The Jurisprudence of WTO Dispute Resolution (2010)

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I. Introduction

This chronicle summarises the jurisprudence of WTO dispute resolution in 2010. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective.[1] Three cases have attracted particular attention. The dispute in *China – Trading Rights* turned on various measures imposed by China, which the United States (US) considered to be inconsistent with China's Protocol of Accession, the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the General Agreement on Trade in Services (GATS). The *EC – Tariff Treatment of Technology Products* case concerned the consistency with Article II of the GATT 1994 of customs duties which the European Communities (EC) imposed on certain information technology products. In the *US – Poultry from China* case, China considered a US measure, which resulted in restricted market access for poultry products, to be inconsistent with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the GATT 1994. These three cases will each be dealt with in turn. Furthermore, two panel reports on trade remedy matters were issued *(US – Polyethylene Retail Carrier Bags* and *US – Certain Products from China).*[2] These cases are not discussed in this chronicle.

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1 Switzerland did not actively participate in any dispute in 2010 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).

2 Panel Report in *US – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, adopted on 18 February 2010 (WT/DS383/R); *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/R).

Arguably, the topic most hotly debated with respect to WTO dispute resolution, in 2010, was the ongoing dispute between the EC and the US on subsidies for the aircraft industry, mainly concerning support measures for Airbus and Boeing, respectively. In June 2010, a panel rendered its report on the US claim that the EC violated the Agreement on Subsidies and Countervailing Measures (SCM Agreement) *(EC – Trade in Large Civil Aircraft)*.[3] The panel found that a number of support measures by the EC were not consistent with the SCM Agreement. No surprisingly, the panel report was appealed, and the case is currently pending before the Appellate Body. In 2011, another panel is expected to issue its report on the *vice versa* claim brought by the EC according to which the US also violated the SCM Agreement *(US – Trade in Large Civil Aircraft)*.[4] In the *Australia – Apples* case, a panel found various measures imposed by Australia on the importation of apples from New Zealand to be inconsistent with the SPS Agreement.[5] The panel report was appealed, and the Appellate Body is expected to issue its final verdict in late 2010/early 2011. Lastly, in the *Thailand – Cigarettes from the Philippines* case, a panel determined that Thailand violated the GATT 1994 and the Agreement on Implementation of Article VII of the GATT (Customs Valuation Agreement) by levying Philippine cigarettes with higher taxes and other duties than local cigarettes.[6] At the time of writing, it was not yet clear whether Thailand was going to appeal the panel report. The final outcome of these disputes will be discussed in next year's chronicle.

II. China – Trading Rights

Introduction and Facts

When a new Member joins the WTO, the accession is concluded on terms to be agreed between the prospective Member and the WTO. Such 'Protocols of Accession' – also so-called 'tickets of admission' – are based on a common template but may vary depending on 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 favour-

3 *EC and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, currently before the Appellate Body (WT/DS316/R).

4 *US – Measures Affecting Trade in Large Civil Aircraft* (WT/DS317/R).

5 *Australia – Measures Affecting the Importation of Apples from New Zealand*, currently before the Appellate Body (WT/DS367/R).

6 *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* (WT/DS371/R).

able 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 in 2001. Its Protocol of Accession was negotiated to a substantial degree of specificity. In particular, it contains a specific provision relating to 'trading rights'. Para. 5.1 of the Protocol of Accession reads, inter alia, as follows:

> 'Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods.'

The *China – Trading Rights* case mainly turned on China's Protocol of Accession and its relationship to the general provisions of the GATT 1994.[7] China maintained, after its accession to the WTO, various measures restricting the importation and distribution of reading materials (*e.g.*, books, electronic publications), audiovisual home entertainment products (*e.g.*, videocassettes, DVDs), sound recordings (*e.g.*, recorded audio tapes) and films for theatrical release. The US argued that China denied foreign companies the right to import books, journals, movies, music, and videos, and instead required all imports to be channelled through specially authorised state-approved or state-run companies. Moreover, the US complained about similar restrictions on the distribution of these products within China. According to the US, the Chinese measures violated the Protocol of Accession as well as the provisions on national treatment in Article III of the GATT 1994 and Article XVII of the GATS. China responded that its measures were consistent with WTO law, arguing that they lawfully established a *content review* mechanism and a system for the selection of import entities for specific types of goods that China considered to be 'cultural goods'. In this regard, China submitted that, 'because these import entities play an essential role in the content review process, and because, in the case of imported products, it is critical that content review be carried out at the border, only "approved" and/or "designated" import entities are authorized to import the relevant products' (Appellate Body report, para. 141).

[7] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, adopted on 19 January 2010 (WT/DS363/AB/R). Australia, the European Union, Japan, the Republic of Korea, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) participated as third parties.

