse
de droit international
et européen

22. Jahrgang 1/2012 22e année

Swiss Review
of International
and European Law

Schulthess §

Rivista svizzera
di diritto internazionale
e europeo

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

www.szier.ch / www.rsdie.ch

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

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

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

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

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

Verlag und Abonnementsverwaltung / Edition et administration

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

Abonnementspreis / Prix de l'abonnement
CHF 250.– / EUR 179.–
Einzelnummer / Prix du numéro
CHF 71.– / EUR 50.70

ISSN 1019-0406

Inhaltsübersicht / Table des matières

Aktuell / Actualité

Artikel / Article

Praxis / Chronique

Praxis

The Jurisprudence of WTO Dispute Resolution (2011)

by **Matthias Oesch**[1]

Contents

I. Introduction

This chronicle summarises the jurisprudence of WTO dispute resolution in 2011. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective.[2] Three cases have attracted particular attention. The dispute in *Thailand – Cigarettes from the Philippines* turned on customs and fiscal measures imposed by Thailand affecting the importation of cigarettes, arguably violating the national treatment principle pursuant to Article III of the General Agreement on Tariffs and Trade (GATT 1994). The *US – Tyres from China* case concerned safeguard measures imposed by the United States on imports of certain passenger vehicle and light truck tyres which China considered to be inconsistent with its Protocol of Accession. In the *EC – Large Civil Aircraft* case, the United States claimed that alleged subsidies granted by the EC and certain member states to Airbus violated the Agreement on Subsidies and

[1] Assistant Professor of European and International Economic Law, University of Bern; matthias.oesch@iew.unibe.ch.

[2] Switzerland did not actively participate in any dispute in 2011 either as complainant, as defendant, or as third party. All WTO panel and Appellate Body reports are accessible online at <www.wto.org> (click the link for disputes).

Countervailing Measures (SCM Agreement). These three cases will each be dealt with in turn. Furthermore, various panel and Appellate Body reports on trade remedy matters were issued, primarily turning on anti-dumping measures *(US – Anti-Dumping and Countervailing Duties [China], EC – Fasteners [China], US – Zeroing [Korea], US – Orange Juice [Brazil], US – Shrimp [Viet Nam], and EU – Footwear [China])*.[3] These cases are not discussed here.

In the *US – Large Civil Aircraft* case, a panel upheld the EC's claims that various measures maintained by the United States for the benefit of Boeing constituted prohibited export subsidies and/or specific subsidies, having caused adverse effects to the EC's interests in the form of serious prejudice, in violation of Articles 3 and 5 of the SCM Agreement.[4] In the *China – Raw Materials* case, a panel found that China's export duties on various forms of raw materials were inconsistent with the commitments that China had agreed to in its Protocol of Accession. Moreover, the panel concluded that export quotas imposed by China as well as its export licensing regime were inconsistent with Article XI of the GATT 1994.[5] In the *Philippines – Distilled Spirits* case, a panel determined that an excise tax on distilled spirits, while facially neutral, was nevertheless discriminatory and thus was inconsistent with the national treatment obligation under Article III of the GATT 1994.[6] The panel reports in these three cases were appealed, and the Appellate Body is expected to issue its final verdicts in early 2012.

In the *US – COOL* case, which concerned US statutory provisions and implementing regulations setting out the US mandatory country of origin labelling (COOL) regime for beef and pork, a panel concluded that this regime was not consistent with Article 2 of the Agreement on Technical Barriers to Trade (TBT Agreement).[7] In the *US – Tuna* case, a panel found that the US dolphin-safe labelling provisions are more trade-restrictive than necessary to achieve a legitimate objective, thus violating Article 2 of the TBT Agreement.[8] In the

[3] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/AB/R); *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (WT/DS397/AB/R); *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* (WT/DS402/R); *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil* (WT/DS/382/R); *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam* (WT/DS404/R); *EU – Anti-Dumping Measures on Certain Footwear from China* (WT/DS405/R).

[4] *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint* (WT/DS353/R), currently before the Appellate Body.

[5] *China – Measures Related to the Exportation of Various Raw Materials* (WT/DS394/R, WT/DS395/R, WT/DS398/R), currently before the Appellate Body.

[6] *Philippines – Taxes on Distilled Spirits* (WT/DS396/R), currently before the Appellate Body.

[7] *United States – Certain Country of Origin Labelling (COOL) requirements* (WT/DS384/R).

[8] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/R).

US – Clove Cigarettes case, a panel held that a US ban on the production and sale of clove cigarettes, as well as most other flavoured cigarettes (but excluding menthol-flavoured cigarettes), violated the national treatment obligation pursuant to Article 2 of the TBT Agreement.[9] At the time of writing, it was not yet clear whether the parties are going to appeal these panel reports. Interestingly, in the *US – Clove Cigarettes* case and the *US – Tuna* case, the Dispute Settlement Body (DSB) agreed to extend the deadline for the adoption or appeal of the panel report (which would have expired on 2 November 2011 and 15 November 2011, respectively) until 20 January 2012.[10] The final outcome of these disputes will be discussed in next year's chronicle.

II. Thailand – Cigarettes from the Philippines

A. Introduction and Facts

The principle of national treatment prohibits discrimination between products (goods and services) produced domestically and those imported from other Member countries. Together with the principle of most favoured nation (MFN) treatment, it forms the fundamental principle of non-discrimination in WTO law. It is one of the cornerstones of the system, applicable throughout the WTO agreements. With respect to goods, Article III of the GATT 1994 is the main national treatment provision. Paragraph 1 of Article III of the GATT 1994 establishes a general principle according to which internal regulations and taxes should not be applied 'so as to afford protection to domestic production'. It informs, as a *chapeau*, the following paragraphs of the provision. Paragraph 2 stipulates national treatment in relation to internal taxes and other internal charges, whereas Paragraph 4 sets out the general obligation to accord imported products treatment no less favourable than that accorded to like products of national origin in respect of internal laws and regulations affecting the sale and use of such products.

The *Thailand – Cigarettes from the Philippines* case related to various Thai customs and fiscal measures affecting the importation of cigarettes from the Philippines.[11] The main imported products at issue were Marlboro and L&M cigarettes manufactured in the Philippines by Philipp Morris (PM) Philippines and imported into Thailand. As to domestically produced cigarettes in Thailand,

[9] *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (WT/DS406/R).

[10] Under Article 16:4 of the Dispute Settlement Understanding (DSU), parties must notify their decision to appeal a panel report within 60 days after the date of circulation of the panel report.

[11] *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, adopted on 15 July 2011 (WT/DS371/AB/R). Australia, China, the European Union, India, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States participated as third parties.

the only domestic manufacturer is the Thailand Tobacco Monopoly (TTM), a government entity. The Philippines argued that Thai law discriminated between resellers of imported cigarettes and resellers of domestically produced cigarettes in a manner inconsistent with the national treatment principle under the GATT 1994. More specifically, the Philippines asserted that Thailand violated Article III:2 of the GATT 1994 'because Thailand imposes VAT liability on imported cigarettes in excess of that applied to like domestic cigarettes through an exemption from VAT for resales of domestic cigarettes' (Appellate Body report, para. 83). Furthermore, it argued that Thailand violated Article III:4 of the GATT 1994 by according less favourable treatment to imported cigarettes because Thai law imposed additional administrative requirements on the resellers of imported cigarettes whereas such requirements did not apply in the case of reselling domestically produced cigarettes. In addition to these two main claims concerning national treatment, the Philippines also alleged that Thailand violated the Agreement on Implementation of Article VII of the GATT 1994 (Agreement on Customs Valuation) by rejecting the use of 'transaction values' of the imported cigarettes for customs purposes, and using 'deductive values' instead. Lastly, the Philippines argued that Thailand acted inconsistently with Article X of the GATT 1994 by failing to maintain or institute independent review tribunals or procedures for the prompt review of customs value determinations (guarantee decisions).

B. Findings

The panel largely followed the argumentation set forth by the Philippines. It concluded that Thailand acted inconsistently with Articles III and X of the GATT 1994 and Articles 1, 7 and 16 of the Agreement on Customs Valuation. Upon appeal, the Appellate Body confirmed the key findings of the panel with respect to Articles III and X of the GATT 1994 (whereas neither party appealed the panel's finding that Thailand had violated the Agreement on Customs Valuation).

With respect to the claims concerning the principle of national treatment, the Appellate Body first turned to the issue of whether Thailand had violated Article III:2, first sentence, of the GATT 1994 by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes. The Appellate Body noted that there is in fact 'an exemption from VAT for all sales of domestic cigarettes by resellers in the distribution chain for domestic cigarettes' (para. 88), whereas resellers of imported cigarettes do not automatically profit from such an exemption. Recalling its prior case law, the Appellate Body pointed out that, when a measure 'subjects imported products to taxes or charges in excess of those applied to like domestic products, it will be inconsistent with

the first sentence of Article III:2' (para. 112). It reiterated that 'even the smallest amount of "excess" is too much' (para. 112).[12] Turning to the facts of the present case, the Appellate Body rejected the prime argument set forth by Thailand according to which its VAT liability system did not necessarily discriminate against imported cigarettes as the challenged measures 'are not fiscal measures', but 'entail only administrative requirements that fall within the scope of Article III:4, rather than Article III:2' (para. 105). The Appellate Body found that the Thai VAT measure was not merely an administrative requirement, as it 'affects the respective tax liability imposed on imported and like domestic cigarettes' (para. 114). Similarly, the Appellate Body rejected Thailand's argument that resellers could take actions to avoid being subjected to VAT liability. It noted that 'Thailand's measure subjects resellers of imported cigarettes to VAT when they do not satisfy prescribed conditions for obtaining input tax credits necessary to achieve zero VAT liability' (para. 114), whereas 'a complete exemption from VAT ensures that there can never be any VAT liability for resellers in respect of their sales of domestic cigarettes' (para. 114). Thus, 'it is not the mere imposition of administrative requirements that creates a differential tax burden, but rather that only resellers of imported cigarettes will incur VAT liability as a consequence of failing to offset output tax' (para. 116). The Appellate Body added that '[r]esellers of imported cigarettes are subject to VAT liability in defined circumstances under Thai law, whereas resellers of domestic cigarettes, due to a complete exemption from VAT, are not' (para. 116). Citing earlier case law, the Appellate Body held that the introduction of 'some element of private choice' did not relieve Thailand of its 'responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product' (para. 117). Overall, the Appellate Body concluded that Thailand had acted inconsistently with Article III:2, first sentence, of the GATT 1994 'by subjecting imported cigarettes to VAT liability in excess of that applied to like domestic cigarettes' (para. 119).

The Appellate Body then turned to the claim that Thailand had acted inconsistently with Article III:4 of the GATT 1994. The Philippines argued that Thailand accorded less favourable treatment to imported cigarettes than to like domestic products by imposing more onerous administrative requirements, including reporting requirements, on resellers of imported cigarettes. According to the Appellate Body, Article III:4 of the GATT 1994 'consists of three elements that must be demonstrated in order to establish inconsistency with this provision, namely: (i) that the imported and domestic products are "like products"; (ii) that the measure at issue constitutes a law, regulation, or requirement

[12] The Appellate Body referred, *inter alia*, to *Japan – Taxes on Alcoholic Beverages* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), Appellate Body report, p. 23.

affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue; and (iii) that the treatment accorded to imported products is less favourable than that accorded to like domestic products' (para. 127). The Appellate Body noted that the present appeal only concerned the third element, *i.e.*, the no less favourable treatment standard. It recalled consistent case law according to which there is less favourable treatment if the measure at issue 'modifies the *conditions of competition* in the relevant market to the detriment of imported products' (para. 128).[13] The Appellate Body went on to state that 'the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4' (para. 128). Rather, it is relevant 'whether such regulatory differences distort the conditions of competition to the detriment of imported products' (para. 128). Turning to the facts of the case before it, the Appellate Body considered that 'the sole difference in regulatory treatment consists of requirements applied *only* to imported cigarettes' (para. 133). Furthermore, the Appellate Body noted that '[t]he uncontested fact that resellers of imported cigarettes are subject to certain administrative requirements, whereas resellers of like domestic cigarettes are not, itself provides a significant indication that imported cigarettes are accorded less favourable treatment' (para. 133). According to the Appellate Body, the panel's analysis of the matter, including consideration of the design, structure and expected operation of the measure at issue, was sufficient to support its finding that 'the additional administrative requirements modify the conditions of competition to the detriment of imported cigarettes' (para. 138). Against this background, the Appellate Body concluded that the contested Thai measure was inconsistent with Article III:4 of the GATT 1994.

Thailand presented two further arguments against the findings that it acted inconsistently with Article III:4 of the GATT 1994. First, it alleged that the panel did not comply with Article 11 of the Dispute Settlement Understanding (DSU). This provision requires a panel, *inter alia*, to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case'. Thailand argued that the panel 'failed to ensure due process and to make an objective assessment of the matter' by accepting and relying on a specific exhibit submitted by the Philippines after the second hearing 'without affording Thailand any opportunity to respond to that evidence' (para. 141). This exhibit PHL-289 consisted of an expert opinion from a Thai tax lawyer, supporting the Philippines' view on the matter. At the outset, the Appellate Body stressed the importance of the principle of due process in WTO dispute resolu-

[13] The Appellate Body referred, *inter alia*, to *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/AB/R, WT/DS169/AB/R), Appellate Body report, para. 137.

tion. It noted that '[d]ue process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules' (para. 147). Granting due process is thus 'a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication' (para. 147). According to the Appellate Body, due process requires that each party is afforded the opportunity to comment on the arguments and evidence submitted by the other party. At the same time, the Appellate Body stressed that 'due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner, and the need for proceedings to be brought to a close' (para. 150). Moreover, the Appellate Body acknowledged that the submission of evidence may not always fall neatly into one or the other of the two stages of panel proceedings, namely the full presentation of the arguments and evidence of each party (the 'case in chief', para. 149) and the rebuttal by each party, 'in particular when panels themselves, in the exercise of their fact finding authority, seek to pursue specific lines of inquiry in their questioning of the parties' (para. 149). The Appellate Body also noted that panels enjoy a certain 'margin of discretion' to deal with situations which are not specifically regulated by the Working Procedures (para. 149). Turning to the exhibit in question which was submitted by the Philippines to the panel 'at the last stage of the proceedings' (para. 142), the Appellate Body found that the panel's acceptance did not violate Article 11 of the DSU. Rather, in the Appellate Body's view, the exhibit was part of the Philippines' rebuttal evidence. Moreover, the Appellate Body took into account that Thailand did not object to the exhibit immediately at the time it was submitted, but rather 'seven months later, in its comments on the Panel's Interim Report' (para. 156). The Appellate Body took the view that 'Thailand could have requested an opportunity to respond when the Philippines submitted the exhibit in question, but it did not' (para. 160). Thus, the Appellate Body ruled that the panel did not err in law by accepting and relying on the exhibit, without having afforded Thailand an explicit opportunity to comment on that evidence. Second, Thailand argued that the violation of Article III:4 of the GATT 1994 could be justified by having recourse to Article XX(d) of the GATT 1994. This provision allows, under certain circumstances, a Member to deviate from GATT-obligations if the measure at issue is 'necessary to secure compliance' with GATT-consistent laws or regulations. The Appellate Body rejected, albeit on different grounds than the panel (which chose, according to the Appellate Body, a 'manifestly incorrect approach', para. 169), this argument. The Appellate Body explained that when Article XX(d) of the GATT 1994 is in-

voked to justify a violation of Article III:4 of the GATT 1994, 'what must be shown to be "necessary" is the treatment giving rise to the finding of less favourable treatment' (para. 177). The Appellate Body noted, however, that Thailand 'provided little or no elaboration of the necessary elements of its asserted defence under Article XX(d)' (para. 178). Therefore, the Appellate Body concluded that 'Thailand failed to make out a *prima facie* defence and, therefore, failed to establish that the additional administrative requirements are justified under Article XX(d)' (para. 180).