Findings

At the outset, the panel determined that various claims set forth by the US were not covered by the terms of reference, thus rejecting them on procedural grounds. Then, the panel turned to those claims, which it consented to examine in substance, and analysed China's Protocol of Accession. It interpreted the relevant provisions broadly, stressing that 'China was under an obligation to ensure that "all enterprises in China", including foreign-invested enterprises registered in China (wholly foreign-owned enterprises, Chinese-foreign equity joint ventures and Chinese-foreign contractual joint ventures), have the right to import all goods into China' (panel report, para. 7.252). Then, the panel turned to the provision in the Protocol of Accession according to which China shall progressively liberalise the availability and scope of the right to trade 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement'. The Panel stated that 'we consider that the phrase "without prejudice to" is intended to indicate that China's obligation to ensure that all enterprises in China have the right to trade must not, and does not, detrimentally affect China's right to regulate trade in a WTO-consistent manner' (panel report, para. 7.254). Therefore, according to the panel, 'if China regulates trade in a WTO-consistent manner, and this results, contrary to the obligation set forth in paragraph 5.1, in "enterprises in China" not "hav[ing] the right to trade in all goods", China's right to regulate trade in a WTO-consistent manner takes precedence over China's obligation to ensure that all enterprises in China have the right to trade' (panel report, para. 7.254). The panel added that the phrase 'right to regulate trade' means 'right to regulate imports and exports' (panel report, para. 7.257). Examining the Chinese measures challenged by the US in light of these principles, the panel concluded that the measures relating to films for theatrical release and unfinished audiovisual products were inconsistent with China's obligations under its Protocol of Accession, by failing to ensure that all enterprises in China (including foreign-invested enterprises), foreign individuals, and foreign enterprises not registered in China have the right to import cinematographic films. Then, the panel turned to Article XX(a) of the GATT 1994. China invoked this provision in order to justify the disputed measures. According to this provision, nothing in the GATT 1994 shall be construed to prevent the adoption of measures 'necessary to protect public morals'. In examining the relevance of Article XX(a) of the GATT 1994 for the present case, the panel did not, however, rule on the issue of whether Article XX of the GATT 1994 was in fact available as a justification for a violation of a non-GATT provision, such as China's Protocol of Accession. Rather, the panel proceeded *arguendo, i.e.,* on the provisional assumption, that Article XX of the GATT 1994 was potentially available to China as justification. Turning to the scope of

the public morals defence, the panel followed the interpretative approach previously adopted in WTO jurisprudence.[8] It accepted that monitoring the content of cultural products and preventing their importation if they contain prohibited content are measures to protect 'public morals'. The panel went on, however, to note that the Chinese measures at issue failed the 'necessity' test, *inter alia* because 'it is not apparent to us that the requirements in question make a contribution to protecting public morals' (panel report, para. 7.868). Moreover, the panel found that the measures could not be considered 'necessary' in light of a less trade-restrictive alternative proposed by the US, namely that the Chinese government could make final content review decisions before the products were cleared through customs. In light of this conclusion, the panel confirmed that 'we need not, and hence do not, revert to the issue whether Article XX(a) is in fact applicable as a direct defence to breaches of China's trading rights commitments. We thus take no position on this issue' (panel report, para. 7.914). Next, the panel turned to examine the allegation that the Chinese measures violated the principle of national treatment pursuant to Article XVII of the GATS and Article III of the GATT 1994. With respect to Article XVII of the GATS, the panel concurred with the US that various Chinese measures violated the principle of national treatment, including a Chinese regulation which had the 'effect of prohibiting foreign service suppliers from wholesaling imported reading materials, while like Chinese suppliers are permitted to do so' (panel report, para. 7.996). According to the panel, such a measure 'clearly modifies the conditions of competition to the detriment of the foreign service supplier and thus constitutes "less favourable treatment" in terms of Article XVII' (panel report, para. 7.996). With respect to Article III of the GATT 1994, the panel examined two specific Chinese measures. One measure required that imported reading material – but not domestically-produced reading material – must be distributed through a subscription-based regime. The Panel stated that 'a distributor of domestic newspapers and periodicals can distribute individual issues to consumers via newsstands, bookstores, and other shops, as well as via subscription, while a distributor of imported newspapers and periodicals may only distribute its products through a subscription to every issue of that publication' (panel report, para. 7.1535). Another measure restricted the 'type of sub-distributors available to imported books, newspapers, and periodicals by excluding foreign-invested enterprises from the potential pool of sub-distributors' (para. 7.1545). The panel found that both measures violated Article III of the GATT 1994.

Upon appeal, the Appellate Body confirmed the key findings of the panel. By way of introduction, China argued before the Appellate Body that its trading

[8] The panel referred to the Appellate Body and Panel Reports in *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R).

rights commitments pursuant to the Protocol of Accession 'apply solely in respect of trade in goods' (Appellate Body report, para. 169) and that its disputed measures 'do not regulate the importation of goods but, rather, regulate the content of films and the services associated with the importation of such content' (Appellate Body report, para. 169). Consequently, China held that the disputed measures did not violate the Protocol of Accession. The Appellate Body rejected this argument. It referred to its earlier case law according to which 'a measure can regulate both goods and services and that, as a result, the same measure can be subject to obligations affecting trade in goods and obligations affecting trade in services' (Appellate Body report, para. 194).[9] The Appellate Body considered that 'content and goods, and the regulation thereof' are not 'mutually exclusive' (Appellate Body report, para. 195). The Appellate Body agreed with the US that China's arguments were 'premised on an artificial dichotomy between film as mere content (which China contends is not a good) and the physical carrier on which content may be embedded (which China views as a good)' (Appellate Body report, para. 195). Based on this line of reasoning, the Appellate Body confirmed the panel's finding that the disputed measures were inconsistent with the Protocol of Accession. With respect to China's argument that this violation could be justified under Article XX(a) of the GATT 1994, the Appellate Body clarified the panel report with respect to a noteworthy facet. The Appellate Body established that China could, in principle, invoke the 'public morals' defence pursuant to Article XX(a) of the GATT 1994 in order to justify a breach of its Protocol of Accession as long as the measure had a 'clearly discernable, objective link to the regulation of trade in the goods at issue' (Appellate Body report, para. 230). With regard to the Chinese measures at issue, the Appellate Body concluded that 'the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products' (Appellate Body report, para. 233). Hence, it turned to examine whether Article XX(a) of the GATT 1994 could in fact justify China's violation of the Protocol of Accession. The Appellate Body concurred with the panel's finding that the measures at issue could not be considered as 'necessary' to protect public morals within the meaning of Article XX(a) of the GATT 1994. It stated that the 'mere fact that an entity involves some foreign investment does not necessarily imply that content review would be carried out by professionals who are not familiar with Chinese values and public morals, or incapable of efficiently communicating with and understanding the authorities' (Appellate Body report, para. 277). Moreover, the Appellate

[9] The Appellate Body referred to the Appellate Body Reports in *Canada – Certain Measures Concerning Periodicals* (WT/DS31/AB/R) and *EC – Regime for the Importation, Sale and Distribution of Bananas* (*Bananas III*, WT/DS27/AB/R).

Body rejected China's argument that the alternative proposed by the US – the Chinese government alone should be responsible for conducting content review – could not be considered as 'reasonably available' as this alternative 'would impose an undue financial and administrative burden on China' (Appellate Body report, para. 324). The Appellate Body reasoned that '[c]hanging an existing measure may involve cost and a Member cannot demonstrate that no reasonably available alternative exists merely by showing that no cheaper alternative exists' (Appellate Body report, para. 327). Rather, 'the respondent must establish that the alternative measure would impose an *undue* burden on it, and it must support such an assertion with sufficient evidence' (Appellate Body report, para. 327). With respect to the panel's findings on Article XVII of the GATS and Article III of the GATT 1994, the Appellate Body confirmed that the Chinese measures at issue violated the national treatment principle pursuant to these provisions. In particular, the Appellate Body rejected China's argument that the Panel erred in interpreting the entry 'sound recording distribution services' in China's GATS schedule as 'encompassing distribution by electronic means' (Appellate Body report, para. 340). The Appellate Body interpreted the term 'sound recording distribution services' in light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)[10] and confirmed that 'China's commitment covers both physical distribution as well as the electronic distribution of sound recordings' (Appellate Body report, para. 398).

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 19 January 2010.

Commentary

Since the accession of China to the WTO in 2001, there have been ongoing concerns about shortcomings in China's legal regime on the treatment of (copyrighted) cultural products. Allegedly, various aspects of China's intellectual property laws and practices as well as other trade-restrictive measures are not consistent with WTO law. Unsurprisingly, various WTO Members have begun to challenge specific aspects of such laws, practices, and measures. A series of informal discussions and formal consultations under the WTO dispute resolution system between China and other WTO Members is currently under way. One of those cases which could not be resolved through a mutually agreeable solution – despite bilateral discussions spanning several years – was the dispute

[10] Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969 (SR 0.111).

in *China – Intellectual Property Rights*.[11] This case concerned the compatibility of certain Chinese laws and practices with the TRIPS Agreement. A panel rendered its final verdict in early 2009.

The *China – Trading Rights* case was, in this series of controversies, the second dispute to reach the panel and Appellate Body stage. It turned on market access of cultural products, in the light of China's Protocol of Accession, the GATT 1994 and the GATS. With respect to the panel's and the Appellate Body's reasoning, three aspects are noteworthy. First, the present case was the first in which 'the right to trade', as stipulated in China's Protocol of Accession (as well as in other Protocols of Accession), was interpreted and applied by a panel or the Appellate Body. The obligation to grant 'the right to trade' is not included in the original WTO agreements, but is routinely incorporated in the Protocols of Accession of newly acceding Members to the WTO. The panel and Appellate Body reports have clarified the meaning and scope of this obligation in two ways. On the one hand, the panel stated that it was 'mindful of the possibility that the Accession Protocol may impose obligations on China that are not imposed on other Members under the WTO Agreement, or are stricter than those that are applicable to other Members' (panel report, para. 7.281). According to BRENDAN MCGIVERN, such trading rights may hence amount to 'WTO plus' obligations as they do not apply to the original WTO Members.[12] This conclusion is based on the clear text of China's Protocol of Accession. It is, therefore, legally sound. From a systemic viewpoint, however, it would be problematic if a new Member were to be subjected to rules which are more burdensome than those which apply to the original membership. Unlike the GATT 1947 and its side agreements, the WTO – for the time being at least – does not allow for variable geometry and membership, except for two plurilateral trade agreements that remain in force. The structure of the WTO reflects the principle, based on the consensus of 1994, that all countries alike should have equal rights and obligations, subject only to provisions on special and differential treatment for developing and least-developed countries.[13] On the other hand, both the panel and the Appellate Body confirmed that the right to trade is not absolute. It is subject to the concerned Member's right to regulate trade in a WTO-consistent manner. The panel explicitly stated that 'China's right to regulate trade in a WTO-consistent manner takes precedence over China's obligation to ensure that all enterprises in China have the right to trade' (panel report, para. 7.254).

[11] Panel Report in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362/R); see MATTHIAS OESCH, The Jurisprudence of WTO Dispute Resolution (2009), in: SZIER 2009, 607–624, at 608–614.

[12] BRENDAN MCGIVERN, WTO Panel Report: *China – Publications and Audiovisual Products*, at 1.

[13] See THOMAS COTTIER/MATTHIAS OESCH, International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland, Berne/London 2005, at 88–90.