Lastly, the Appellate Body upheld the panel's finding that Thailand acted inconsistently with Article X:3(b) of the GATT 1994 'by failing to maintain or institute independent tribunals or procedures for the prompt review of guarantee decisions' (para. 223). The Appellate Body reached this conclusion by noting that it was not possible, under Thai customs law, to challenge a guarantee decision unless certain conditions were fulfilled, namely that i) the importer has been provided with a notice of assessment regarding the final customs value of the goods concerned, and ii) that the importer has challenged that notice before a Board of Appeals. The Appellate Body found that 'we do not consider that a guarantee is merely an intermediate step within the administrative procedure leading up to the final assessment of customs duty. Rather, a requirement to provide a guarantee in exchange for release of the goods has an administrative content of its own. (…), the guarantee is a device allowing, on the one hand, the importer to withdraw their goods from customs, and, on the other hand, securing the payment of the ultimate customs duty' (para. 215). Thus, Thailand would have been obliged to allow the prompt review of guarantee decisions independently of the fulfilment of the *supra* mentioned conditions.

The Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB) on 15 July 2011.

C. Commentary

The Appellate Body's findings do not break into new legal territory. They are accurate and based on established case law. From a legal viewpoint, two aspects are noteworthy.

First, the Appellate Body confirmed, once again, that the principle of national treatment is to be interpreted strictly. The Appellate Body does so explicitly with respect to Article III:2, first sentence, of the GATT 1994, according to which imported products shall not be subject, directly or indirectly, to internal taxes or other charges of any kind in excess of those applied, directly or indirectly, to like domestic products. The Appellate Body reiterated that 'the provision applies to a broad range of measures' (para. 112), referring to the *Canada* –

Periodicals case.[14] Ever since the early days of the GATT 1947, it has been consistently held that the scope of the national treatment obligation covers not only direct *(de jure)* but also indirect *(de facto)* discrimination.[15] Furthermore, with respect to the requirement of 'not (…) in excess of', the Appellate Body confirmed, in the present case, earlier jurisprudence that a finding of inconsistency under Article III:2, first sentence, of the GATT 1994 is not conditional on a 'trade effects test', and that 'even the smallest amount of "excess" is too much' (para. 112), referring to the *Japan – Alcoholic Beverages* case.[16] In that case, the Appellate Body had found that 'it is irrelevant that "the trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.'[17] Thus, the Appellate Body's findings in the present case are in line with GATT 1947 panel reports as well as WTO panel and Appellate Body reports according to which the prohibition of discriminatory taxation pursuant to Article III:2, first sentence, of the GATT 1994 is not qualified by a *de minimis* standard.[18] Overall, panels and the Appellate Body are well advised to continue, when interpreting the principle of national treatment pursuant to Article III:2, first sentence, of the GATT 1994, to stick to such a strict benchmark and to meticulously examine contentious taxation allegedly operating to the detriment of imported products.

Second, the Appellate Body touched upon an interesting facet with respect to the principle of due process. This principle has constituted, ever since the introduction of dispute settlement procedures during the old GATT 1947 years, a well-established core fundamental in WTO dispute resolution.[19] As the Philippines submitted an exhibit to the panel only after the second hearing as part of its comments on Thailand's answers to the panel's questions, the issue arose of whether the panel should have given Thailand the possibility to comment on the

[14] *Canada – Certain Measures Concerning Periodicals* (WT/DS31/AB/R), Appellate Body report, p. 19; for an overview on the case law Peter Van den Bossche, The Law and Policy of the World Trade Organization. Text, Cases and Materials, 2nd ed. 2008, at 344–358.

[15] *See e.g.*, *Italian Discrimination against Imported Agricultural Machinery*, panel report, BISD 7S/60 (1961), para. 11; *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* (WT/DS392/R), panel report, paras. 7.354–7.358.

[16] *Japan – Taxes on Alcoholic Beverages* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), Appellate Body report, p. 23.

[17] *Japan – Taxes on Alcoholic Beverages* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), Appellate Body report, p. 16.

[18] See, e.g., *United States – Taxes on Petroleum and Certain Imported Substances*, report of the panel, BISD 34S/136 (1988), para. 5.1.1; *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather* (WT/DS155/R), panel report, para. 11.245.

[19] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), Appellate Body report, para. 182; Van den Bossche (*supra,* n. 14), at 57.

exhibit. The Appellate Body rejected this claim, basing its finding essentially on the following three considerations: i) in the Appellate Body's view, the exhibit was part of the Philippines' rebuttal evidence; ii) the Appellate Body noted that Thailand did not explicitly request an opportunity to respond when the Philippines submitted the exhibit, although it could perfectly well do so. It was not until seven months later, namely in its comments on the panel's Interim Report, that Thailand raised objections; iii) the Appellate Body made it clear that the interest in proceeding 'in a timely manner' (para. 150) is equally relevant in this context. From a practical viewpoint, the Appellate Body's reasoning is sound. At the same time, parties need to be aware, in future cases, that a failure to object to the other party's comments will be taken into account in a due process challenge, however late in the proceedings such comments might have been submitted. Therefore, cautious parties are well advised to submit substantive comments on late evidence in order to avoid implicitly waiving their due process rights.[20]

III. US – Tyres from China

A. Introduction and Facts

When a new Member joins the WTO, the accession is concluded on terms agreed between the prospective Member and the WTO Members. Such 'Protocols of Accession' – also known as 'tickets of admission' – are based on a common template but may vary depending on the specific circumstances of negotiations. They contain substantive provisions themselves or incorporate, by reference, relevant language set out in the Working Party Reports which accompany the process of admission by way of temporary or phase-in provisions after accession. Tariffs and services concessions are negotiated bilaterally with interested Members, with the most favourable terms having to be multilateralised at the end of the process. They are stipulated in the respective schedules and thus constitute a substantive part of the Protocol of Accession. This procedure was, of course, also applied when China became a Member to the WTO on 11 December 2001. Its Protocol of Accession was negotiated to a substantial degree of specificity.[21] *Inter alia*, Paragraph 16 contains a 'Transitional Product-Specific Safeguard Mechanism' which allows other WTO Members to restrict Chinese imports that cause or threaten to cause market disruption to their domestic

[20] Brendan McGivern, WTO Appellate Body Report: Thailand – Cigarettes, at 2.

[21] Protocol on the Accession of the People's Republic of China, Decision of 10 November 2001 (WT/L/432).

producers of like products.[22] Paragraph 16 of the Protocol of Accession reads, in part, as follows:

> *1. In cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products, the WTO Member so affected may request consultations with China with a view to seeking a mutually satisfactory solution, including whether the affected WTO Member should pursue application of a measure under the Agreement on Safeguards. Any such request shall be notified immediately to the Committee on Safeguards. …*
>
> *4. Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products. …*

The requirements which need to be fulfilled in order to adopt safeguard measures vis-à-vis Chinese products under this product-specific mechanism are less onerous than the generally applicable rules pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards. Paragraph 16:9 of the Protocol specifies that the application of the transitional product-specific safeguard mechanism shall be terminated 12 years after the date of China's accession to the WTO, *i.e.*, in December 2013.

The *US – Tyres from China* case turned on the correct interpretation and application of the transitional product-specific safeguard mechanism provided for in China's Protocol of Accession.[23] It concerned a safeguard measure applied by the United States to imports of certain passenger vehicle and light truck tyres from China, subjecting them to additional duties for a three-year period in the amount of 35 per cent *ad valorem* in the first year, 30 per cent *ad valorem* in the second year, and 25 per cent *ad valorem* in the third year. The measure took effect on 26 September 2009. China challenged the measure, claiming that it was not consistent with Paragraph 16 of the Protocol of Accession. More specifically, China argued that the United States did not properly demonstrate that the imports resulted in 'market disruption', as defined in Paragraph 16:4 of the Protocol.