Thus, only future cases will demonstrate whether the inclusion of 'the right to trade' in Protocols of Accession does in fact have a practical impact or not, *i.e.*, whether there can be circumstances in which a newly acceding Member is in fact bound by more burdensome obligations than apply to the existing membership.[14]

Second, the present case represents the first dispute in which a panel and the Appellate Body were called upon to interpret the 'public morals' exception pursuant to Article XX(a) of the GATT 1994. Although this exception was already included in the original GATT 1947 ('renamed' as GATT 1994 with the coming into force of the WTO in 1995), neither a GATT Contracting Party nor a WTO Member has ever invoked this exception in dispute resolution proceedings before. With respect to trade in services, the similarly worded 'public morals' exception, stipulated in Article XIV(a) of the GATS, was at issue for the first time in the *US – Gambling* case.[15] The panel in that case had found that 'the term "public morals" denotes standards of right and wrong conduct maintained by or on behalf of a community or nation' (panel report in *US – Gambling,* para. 6.465). It had further noted that 'Members should be given some scope to define and apply for themselves the concepts of "public morals" (...) in their respective territories, according to their own systems and scales of values' (panel report in *US – Gambling,* para. 6.461). In the present dispute, the panel saw 'no reason to depart from the interpretation of "public morals" developed by the panel in *US – Gambling'* (panel report, para. 7.759), and it adopted the same interpretation for the purpose of its analysis of Article XX(a) of the GATT 1994. The ruling in *China – Trading Rights* thus confirms that neither panels nor the Appellate Body are willing to impose on the 153 Members, with respect to public morals, an internationally uniform standard. Panels and the Appellate Body are ready to grant a considerable degree of deference to WTO Members in interpreting and applying for themselves public morals pursuant to Article XX(a) of the GATT 1994. At the same time, the panel and the Appellate Body made it clear in the present dispute that such deference does not extend to a free determination whether any, and, if so, which trade-restrictive measure is 'necessary' in order to protect the public morals defined. The Appellate Body reiterated its earlier case law on Article XX of the GATT 1994 according to which 'an assessment of "necessity" involves "weighing and balancing" a number of

[14] See for possible meanings of the phrase 'to regulate trade in a manner consistent with the WTO Agreement' WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *China – Publications and Audiovisual Products,* at 65 (accessible online at www.worldtradelaw.net, visited November 2010).

[15] Panel and Appellate Body Reports in *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (WT/DS285/AB/R); see WERNER ZDOUC/MATTHIAS OESCH, The Jurisprudence of WTO Dispute Resolution (2004/2005), in: SZIER 2005, 641–658, at 646–649.

distinct factors relating both to the measure sought to be justified as "necessary" and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective' (Appellate Body report, para. 239).[16] It was, *in casu,* a relatively easy task for the US to claim that China had not demonstrated that its measures were 'necessary' to protect public morals. Overall, the necessity test, pursuant to Article XX(a) of the GATT 1994 as well as pursuant to the other exceptions under Article XX of the GATT 1994, remains a considerable hurdle for WTO Members to pass.

Third, as the Appellate Body ruled that the 'public morals' exception pursuant to Article XX(a) of the GATT 1994 was potentially available to justify a violation of China's Protocol of Accession, the question arises as to whether the reasoning set forth by the Appellate Body equally applies vis-à-vis the other exceptions pursuant to Article XX of the GATT 1994. There are no indications that the other exceptions could not be invoked in order to justify a violation of an obligation stipulated in a Protocol of Accession. A further question which arises is whether the Appellate Body has, with this finding, opened the door for the general applicability of Article XX of the GATT 1994 to a violation of non-GATT 1994 obligations (related to goods), such as to a violation of the Agreement on Implementation of Article VI of the GATT (Anti-Dumping Agreement), the Agreement on Safeguards or the Agreement on Technical Barriers to Trade (TBT Agreement). The potential applicability of Article XX of the GATT 1994 to non-GATT 1994 provisions is of particular relevance as the aforementioned agreements, as well as other side agreements, do not contain 'general exceptions', *i.e.,* provisions explicitly allowing deviation, under certain conditions, from obligations in order to pursue legitimate policy goals other than trade liberalisation. The Appellate Body report does not offer much guidance on this issue. Hence, the applicability of Article XX of the GATT 1994 to non-GATT 1994 obligations remains a subject for debate.[17]

[16] See, for a comprehensive examination of the necessity of a trade-restrictive measure under Article XX(b) of the GATT 1994, Panel and Appellate Body Reports in *Brazil – Measures Affecting Imports of Retreaded Tyres*, (WT/DS332/AB/R); MATTHIAS OESCH, The Jurisprudence of WTO Dispute Resolution (2007), in: SZIER 2007, 665–677, at 671–677.

[17] See also the Panel Report in the *US – Poultry from China* case (below III.), in which the panel determined that an SPS measure which is found to be inconsistent with provisions of the SPS Agreement – such as Articles 2 and 5, which are explanations of the disciplines of Article XX(b) of the GATT 1994 – cannot be justified under Article XX(b) of the GATT 1994.

III. EC – Tariff Treatment of Technology Products

Introduction and Facts

At the Singapore Ministerial Conference in 1996, 29 WTO Members (including Switzerland and the then 15 EC Member States) signed the Ministerial Declaration on Trade in Information Technology Products. This Declaration, known as the Information Technology Agreement (ITA), entered into force in 1997, and participation has increased to more than 70 WTO Members. The ITA constitutes a plurilateral agreement, not being part of the 'single undertaking' approach generally followed under the WTO. Its provisions are binding only for those WTO Members which have formally agreed to become participants.[18] The ITA Preamble expresses the desire to 'achieve maximum freedom of world trade in information technology products' and to 'encourage the continued technological development of the information technology industry on a worldwide basis'. The participants agree to bind and eliminate their tariffs as well as other duties and charges of any kind with respect to information technology products. To this end, the ITA contains two attachments providing information about the covered products: i) Attachment A lists the covered products according to the Harmonized System (HS), down to the six-digit level classification ('list of HS headings'); ii) Attachment B lists specific products which are covered by the ITA 'whether or not they are included in Attachment A' ('list of products'). According to the panel, the reason for this technique was the following (panel report, para. 7.409):