[22] Furthermore, Paragraph 242 of the Report of the Working Party on the Accession of China of 1 October 2001 (WT/ACC/CHN/49) establishes a specific (transitional) safeguards regime applicable to textiles and clothing.

[23] *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, adopted on 5 October 2011 (WT/DS399/AB/R). Chinese Taipei, the European Union, Japan, Turkey, and Viet Nam participated as third parties.

B. Findings

The panel rejected all claims put forward by China. It concluded that the United States provided a reasoned and adequate explanation for its overall determination that the requirements pursuant to Paragraph 16 of China's Protocol of Accession were fulfilled and that it was therefore permitted to adopt the safeguard measure in question. Upon appeal, the Appellate Body confirmed the panel's findings. In particular, it did so with respect to the two requirements of 'increasing rapidly, either absolutely or relatively' and of 'a significant cause', as stipulated in Paragraph 16:4 of the Protocol. Furthermore, the Appellate Body dismissed China's claim that the panel erred in making an objective assessment of the matter before it, pursuant to Article 11 of the DSU, and henceforth applied an incorrect standard of review.

Examining the panel's obligation to make an objective assessment of the matter before it, the Appellate Body explained, referring to consistent case law on the correct standard of review applicable in safeguard cases, that 'it is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the investigating authority' (para. 280).[24] Instead, 'it must test whether the explanations for the conclusions reached by the investigating authority are reasoned and adequate in the light of other plausible alternative explanations' (para. 280). In doing so, 'a panel should examine whether the investigating authority provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings and how those factual findings supported the overall determinations' (para. 280). Although the Appellate Body acknowledged that the panel erred in relying, in part, on dissenting opinions of US International Trade Commission (USITC) commissioners regarding the existence of market disruption, it nonetheless concluded, overall, that the panel had made an objective assessment of the matter before it and applied a correct standard of review.[25]

With respect to the requirement of 'increasing rapidly, either absolutely or relatively' pursuant to Paragraph 16:4 of China's Protocol of Accession, the Appellate Body noted, *inter alia*, that the definition of 'increase' is to 'make or become greater in size, amount, duration or degree' (para. 134), taking recourse

[24] The Appellate Body referred to a variety of cases, see Appellate Body report, fn. 619; for an overview on the issue of standard of review relating to questions of facts Matthias Oesch, Standards of Review in WTO Dispute Resolution, Oxford 2003, at 105ff.

[25] The US International Trade Commission (USITC), comprising six commissioners, is in charge of investigating safeguard matters. In the present case, the ITC determined that the requirements to adopt safeguard measures were fulfilled, by a vote of 4 to 2, and proposed that the US President take actions. Two commissioners dissented with respect to the affirmative determination of market disruption.

to the *Shorter Oxford English Dictionary*.[26] Furthermore, the use of the present continuous tense 'are increasing' 'connotes import increases that are still in progress at the present time' and means that imports 'follow an upward trend, in that they have increased in the past and continue to increase at present' (para. 134). The Appellate Body went on to state that the ordinary meaning of the adverb 'rapidly' 'refers both to the speed with which, and to the short period of time in which, such increase is occurring' (para. 135). The Appellate Body concluded that the ordinary meaning of the term 'increasing rapidly' suggests that imports 'are presently becoming greater in amount or degree, at great speed or swiftly, and within a short period of time' (para. 135). With respect to the requirement that imports increase 'either absolutely or relatively', the Appellate Body held that a rapid increase in absolute terms occurs 'when the volume of imports increases significantly over a short period of time', whereby imports will be increasing rapidly in relative terms 'when the share of imports from China relative to consumption or other relevant benchmarks increases significantly over a short period of time' (para. 136). Turning to the facts of the case before it, the Appellate Body rejected China's claim that the panel erred in finding that the United States was not required to focus its analysis exclusively on import trends during the most recent period, *i.e.*, during the year 2008. The Appellate Body sympathised with the analysis undertaken by the United States which included data over the entire 2004–2008 period. Moreover, the Appellate Body noted that, while it was useful for the US investigating authorities to review rates of increase in imports in assessing whether imports are 'increasing rapidly', a decline in the yearly rate of increase does not 'necessarily preclude a finding that imports are "increasing rapidly"' (para. 158). Thus, a decline in the rates of increase in imports towards the end of the period of investigation was not, in itself, enough to detract from the United States' conclusion that imports from China were increasing rapidly.

With respect to the requirement of 'a significant cause' pursuant to Paragraph 16:4 of China's Protocol of Accession, the Appellate Body noted that rapidly increasing imports must be an 'important' or 'notable' factor in 'bringing about, producing or inducing' material injury to the domestic industry (para. 176), again citing the *Shorter Oxford English Dictionary*.[27] The Appellate Body added, with a view to the object and purpose of Paragraph 16 of the Protocol of

[26] Shorter Oxford English Dictionary, 5th ed. Oxford 2002, Vol. 1, at 1350; according to the ironic statement of Claus-Dieter Ehlermann, a former member and chairman of the Appellate Body, dictionaries, in particular the Shorter Oxford English Dictionary, are in practice attributed the status of 'one of the covered agreements' (reprinted in Thomas Cottier/Matthias Oesch, International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland, Berne/London 2005, at 119).

[27] See *supra,* n. 26.

Accession, that temporary relief is available whenever rapidly increasing imports are making an important rather than a 'particularly strong [and] substantial' contribution to the material injury of the domestic industry (para. 184). The Appellate Body agreed with the panel that Paragraph 16:4 gives investigating authorities 'a certain degree of discretion in selecting the methodology to assess the existence of a causal link' (para. 191), provided that such methodology establishes that rapidly increasing imports are a significant cause of material injury to the domestic industry. Moreover, the Appellate Body found, citing earlier case law on a similar provision in the Agreement on Subsidies and Countervailing Measures (SCM Agreement), that 'an investigating authority can make a determination as to whether subject imports are a significant cause of material injury only if it properly ensures that effects of other known causes are not improperly attributed to subject imports and do not suggest that subject imports are in fact only a "remote" or "minimal" cause, rather than a "significant" cause, of material injury to the domestic industry' (para. 201).[28] Turning to the substantive issues on appeal, the Appellate Body first upheld the panel's finding that the United States did not err in its assessment of the conditions of competition in the US tyres market. It found that the United States properly established that there was significant competition between imports from China and domestically produced tyres, both in the US replacement market and in the original equipment manufacturer (OEM) market. Moreover, the Appellate Body confirmed the panel's finding that the United States' reliance on an overall coincidence between an upward movement in imports of tyres from China and a downward movement in injury factors reasonably supports the United States' finding that rapidly increasing imports from China are a significant cause of material injury to the domestic industry. The Appellate Body added that correlation between increases in imports and decreases in injury factors 'is not an exact science' (para. 238). Lastly, the Appellate Body turned to China's claim that the United States improperly attributed injury caused by other factors to imports of Chinese tyres. The Appellate Body explained that, although Paragraph 16 of the Protocol of Accession does not explicitly contain a non-attribution provision, 'some form of non-attribution analysis is *inherent* in the establishment of a causal link between rapidly increasing imports from China and material injury to the domestic industry' (para. 252). The Appellate Body rejected the argument set forth by China according to which the injury suffered by the US domestic industry was caused, at least in part, by three causal factors other than imports from China, namely, i) the US domestic industry's business strategy of shifting focus to higher-value products for its US production; ii)

[28] The Appellate Body referred to *United States – Subsidies on Upland Cotton* (WT/DS267/AB/R), Appellate Body report, paras. 436–438.

demand declines in the US market, and iii) imports other than tyres from China. After a detailed examination of the evidence, the Appellate Body noted that 'the Panel properly concluded that the effects of rapidly increasing imports from China remained significant in the context of the effects of these other causes' (para. 315).

The Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB) on 5 October 2011.