> '[T]he drafters of the ITA considered that the traditional approach of listing HS codes was inadequate to address the full scope of the product coverage that was intended by participants to the ITA, in particular given the then prevailing divergences in the classification of products in and for Attachment B. Consequently, ITA participants agreed to implement their commitments through a "dual" approach that included binding and eliminating duties for both: (i) products classified or classifiable in HS codes listed in Attachment A, and (ii) products specified in Attachment B. While the approach under Attachment A is straightforward and "traditional" in WTO terms, ITA participants were directed under Attachment B to eliminate duties on all products "specified" in that Attachment. This approach was taken because ITA participants could not agree on precise headings for the products identified through the narrative descriptions in Attachment B. Since the narrative descriptions must determine the scope of coverage of those products, duty-free treatment must be extended to products specified in Attachment B "wherever

[18] As WTO law does not provide for an exception with respect to tariff reductions among the participants to the ITA on a plurilateral basis, the ITA is subject to the principle of most-favoured-nation (MFN) treatment pursuant to Article I of the GATT 1994. Therefore, the advantages of such tariff elimination are multilateralised and thus benefit all WTO Members alike, without requiring reciprocity.

they are classified". Otherwise, ITA participants would have ended up with diverging product coverage, which runs contrary to the intent to provide duty-free coverage for specified "products" in Attachment B, and not headings of tariff lines under which products are classified.'

The participants agreed, based on the provisions in the ITA, to implement the obligation to bind and eliminate their tariffs as well as other duties and charges of any kind with respect to the covered products by amending their schedules of commitments accordingly. The revision of the schedules had to be completed by 2000.

The *EC – Tariff Treatment of Technology Products* case concerned the question whether certain products were covered by the ITA, *i.e.,* whether the EC was obliged, pursuant to the ITA and the EC schedule of commitments, to grant to those products tariff-free access to its market.[19] The products at issue were i) flat panel displays (FPDs), ii) set-top boxes which have a communication function (STBCs), and iii) multifunctional digital machines (MFMs). The complaining parties, the US, Japan and Chinese Taipei, argued that the EC acted inconsistently with WTO law by applying duties (between 6% and 14% *ad valorem*) on these products. According to the complaining parties, these products were covered by the ITA and the EC schedule of commitments, and the EC would have been obliged, accordingly, to accord duty-free tariff treatment to these products. With respect to FPDs, for example, the complaining parties argued that FPDs refer to 'certain flat panel displays using LCD technology that are "capable of reproducing video images from a source other than an automatic data-processing machine"', as well as 'flat panel displays with certain attributes, including digital visual interface (DVI)' (panel report, para. 7.118). The complaining parties thus argued that the ITA obligation, as implemented by the EC in its schedule of commitments, covered not only video monitors (*i.e.,* FPDs) which were for computers (*i.e.,* automatic data-processing machines) but also monitors which could be used as a television as well, separate from a computer. The complaining parties concluded that, by having imposed tariffs on these products, the EC violated its obligations under Article II of the GATT 1994. The EC rejected these allegations. It argued that it was not obliged to grant duty-free access to these products, as they were typical examples of products which continued to be developed after the drafting of the ITA. These products were multifunctional, displaying characteristics of products included in

[19] *EC and its Member States – Tariff Treatment of Certain Information Technology Products,* adopted on 21 September 2010 (WT/DS375R, WT/DS376/R, WT/DS377/R). Australia, Brazil, China, Costa Rica, Hong Kong, China, India, Japan (in respect of the US' and Chinese Taipei's complaints), Korea, the Philippines, Singapore, Chinese Taipei (in respect of the US' and Japan's complaints), Thailand, Turkey, the US (in respect of Japan's and Chinese Taipei's complaints), and Viet Nam participated as third parties.

scheduled commitments as part of the ITA, but also displaying characteristics that arguably could place the products outside the scope of the ITA commitments. The EC contended that changes and developments in the technology and usability of these products made it difficult to distinguish between products which are covered by the ITA obligations (*e.g.*, genuine automatic data-processing machine monitors), products which are outside the scope of the ITA (*e.g.*, television sets), and products which might at first sight fall within more than one category (*e.g.*, monitors used as video monitors including television sets). With respect to FDPs, for example, the EC contended that there was no 'specific heading' for such 'multifunctional' products; they had to be classified 'on a case-by-case basis, considering their specific characteristics' (panel report, para. 7.120). In the EC's view, 'the ITA Annex reflects the notion that the information technology industry has a "rapidly advancing nature" and that the language of the ITA was not intended to "cover every new product that may come along in the rapidly developing, converging information technology sector".' (panel report, para. 7.358). The EC concluded that 'new products must be subject to negotiations' (panel report, para. 7.593) rather than automatically be included in the product coverage of the ITA simply on the grounds that they perform similar functions to a product that is traditionally covered by the ITA.