C. Commentary

This dispute was the first to turn on the correct interpretation and application of the transitional product-specific safeguard mechanism in China's Protocol of Accession from 2001. This fact starkly contrasts with the quantity of disputes before WTO panels and/or the Appellate Body which concerned safeguard measures adopted on the basis of the generally applicable safeguard rules in Article XIX of the GATT 1994 and the Agreement on Safeguards.[29] Against this background, two aspects are noteworthy.

First, the panel and the Appellate Body substantially referred, in interpreting the requirements pursuant to Paragraph 16:4 of the Protocol of Accession, to their case law concerning Article XIX of the GATT 1994, the Agreement on Safeguards and – with respect to determining the injurious effects of factors other than imports of Chinese tyres – even the SCM Agreement. In essence, they decided the present dispute along established lines. Those parts of their findings specifically concerning the interpretation of terms, which are only to be found in the Protocol's safeguard mechanism and do not appear in the general safeguard clauses, are of limited informative value as the Protocol's safeguard mechanism elapses in December 2013. This holds true, *e.g.,* for the interpretation of the requirement that imports be increasing rapidly so as to be a 'significant cause of material injury'. To our knowledge, the Protocol's safeguard mechanism was specifically carved out for the accession of China and is not included in any other Protocol of Accession.

Second, this case represents the first ever before the Dispute Settlement Body (DSB) in which a panel or the Appellate Body approved of the WTO-consistency of a safeguard measure in its entirety. In all other safeguard cases,

[29] See, for an overview of these cases, Van den Bossche (fn. 14), at 672. Arguably the most prominent dispute, in terms of economic interests at stake and parties involved, was the *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* case (WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R). This case also represented the only case ever in the history of the GATT 1947 and the WTO in which Switzerland actively participated as complaining party.

which have been brought before the DSB to date, a panel and/or the Appellate Body identified at least one element in the importing country's determination to be inconsistent with Article XIX of the GATT 1994 and/or the Agreement on Safeguards. As a result, the jurisprudence of the panels and of the Appellate Body has been criticised for being overly exacting in this respect.[30] Therefore, it might be good news, at least psychologically, that the US determination survived the scrutiny of the panel and the Appellate Body in this case, irrespective of the fact that it concerned the transitional product-specific safeguard mechanism applicable only vis-à-vis China rather than the general safeguards regime under Article XIX of the GATT 1994 and the Agreement on Safeguards.

IV. EC – Large Civil Aircraft

A. Introduction and Facts

Subsidies, consisting of specific financial or equivalent benefits to economic operators, are an important instrument in pursuing domestic policy goals and redistribution. At the same time, they exert distorting effects on competition, in particular to the detriment of foreign competitors who generally do not benefit from such measures. International trade regulation has been characterised by a progressive regulation of subsidies, tightening disciplines over time in order to avoid such distortions. Initially, the GATT rules were rudimentary, despite efforts to strengthen the law (cf. Articles III:8(b) and XVI). Often, it was necessary to have recourse to non-violation complaints pursuant to Article XXIII:1(b) of the GATT by which a claim of nullification or impairment of a benefit can also be brought before a panel if *no* actual violation under the GATT has occurred. In the 1970s, the Tokyo Round resulted in the conclusion of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Subsidies Code) which was refined during the Uruguay Round and renamed as the Agreement on Subsidies and Countervailing Measures (SCM Agreement). This agreement sets out detailed rules on i) whether or not a subsidy may be provided by WTO Members, and ii) whether WTO Members can adopt countervailing measures to offset injury caused by subsidised imports. In addition, the Agreement on Agriculture, which was also negotiated during the Uruguay Round, contains specific provisions on the subsidisation of agricultural products. These rules essentially seek to balance the need for redistribution and implementation of legitimate policy goals and to avoid protectionism

[30] See *e.g.,* Alan O. Sykes, The Safeguards Mess: A Critique of WTO Jurisprudence, 2 World Trade Review (2003), at 261–295; WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *U.S. Tyres* (AB), at 16 (accessible online at <www.worldtradelaw.net>, visited December 2011).

and unnecessary distortions of conditions of competition on domestic and foreign markets.

The *EC – Large Civil Aircraft* case related to subsidies granted by the EC (now EU) and certain member states to the aircraft industry.[31] The US complaint alleged 'more than 300 separate instances of subsidization, over a period of almost forty years, by the European Communities and four of its member States, France, Germany, Spain and the United Kingdom, with respect to large civil aircraft (LCA) developed, produced and sold by the company known today as Airbus SAS' (panel report, para. 7.1).[32] The alleged subsidies that were subject of the complaint can be grouped into five categories: i) 'launch aid' or 'member State financing' (LA/MSF) for the development of various Airbus LCA, consisting of the A300, A310, A320, A330/A340, A350, and A380 models (and variants thereof), allegedly providing benefits to the recipient Airbus companies, such as below-market interest rates and a repayment obligation that is required to be met only upon successful sales; ii) loans from the European Investment Bank (EIB) to Airbus companies for LCA design, development, and other purposes; iii) infrastructure and infrastructure-related grants by the member state governments to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies; iv) corporate restructuring measures, involving the assumption and forgiveness by the EC and the member states of debt resulting from launch aid and other financing for LCA development and production as well as equity infusions and other grants; and v) research and technological development (R&TD) funding granted to Airbus companies by the EC and the member state governments at central and regional levels. The United States claimed that each of the challenged measures is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, and that the EC, through the use of these subsidies, caused adverse effects to US interests within the meaning of Articles 5 and 6 of the SCM Agreement. In addition, the United States claimed that certain LA/MSF measures constitute prohibited export subsidies within the meaning of Article 3 of the SCM Agreement. The EC responded that the US allegations were unfounded, arguing that the various

[31] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, adopted on 1 June 2011 (WT/DS316/AB/R). Australia, Brazil, Canada, China, Japan, and Korea participated as third parties.

[32] Large civil aircraft (LCA), as opposed to smaller (regional) aircraft and military aircraft, are generally described as large, *i.e.,* as weighing over 15,000 kilograms, 'tube and wing' aircraft, with turbofan engines carried under low-set wing, designed for subsonic flight, transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers (panel report, para. 2.1). At present, LCA are produced only by Boeing and Airbus, both engaging in the continued development of LCA, which requires significant up-front investments over a period of three to five years before any revenues are obtained from customers (panel report, para. 2.2).

measures were adopted in compliance with the obligations under the SCM Agreement.

B. Findings

The panel largely followed the argumentation set forth by the United States. By way of introduction, the panel decided a number of preliminary issues. With respect to the identity of the subsidy recipient(s), it found that, notwithstanding changes in corporate structure, Airbus SAS was the same producer of Airbus LCA as the Airbus consortium, which consisted of French, German, Spanish, and British aerospace companies before their LCA-related activities were consolidated under the European Aeronautic Defence and Space Company (EADS, which today owns Airbus SAS). Based thereon, the panel concluded that all of the alleged financial contributions provided to entities in the consortium found to constitute subsidies would be considered to subsidise Airbus LCA, and would be taken into account for purposes of the analysis of adverse effects. Moreover, the panel rejected the EC's request for a preliminary ruling that 'all alleged prohibited and actionable subsidies granted by the European Communities prior to 1 January 1995 be excluded from the temporal scope of these proceedings' (para. 7.65), explaining that the provision exhorting the parties not to cause adverse effects pursuant to Article 5 of the SCM Agreement applies to any situation which exists as of the effective date of the SCM Agreement, 'even if that situation arose as a result of the granting of a subsidy prior to that date' (para. 7.64).