Findings

By way of introduction, the panel explained that, in assessing the complaining parties' claims, it would consider the following: '(a) the treatment accorded to the products at issue under the EC Schedule; (b) the treatment accorded to the products at issue under the measures at issue; and (c) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule' (panel report, para. 7.100). The panel noted that the EC schedule of commitments is annexed to the GATT 1994 and, hence, is an integral part thereof in accordance with Article II:7 of the GATT 1994. Then, the panel began its analysis by examining the relevant headings and further provisions in the EC schedule of commitments. In order to implement the obligations stemming from the ITA, the EC had consolidated, in a single section, all the HS codes appearing in Attachment A. In many cases, the EC had introduced further sub-divisions of its domestic nomenclature ('Combined Nomenclature' or 'CN') at the eight-digit level. In addition, the EC had attached an annex to its schedule. This annex includes a headnote which reads as follows:

> 'With respect to any product described in or for Attachment B to the Annex to the Ministerial Declaration on Trade in Information Technology Products (WT/MIN[96]/16), to the extent not specifically provided for in this Schedule, the customs duties on such product, as well as any other duties and charges of any kind (within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994) shall be bound and eliminated as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.'

Following the headnote, the annex to the EC schedule contains a consolidated list of product descriptions (narrative descriptions). For each of the products at issue (FPDs, STBCs, and MFMs), the panel interpreted the relevant parts of the EC schedule of commitments in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[20] With respect to FPDs, for example, it examined the EC headnote and the narrative description ('Flat panel display devices [including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies] for products falling within this agreement, and parts thereof'), looking at the meaning of the terms, the context, the object and purpose, the issue of subsequent practice, and several additional arguments based on the negotiations on the ITA pursuant to supplementary means of interpretation. The panel found that there was 'no express limitation on technical characteristics' and 'no requirement for exclusivity' (panel report, paras. 7.485, 7.604). On this basis, the panel concluded that 'duty-free treatment must be extended to *all* products that fall within the scope of the FPDs concession in the Annex to the EC Schedule irrespective of where they are classified in the EC Schedule' (panel report, para. 7.604). The panel then turned to the relevant tariff item headings – that which the complaining parties argued to be the correct one (*8471 60 90;* duty-free concession) and those which the EC in fact applied (*various;* resulting in a 14% *ad valorem* duty) – and interpreted them accordingly. With respect to treaty interpretation of a tariff schedule, the panel reiterated the jurisprudence of panels and the Appellate Body according to which particular emphasis is to be put on the wording of a term. Moreover, it confirmed that 'tariff concessions made by WTO Members should be interpreted in such a way as to further the objectives of preserving and upholding the "security and predictability" of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade".' (panel report, para. 7.547). The panel went on to note that this 'includes consideration of the general objective of the expansion of trade and the substantial reduction of tariffs', but 'a panel should take care not to disturb the balance of reciprocal and mutually advantageous concessions negotiated by parties' (panel report, para. 7.547). At the same time, the Panel did not agree with the complaining

[20] Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969 (SR 0.111).

parties that the 'provisions of the ITA, a plurilateral agreement that is separate from the *WTO Agreement,* are relevant in determining the object and purpose of the *WTO Agreement'* (panel report, para. 7.1328). Based on a detailed review of the technical evidence related to the products at issue (FPDs, STBCs, and MFMs), the panel established that (at least some of) these products fell within the scope of the duty-free tariff concessions, as argued by the complaining parties. Accordingly, the EC was not permitted to levy these products, upon importation, with a tariff or other duties and charges of any kind. The products should be granted duty-free treatment. Therefore, the panel concluded that, by imposing tariffs on the importation of these products, the EC acted inconsistently with Article II of the GATT 1994.

Moreover, the panel established that the EC violated Article X:1 of the GATT 1994, by failing to publish promptly certain measures (amendments to the Explanatory Notes to the EC Regulation on the Common Customs Tariff) in such a manner as to enable governments and traders to become acquainted with them. As such a measure was enforced before its official publication, the panel also found a violation of Article X:2 of the GATT 1994.

The panel report was not appealed by any party and accordingly was adopted by the Dispute Settlement Body (DSB) on 21 September 2010.

Commentary

The *EC – Tariff Treatment of Technology Products* dispute did not concern a 'typical' disagreement between WTO Members on the correct tariff classification in which it is argued under what tariff item heading a specific product should fall. In the present case, the panel was called upon to interpret and apply the obligation to bind and eliminate customs duties on information technology products pursuant to the Information Technology Agreement (ITA). It was Attachment B to the ITA – the 'positive list of specific products to be covered by this agreement wherever they are classified in the HS' – as implemented by the EC in its schedule of commitments, which stood at the centre of interest. Thus, the panel faced the difficult task of interpreting language – the heading and the narrative descriptions – which does not appear in the Harmonized System (HS) and, consequently, is not used in conventional tariff schedules of WTO Members either. Unsurprisingly, the World Customs Organization (WCO) could not contribute substantially to resolving the interpretative questions under debate although the panel formally requested, pursuant to Article 13 of the Dispute Settlement Understanding (DSU), the assistance of the WCO in certain issues relating to the HS.

From a legal viewpoint, the panel's findings are accurate. Two aspects are noteworthy. First, the panel report reaffirms the principle that WTO Members

cannot easily re-classify a certain product within their own tariff schedule after they have 'bound' that product in their schedule, *i.e.,* after they have specified a legally-binding maximum tariff level. Ever since the coming into force of the WTO, panels and the Appellate Body have, and rightly so, set a high benchmark for a unilateral re-classification with respect to schedules of commitments based on the Harmonized System (HS).[21] In the present case, the panel has now made it clear that a similarly high standard applies to a unilateral re-classification of products which are covered by the ITA. This holds true, according to the panel, also in those cases in which a covered product has over the years continued to be developed, due to technological innovation, and has become capable of performing additional functions. This rationale is arguably applicable to tariff matters in general, *i.e.,* beyond the ITA. As product evolution and development is not limited to information technology products, it might also become relevant in the field of 'traditional' goods bound in WTO Members' schedules of commitments.[22]