Turning to the substantive claims made by the United States, the panel examined each of the challenged measures, as grouped into the *supra* mentioned five categories, to determine whether it constituted 'specific subsidies' within the meaning of Articles 1 and 2 of the SCM Agreement. With respect to *LA/MSF*, the panel found that each of the challenged LA/MSF measures constituted a specific subsidy (with the exception of a commitment for the A350), as 'these measures involved *direct* transfers of funds' (para. 7.377), the cost of the contracts to Airbus was less than the cost that Airbus would have incurred if it sought financing on the same or similar terms from market lenders, and '[e]ach of the challenged LA/MSF contracts involves a unique transfer of funds at below-market interest rates to one particular company, Airbus' (para. 7.497). Moreover, the panel found, however, that the United States failed to demonstrate the existence of a 'LA/MSF Programme' as a distinct measure, separate from the individual grants of LA/MSF. Lastly, the panel concluded that the German, Spanish and British A380 LA/MSF contracts were in fact subsidies contingent upon anticipated export performance; henceforth, they are prohibited export subsidies, violating Article 3.1(a) of the SCM Agreement. The panel ar-

rived at this finding by noting that the meaning of 'contingent', as provided for in Article 3.1(a) of the SCM Agreement, is 'conditional' or 'dependent for its existence upon', and thus, in order to qualify as a prohibited export subsidy, the grant of the subsidy 'must be *conditional* or *dependent upon* actual or anticipated export performance' (para. 7.648). The panel rejected, however, related claims concerning A330-200, A340-500/600 and French A380 contracts. With respect to various *loans provided by the European Investment Bank (EIB),* the panel found that each of the 12 challenged loans is a subsidy, but that none of these subsidies was 'specific', as 'the wide array of economic sectors covered by the EIB's explicit lending objectives means that its operations are expressly intended to benefit recipients well beyond a particular enterprise or industry or group of enterprises or industries' (para. 7.931). With respect to *infrastructure grants,* the panel noted, in interpreting Article 1.1(a)(1)(iii) of the SCM Agreement, that 'the determination whether the provision of the good or service in question is "general infrastructure" or not must be made on a case-by-case basis, taking into account the existence or absence of *de jure* or *de facto* limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities' (para. 7.1039). Based on these considerations, the panel found that a number of infrastructural improvements constituted specific subsidies to Airbus, such as provision of a runway extension at an airport and grants for the construction of manufacturing and assembly facilities in Germany and Spain, whereas others, such as road improvements in France, which were open to the public at large, did not. With respect to *corporate restructuring measures,* the panel found that the acquisition by the German government (through its development bank Kreditanstalt für Wiederaufbau) of a 20 per cent equity interest in Deutsche Airbus was inconsistent with the usual investment practice of private investors in Germany, and thus constituted a specific subsidy. The panel made similar findings in respect of capital investments by the French government to Aérospatiale. It also held that 'the 1998 transfer by the French government of its 45.76 percent interest in Dassault Aviation to Aérospatiale constitutes a specific subsidy to Aérospatiale' (para. 7.1413). With respect to *R&TD funding,* the panel determined that various grants offered by the EC and the member states to Airbus constituted specific subsidies, as 'the research grants at issue could be viewed as emanating from a closed system of subsidization that focused on "aeronautics" or "aeronautics and space"' (para. 7.1563).

Having determined which of the measures challenged by the United States are specific subsidies, the panel turned to examine whether these subsidies caused adverse effects to the US interests within the meaning of Articles 5(a), 5(c) and 6 of the SCM Agreement. At the outset, the panel noted that it was appropriate to conduct the analysis of adverse effects on the basis of one subsi-

dized product, namely all Airbus LCA, and that there is a single US product that is 'like' the subsidized product, namely all Boeing LCA. Examining the evidence before it, the panel found that the EC and the member states have, through the use of the specific subsidies, caused 'serious prejudice' to US interests, over the period of 2001–2006, in the form of i) displacement of US imports of LCA into the EC market (within the meaning of Article 6.3(a) of the SCM Agreement); ii) displacement of US exports of LCA from the markets in Australia, Brazil, China, Chinese Taipei, Korea, Mexico and Singapore as well as the threat of displacement of US exports of LCA from the market in India (within the meaning of Article 6.3(b) of the SCM Agreement); iii) lost sales of US LCA in the same market (within the meaning of Article 6.3(c) of the SCM Agreement). With respect to causation, the panel examined whether these market trends were 'caused by the subsidies we have found were provided to Airbus' (para. 7.1732). The panel noted 'that LA/MSF shifts a significant portion of the risk of launching an aircraft from the manufacturer to the governments supplying the funding, which we recall is on non-commercial terms' (para. 7.1949). Based on its review of the development of successive models of Airbus LCA, the panel concluded 'that Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF' (para. 7.1949). The panel further stated that 'we do not conclude that Airbus necessarily would not exist at all but for the subsidies, but merely that it would, at a minimum, not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market' (para. 7.1993). The panel went on to note that the beneficial 'product effect' of LA/MSF was 'complemented and supplemented by the other specific subsidies' (para. 7.1956). The panel rejected, however, the US claim that the challenged subsidies, in particular launch aid, 'provided Airbus with the financial means to be flexible with its pricing of LCA in competitions against Boeing, thereby enabling it to win sales, capture market share and significantly depress and suppress the prices of LCA between the years 2001 and 2006' (para. 7.1997). Furthermore, the panel also rejected the US argument that, through the use of the subsidies, the EC and the member states caused or threatened to cause injury to the US LCA industry pursuant to Article 5(a) of the SCM Agreement. The panel explained that 'the question to be answered is not whether the subsidy(ies) cause injury, but whether the subsidized imports, that is, the imports of the subsidized product, do so' (para. 7.2077). Examining the evidence before it, the panel found that Boeing 'was operating at levels which, in our view, do not warrant a finding that the United States' domestic industry producing LCA is materially injured' (para. 7.2111).

Upon appeal, the Appellate Body issued a mixed ruling. It reversed some of the panel's findings, whereas it upheld others. At the outset, the Appellate Body clarified some procedural issues. It upheld the panel's finding 'that the United

States was not required to demonstrate, as part of its *prima facie* case under Article 5 of the SCM Agreement, that subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA, Airbus SAS' (para. 777). The Appellate Body arrived at this conclusion by explaining that 'we do not consider that the relationship between the predecessor companies and Airbus SAS is one that can be characterized as a relationship between unrelated companies operating at "arm's length"' (para. 776). Moreover, the Appellate Body upheld the panel's rejection of the EC's request to exclude all subsidies granted prior to 1 January 1995 from the temporal scope of the dispute, albeit slightly modifying the panel's interpretation of Article 5 of the SCM Agreement in this respect. Lastly, and contrary to the panel, the Appellate Body decided that the 'alleged LA/MSF Programme was not within the Panel's terms of reference because it was not identified in the request for the establishment of a panel, as required by Article 6.2 of the DSU' (para. 795). According to the Appellate Body, it was uncontested that the references in the US panel request 'can be read to refer to individual provisions of LA/MSF', but not 'to refer to a *distinct* measure, consisting of an unwritten LA/MSF programme or indeed "concerted and coherent approach …" designed to contribute to the long-term competitiveness of Airbus' (para. 790). Therefore, the Appellate Body had no basis upon which to further examine the panel's finding that no such scheme or programme existed. The panel's findings on this issue were 'moot and of no legal effect' (para. 796).

Then, the Appellate Body examined the substantive issues, turning first to the question whether the challenged measures, as grouped into the *supra* mentioned five categories, constituted 'specific subsidies' within the meaning of Articles 1 and 2 of the SCM Agreement. With respect to *LA/MSF*, the Appellate Body noted that several aspects of the panel's considerations were not consistent with the requirement to make an objective assessment of the matter before it pursuant to Article 11 of the DSU. Nonetheless, it did not consider that its concerns 'warrant disturbing the Panel's finding that the project-specific risk premium proposed by the European Union underestimates the appropriate level of project-specific risk associated with the challenged LA/MSF measures' (para. 922). Therefore, it upheld the panel's finding that the challenged LA/MSF measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. As regards the alleged export subsidies granted under the German, Spanish, and UK A380 contracts, the Appellate Body found that the panel erred in the interpretation of Article 3.1(a) of the SCM Agreement that, in order to find that the granting of a subsidy is in fact tied to anticipated exportation, a subsidy must be granted because of anticipated export performance. Instead, the Appellate Body considered that the *de facto* export contingency standard would be met 'when the subsidy is granted so as to provide an incentive to the

recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy' (para. 1045). Moreover, the Appellate Body noted that 'a subsidy is *de facto* export contingent within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement if the granting of the subsidy is geared to induce the promotion of future export performance by the recipient' (para. 1414(j)). Consequently, the Appellate Body reversed the panel's finding that the United States had demonstrated that the German, Spanish, and UK A380 contracts amounted to prohibited export subsidies. On similar grounds, the Appellate Body reversed the panel's finding that 'the United States had not shown that the granting of the French LA/MSF for the A380 and A330-200, and the French and Spanish LA/MSF for the A340-500/600, were contingent in fact upon anticipated exportation, within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement' (para. 572). Due to the insufficient factual findings by the panel or undisputed facts on the panel record, the Appellate Body was not able to complete the legal analysis. With respect to *infrastructure grants*, the Appellate Body modified various aspects of the panel's findings. It did so, *inter alia*, with respect to the characterisation of infrastructure measures constituting a financial contribution under Article 1.1(a)(1)(iii) of the SCM Agreement. According to the Appellate Body, 'because there is not a sufficient basis on the Panel record for us properly to compare the market value of the special purpose facilities with the amounts paid for those facilities' (para. 990), it was 'unable to complete the analysis in respect of whether the lease of those facilities conferred a benefit on Airbus' (para. 990). With respect to *corporate restructuring measures*, the Appellate Body upheld the panel's finding that the challenged capital investments in Aérospatiale by the French government conferred a benefit on Aérospatiale pursuant to Article 1.1(b) of the SCM Agreement. However, the Appellate Body reversed the panel's finding that the French Government's transfer of shares of Dassault Aviation to Aérospatiale conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the SCM Agreement; again, it found that there were insufficient factual findings by the panel or undisputed facts on the panel record to complete the legal analysis. With respect to *R&TD funding*, the Appellate Body found that the panel did not err 'in applying the principle under Article 2.1(a) to determine that the allocation of R&TD subsidies to the aeronautics sector was specific' (para. 952). Accordingly, it upheld the panel's finding that the R&TD subsidies granted to Airbus under each of the EC Framework Programmes were 'specific' within the meaning of Article 2.1(a) of the SCM Agreement.

Having determined which of the measures challenged by the United States are specific subsidies, the Appellate Body turned to examine whether these subsidies to Airbus caused adverse effects to the US interests within the meaning of

Articles 5(a), 5(c) and 6 of the SCM Agreement. By way of introduction, the Appellate Body found that the panel erred in its interpretation of the term 'market' in Articles 6.3(a) and 6.3(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU, in particular by concluding that it was not required 'to make an independent determination of the "subsidized product", as opposed to relying on the complainant's identification of the product' (para. 1137). Therefore, the Appellate Body held that the panel's conclusion that 'there is a single subsidized product and a single like product cannot stand' (para. 1174). Based on the uncontested evidence on the panel record, the Appellate Body found that there was displacement during the reference period 2001–2006 in the single-aisle and twin-aisle LCA product markets in the EC. Moreover, the Appellate Body found that there was also displacement in the single-aisle LCA product market in Australia as well as in the single-aisle and twin-aisle LCA product markets in China and Korea. It rejected the assertion that there was displacement in Brazil, Mexico, Singapore, and Chinese Taipei, or that there was a threat of displacement in India. Lastly, the Appellate Body upheld the panel's finding that 'Boeing lost the Emirates Airlines sale to Airbus and that the lost sale is "significant"' (para. 1228). With respect to causation, the Appellate Body upheld almost all findings of the panel. In particular, it sympathised with the panel's ultimate finding 'that the displacement and lost sales were the effect of the challenged LA/MSF measures' (para. 1414(p)), to the extent that the panel 'refers to the displacement in the single-aisle LCA product market in Australia and in the single-aisle and twin-aisle LCA product markets in the European Communities, China, and Korea, and lost sales in the Air Asia, Air Berlin, Czech Airlines, easyJet, Emirates Airlines, Qantas, and Singapore Airlines sales campaigns' (para. 1414(p)). Similarly, the Appellate Body upheld the panel's finding that 'either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380' (para. 1356) and that the 'product effect' of the LA/MSF measures was 'complemented and supplemented' (paras. 1391 and 1400) by the equity infusions and infrastructure measures (except those that have been found not to constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement). Lastly, the Appellate Body reversed the panel's finding that the 'product effect' of the LA/MSF was 'complemented and supplemented' by the R&TD subsidies at issue (para. 1408).

In conclusion, the Appellate Body confirmed that certain subsidies provided by the EC and the member state governments to Airbus are incompatible with Article 5(c) of the SCM Agreement. According to the press information released by the Appellate Body secretariat, the principal subsidies covered by the Appellate Body's ruling are the following:

> 'The principal subsidies covered by the ruling include financing arrangements (known as "Launch Aid" or "Member state financing") provided by France, Germany, Spain, and the UK for the development of the A300, A310, A320, A330/A340, A330-200, A340-500/600, and A380 LCA projects. The ruling also covers certain equity infusions provided by the French and German governments to companies that formed part of the Airbus consortium. Additionally, it covers certain infrastructure measures provided to Airbus, namely, the lease of land at the Mühlenberger Loch industrial site in Hamburg, the right to exclusive use of an extended runway at Bremen airport, regional grants by the German authorities in Nordenham, and Spanish government grants and regional grants by Andalucia and Castilla-La Mancha in Sevilla, La Rinconada, Toledo, Puerto Santa Maria, and Puerto Real. The Appellate Body found that the effect of the subsidies was to displace exports of Boeing single-aisle and twin-aisle LCA from the European Union, Chinese, and Korean markets and Boeing single-aisle LCA from the Australian market. Moreover, the Appellate Body confirmed the Panel's determination that the subsidies caused Boeing to lose sales of LCA in the campaigns involving the A320 (Air Asia, Air Berlin, Czech Airlines, and easyJet), A340 (Iberia, South African Airways, and Thai Airways International), and A380 (Emirates, Qantas, and Singapore Airlines) aircraft.'[33]

To the extent that the Appellate Body upheld the panel's findings with respect to actionable subsidies that caused adverse effects or that such findings have not been appealed, the Appellate Body confirmed the panel's recommendation pursuant to Article 7.8 of the SCM Agreement that 'the Member granting each subsidy found to have resulted in such adverse effects, "take appropriate steps to remove the adverse effects or … withdraw the subsidy"' (para. 1416). Importantly, as the Appellate Body reversed the panel's finding that certain A380 LA/MSF contracts amounted to prohibited export subsidies, the panel's recommendation pursuant to Article 4.7 of the SCM Agreement, *i.e.,* to withdraw the export subsidies within 90 days, consequently was also to be reversed.

The Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB) on 1 June 2011.

C. Commentary

The panel's and the Appellate Body's reports are the first authoritative *dicta* in the ongoing aircraft subsidies row between the European Union and the United States. Since 2004, these two WTO Members have accused each other of having subsidised their own development and manufacturing of LCA by Airbus and Boeing, respectively, allegedly violating the obligations under the SCM Agreement. Currently, Airbus and Boeing remain the only manufacturers of LCA worldwide, and engage in fierce competition over purchase orders and market shares. Whereas the present Appellate Body report confirms that the EC acted

[33] See <www.wto.org> and the link to trade topics, disputes chronologically (visited December 2011).

inconsistently with Article 5(c) of the SCM Agreement, by providing LA/MSF measures, equity infusions and infrastructure measures to Airbus, the Appellate Body is expected to issue its final verdict on the allegedly WTO-inconsistent subsidies granted by the United States to Boeing in early 2012.[34]