Second, the panel has, again, confirmed that tariff concessions provided for in a WTO Member's schedule of commitments are part of the terms of the WTO treaty, and, 'as such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention' (panel report, para. 7.66).[23] In interpreting the relevant parts of the EC schedule of commitments, the panel has meticulously analysed and applied the various methods of interpretation as set out under Articles 31 and 32 of the VCLT. The findings provided by the panel will serve as a further useful precedent for future disputes within the WTO as well as in other international dispute settlement fora. In particular, it has been confirmed, once again, that the ordinary meaning plays the leading role in ascertaining the correct interpretation of a treaty term. According to the ironic statement of a former member and chairman of the Appellate Body, dictionaries, in particular the *Shorter Oxford Dictionary,* are in practice attributed the status of 'one of the covered agreements'.[24] Moreover, the panel carefully interpreted the relevant terms of the EC schedule of commitments with regard to the context, the object and purpose, and subsequent practice pursuant to Article 31 of the VCLT. Fi-

[21] See, in particular, Panel and Appellate Body reports in *EC – Customs Classification of Frozen Boneless Chicken Cuts,* adopted on 27 September 2005 (WT/DS269/AB/R, WT/DS286/AB/R); MATTHIAS OESCH, The Jurisprudence of WTO Dispute Resolution (2006), in: SZIER 2006, 501–523, at 502–507.

[22] See BRENDAN MCGIVERN, WTO Panel Report: *EC – Tariff Treatment of Technology Products*, at 2.

[23] The panel explicitly referred to the Appellate Body Report in *EC – Customs Classification of Frozen Boneless Chicken Cuts,* adopted on 27 September 2005 (WT/DS269/AB/R, WT/DS286/AB/R).

[24] CLAUS-DIETER EHLERMANN, 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.

nally, the panel also examined various arguments based on the negotiations on the ITA, pursuant to supplementary means of interpretation under Article 32 of the VCLT.

IV. US – Poultry from China

Introduction and Facts

At the end of the Uruguay Round, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) was put in force, containing detailed rules on the enactment of measures intended to protect human, animal and plant life or health from risks arising from additives, pests, contaminants or other disease-causing organisms. While the new agreement did not attract much attention during the negotiations, it quickly moved to the centre of major trade disputes after its adoption in 1995. Questions regarding risk assessment and risk management, the proper balance of government discretion and adequate judicial review of Members' determinations have been extensively tried and debated in this context.[25] Moreover, the SPS Agreement finds itself at the heart of the debate on market access and trade restrictions for genetically modified organisms (GMOs).[26]

The *US – Poultry from China* case concerned the question whether US legislation violated the SPS Agreement and the GATT 1994 by not granting due market access for Chinese poultry products.[27] In the US, the Food Safety and Inspection Service (FSIS), which is an agency of the US Department of Agriculture (USDA), is responsible for the authorisation of the importation of poultry products on a country-by-country basis. Upon request by a country wishing to export poultry products, the FSIS evaluates whether the applicant country's poultry inspection system is 'equivalent' to that of the US. If the FSIS determines that this is the case, it allows the importation of poultry products from that country. In 2004, China requested such an equivalence determination in

[25] See, *e.g.*, Panel and Appellate Body Reports in *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998 (WT/DS18/AB/R); Panel and Appellate Body Reports in *EC – Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998 (WT/DS26/AB/R, WT/DS48/AB/R); Panel and Appellate Body Reports in *Japan – Measures Affecting the Importation of Apples*, adopted on 10 December 2003 (WT/DS245/AB/R).

[26] See Panel Report in *EC – Measures Affecting the Approval and Marketing of Biotech Products*, adopted on 21 November 2006 (WT/DS291/R, WT/DS292/R, WT/DS293/R); Matthias Oesch, The Jurisprudence of WTO Dispute Resolution (2006), in: SZIER 2006, 501–523, at 514–523.

[27] *US – Certain Measures Affecting Imports of Poultry from China*, adopted on 25 October 2010 (WT/DS392/R). Brazil, Chinese Taipei, the European Union, Guatemala, Korea, and Turkey participated as third parties.

order to gain access to the US market for its poultry products. While the FSIS was in the process of evaluating China's poultry inspection system, the US Congress passed legislation restricting executive branch agency funds from being used to establish or implement a rule allowing the import of poultry from China. As a consequence of the enactment of this legislation, imports of Chinese poultry products were effectively banned, because such a rule is necessary in order for imports from a particular country to be permitted.

China requested the establishment of a WTO panel in order to examine the matter in light of WTO law. China argued that the relevant provision of the US legislation, namely Section 727 of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act (AAA), violated Articles I and XI of the GATT 1994 as well as various provisions of the SPS Agreement. It alleged that Section 727 amounted to a ban on the importation of poultry products which could not be justified under the GATT 1994 or the SPS Agreement. The US responded that Section 727 was intended to provide an additional period for review of food safety issues relating to China's enforcement problems. The US explained that 'action by Congress was not separate and apart from the system in the United States to ensure the safety of imported food, but rather, part of the equivalence regime' (panel report, para. 7.126). The US went on to argue that Section 727 was a 'procedural requirement adopted in the course of an ongoing equivalency review' (panel report, para. 7.126). Moreover, the US pointed to the fact that Section 727 elapsed during the panel proceedings, thus raising the question of 'whether the Panel should make findings on a measure that is no longer in force' (panel report, para. 7.51).