The present case has been both the lengthiest ever, in terms of the duration of proceedings, and the most complex, in terms of legal and factual issues, in WTO dispute resolution history. The proceedings took almost seven years from the request for consultations to the circulation of the Appellate Body report. Although Article 7 of the SCM Agreement contains strict time limits for each step of the proceedings (circulation of the panel report within 120 days from the date of the composition and establishment of the panel's terms of reference, circulation of the Appellate Body report within 60 days from the date when a party formally notifies its intention to appeal), both the panel and the Appellate Body were forced to inform the Dispute Settlement Body (DSB) several times that they had not been able to complete their work within the set time limits, due to substantive and procedural complexities and the volume of materials involved. When the two reports were issued, it was no surprise that the factual and legal elaborations were of a highly technical nature, virtually inaccessible for laymen in the field – even more so taking into account that the panel report runs to more than 1,000 pages, and the Appellate Body report consists of more than 600 pages. As the final verdict of the Appellate Body was somewhat mixed, upholding some of the panel's findings and rejecting others, both parties claimed victory.[35] According to Karel de Gucht, the EU Trade Commissioner, 'the U.S. central claim that Airbus received prohibited export subsidies has been dismissed in its entirety. I am particularly pleased with this important result.' Ron Kirk, the US Trade Representative, pointed to the Appellate Body's finding that the LA/MSF measures were considered specific subsidies causing serious prejudice to the US interests, and stated that 'these subsidies have greatly harmed the United States, causing Boeing to lose sales and market share in key markets throughout the world.' Karel de Gucht acknowledged this aspect of the Appellate Body ruling, but insisted that the economic impact of those subsidies was 'very limited'. Statements were also issued by representatives from Airbus and Boeing. Airbus Chief Executive Tom Enders welcomed the ruling and noted that 'this is a big win for Europe', whereas Boeing Chairman Jim McNerney was quoted as saying that 'this is a clear, final win for fair trade that will level the playing field for America's aerospace workers.'

[34] *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint* (WT/DS353/R), currently before the Appellate Body.

[35] The following statements are reprinted in Nicola Clark, *WTO Ruling on Airbus – Subsidies Upheld on Appeal,* New York Times, 19 May 2011, at B3, and in Frank Jordan, *Boeing, Airbus Each Claim Win with WTO Ruling,* Associated Press, 18 May 2011.

From a legal perspective, the final outcome of the dispute is somewhat unsatisfactory. Two problematic issues stand out. First, the Appellate Body reversed various findings of the panel on how to interpret the SCM Agreement. In particular, the Appellate Body reversed the panel's interpretation of Article 3.1(a) of the SCM Agreement according to which 'subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance' shall be prohibited. With respect to the legal standard for determining when export contingency 'in fact' exists, the Appellate Body said that 'the factual equivalent of such conditionality can be established by recourse to the following test: is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?' (para. 1044). It considered that the standard for *de facto* export contingency under Article 3.1(a) of the SCM Agreement would be met 'when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy' (para. 1045), thus establishing as key the creation of an 'incentive', *i.e.,* the encouragement to export rather than to sell domestically.[36] Due to the insufficient factual findings by the panel or undisputed facts on the panel record, however, the Appellate Body was not able to complete the legal analysis. As a consequence thereof, the Appellate Body report is simply silent on whether the challenged measures amount to export subsidies, within the meaning of Article 3.1(a) of the SCM Agreement, and henceforth are prohibited *per se*. The issue of prohibited export subsidies was not the only subject-matter for which the Appellate Body reversed an interpretative finding by the panel but could not complete the analysis due to a lack of factual findings by the panel or undisputed facts on the panel record. This was also the case, *inter alia,* for the assessment of whether a benefit was conferred with respect to the Aéroconstellation industrial site in Toulouse *(infrastructure measures)* or whether a benefit was conferred by the French Government's transfer of shares of Dassault Aviation to Aérospatiale *(corporate restructuring measures)*. Consequently, the parties have been left without a substantive ruling on these claims. Even the Appellate Body expressed, on the final page of its report, concern about this problematic facet of its ruling:

> 'We realize that, after five years of panel proceedings and almost ten months of appellate review, there are a number of issues that remain unresolved in this dispute. Some may consider that this is not an entirely satisfactory outcome. Our mandate under Article 17 of the DSU does not permit us to engage in fact-finding. However, wherever we have found that there are sufficient factual findings by the Panel or undisputed facts to com-

[36] WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *EC – Aircraft* (AB), at 67 (accessible online at <www.worldtradelaw.net>, visited December 2011).

> plete the legal analysis, we have done so with a view to achieving a "prompt settlement" of the dispute in accordance with Article 3.3 of the DSU' (para. 1417).

Overall, this case brings to light, once again, an obvious deficiency in the current system under the DSU and reinforces the argument for the inclusion of remand competence for the Appellate Body. In the Doha Round, various proposals to this effect have been tabled, and the majority of the membership – including Switzerland – seems to support the introduction of remand authority.[37] At present, the Appellate Body's findings permit the United States at least to request the establishment of a new panel to examine the matter again. At the time of writing, at the end of 2011, no such action has been initiated.

Second, it is not clear, at the moment, how the European Union will implement the ruling, in particular with respect to the LA/MSF subsidies which were considered to cause adverse effects to US interests pursuant to Article 5 of the SCM Agreement. The panel explicitly refused to indicate guidelines to this effect. It stated that 'in the absence of any requirement to do so, and given that the United States has not even requested that we do so, we do not make any suggestions concerning steps that might be taken to implement those recommendations' (para. 8.8). The Appellate Body did not do so either. At the Dispute Settlement Body (DSB) meeting on 17 June 2011, the European Union informed the DSB that it intended 'to implement the DSB's recommendations and rulings in a manner that respected its WTO obligations, and within the time-limit set out in the SCM Agreement.'[38] According to Article 7.9 of the SCM Agreement, a WTO Member granting or maintaining subsidies, which have been found to cause adverse effects to the interests of another Member, 'shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy' within six months from the date of the adoption of the panel or Appellate Body report. At the same DSB meeting on 17 June 2011, the United States noted that the six-month period will expire on 1 December 2011. It added that 'withdrawing these enormous subsidies or removing their adverse effects would be economically very significant for the US' and that 'it would monitor developments in the EU closely.'[39] At the time of writing, the European Union has not yet informed the public on the approach it plans to take to implement the ruling. In particular, the Appellate Body's finding that the 'alleged LA/MSF Programme was not within the Panel's terms of reference' (para. 795) and, consequently, that the panel's

[37] See, on the issue of remand authority, Fernando Pierola, *The Question of Remand Authority for the Appellate Body,* in: Andrew D. Mitchell (ed.), Challenges and Prospects for the WTO, London 2005, at 193–213; for a similarly problematic outcome *European Communities – Selected Customs Matters* (WT/DS315/AB/R), Appellate Body report, and the comments by Matthias Oesch, The Jurisprudence of WTO Dispute Resolution (2006), 15 SZIER (2006), 501–523, at 507–510.

[38] See <www.wto.org> and the link to WTO News (visited December 2011).

[39] See <www.wto.org> and the link to WTO News (visited December 2011).

findings on this issue were 'moot and of no legal effect' (para. 796), constituted a serious setback for the United States as it considerably limits the ability to challenge future 'launch aid' subsidies, which are not specifically addressed in the panel and Appellate Body reports, on the basis of the findings in the present case.[40] It might well be that the United States will not be able, in the case of disagreement over the appropriateness of implementation measures, to proceed directly to Article 21.5-panel proceedings, *i.e.,* to request the same panel to review the European Union's implementation efforts, but that, rather, it will be forced to initiate dispute resolution proceedings anew, *i.e.,* to request the establishment of a new panel in order to examine the matter again from scratch.[41] In all likelihood, the row between the United States and the European Union over the WTO-consistency of subsidies granted to Airbus and Boeing, their respective flagship enterprises in the field, will continue.

[40] Brendan McGivern, WTO Panel Report: EC – Large Civil Aircraft (Airbus), at 2.

[41] WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *EC – Aircraft* (AB), at 62 (accessible online at <www.worldtradelaw.net>, visited December 2011). See, for the implementation of an Appellate Body ruling that a subsidy programme (namely the Brazilian *Programa de Financiamento às Exportações, PROEX*) violated the SCM Agreement, including subsequent Article 21.5-proceedings, *Brazil – Export Financing Programme for Aircraft* (WT/DS46/R, WT/DS46/RW).