Findings

At the outset, the panel declared that it would duly examine the consistency of the challenged US measure although it was no longer in force. The panel reasoned that 'if we were to refuse to make findings on the expired measures – Section 727 – the Panel might be depriving China of any meaningful review of the consistency of the United States' actions with its WTO obligations, while allowing the repetition of the potentially WTO-inconsistent conduct' (panel report, para. 7.55). Then, the panel turned to examine whether Section 727 was an SPS measure. The panel reiterated the jurisprudence of earlier panels and the Appellate Body according to which a governmental measure needs to fulfil two conditions in order to qualify as an SPS measure: i) the measure must be an SPS measure as defined in Annex A(1) to the SPS Agreement, and ii) the measure has to directly or indirectly affect international trade pursuant to Article 1 of the

SPS Agreement (panel report, para. 7.90).[28] The panel stated – adopting a slightly different approach than the panel in the *EC – Biotech Products* case had chosen – that it had to assess whether Section 727 is an SPS measure by 'looking at whether it serves one of the purposes set forth in Annex A(1)(a) through (d) and whether it is of the type listed in the second part of Annex A' (panel report, para. 7.102). In doing so, the panel found that 'Section 727 was enacted for the purpose of protecting human and animal life and health from the risk posed by the prospect of the importation of contaminated poultry products from China' (panel report, para. 7.115). Moreover, the panel noted that 'Section 727 is a provision of a law, the AAA of 2009, dealing with appropriations relating to the activities of an Executive Branch agency of the United States Government' (panel report, para. 7.118). Although Section 727 is an appropriations bill, the panel stated, 'the law is Congress' way of exerting control over the activities of a government agency responsible for implementing substantive laws and regulations on SPS matters' (panel report, para. 7.119). Thus, 'the fact that it is an appropriations bill does not exclude it from the scope of the types of SPS measures set forth in the second part of Annex A(1)' (panel report, para. 7.119). Moreover, the panel found that 'Section 727 did affect international trade because it prohibited the FSIS from using appropriated funds for the establishment and implementation of a rule allowing the importation of poultry products from China' (panel report, para. 7.123). Therefore, the panel concluded that Section 727 is an SPS measure within the scope of the SPS Agreement.

After the panel had determined that Section 727 was an SPS measure, it turned to examine the consistency of Section 727 with the substantive provisions of the SPS Agreement. The US argued that Section 727 should be subject only to the provisions of Article 4 of the SPS Agreement, which urges Members to accept SPS measures of other Members as equivalent, if the exporting Member objectively demonstrates that its measures achieve the importing Member's appropriate level of sanitary and phytosanitary protection. The US contended that Article 4 was 'the only provision in the *SPS Agreement* that is applicable to equivalence-based measures, such as, in its view, Section 727' (panel report, para. 7.132). The panel rejected this argument and determined that Article 4 of the SPS Agreement is not to be applied 'to the exclusion of other relevant provisions of the SPS Agreement' (panel report, para. 7.139). Then, the panel turned to China's claim that Section 727 is not supported by a risk assessment and, therefore, it is inconsistent with Articles 2 and 5 of the SPS Agreement. The

[28] In particular, the panel referred to the Panel Report in *EC – Measures Affecting the Approval and Marketing of Biotech Products,* adopted on 21 November 2006 (WT/DS291/R, WT/DS292/R, WT/DS293/R); MATTHIAS OESCH, The Jurisprudence of WTO Dispute Resolution (2006), in: SZIER 2006, 501–523, at 514–523.

panel recalled that Article 5.1 of the SPS Agreement 'enunciates the basic principle that SPS measures must be based on a risk assessment' (panel report, para. 7.170). It added that Article 5.2 'further instructs WTO Members on how to conduct a risk assessment (panel report, para. 7.171), citing prior jurisprudence on this issue, according to which 'the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake' (panel report, para. 7.180).[29] The panel found that the US did not present a 'scientific basis' for Section 727, and concluded that the US violated Articles 5.1 and 5.2 of the SPS Agreement. The panel also determined that the US violated Article 2.2 of the SPS Agreement which requires WTO Members to ensure that any SPS measure is 'applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence'. The panel recalled that the US presented evidence related to alleged food safety problems in China, such as 'newspaper articles and publications related to avian influenza, poultry smuggling, and melamine in chicken feed' (panel report, para. 7.202). The panel noted, however, that this evidence does not 'establish the existence of a risk of consuming unsafe poultry from China' (panel report, para. 7.202). Therefore, the panel concluded that Section 727 'was maintained without sufficient scientific evidence in contravention of the obligation in Article 2.2' (panel report, para. 7.202). Furthermore, the panel also found that the US violated Article 5.5 of the SPS Agreement, according to which each WTO Member shall 'avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.' The panel established that this provision 'embodies a non-discrimination principle in respect of the application of the appropriate level of sanitary or phytosanitary protection' (panel report, para. 7.218), and found that Section 727 violated this principle. The panel based its finding on the fact that Section 727 resulted in dissimilar levels of protection in 'different yet comparable situations' (panel report, para. 7.254). It stressed that 'the funding restriction imposed through Section 727 applies *only* to poultry products from China, and not to poultry products from other WTO Members' (panel report, para. 7.233). Subsequently, the panel looked at China's claim under Article 8 of the SPS Agreement. This provision requires Members to comply with Annex C for the purposes of 'control, inspection and approval procedures'. As the FSIS equivalence determination process for the importation of poultry was an 'approval procedure' and Section 727 'undeniably eliminates any possibility for "completion" of the FSIS equivalence determination process' (panel report,

[29] The panel explicitly referred to the Appellate Body Report in *EC – Measures Concerning Meat and Meat Products (Hormones)*, adopted on 13 February 1998 (WT/DS26/AB/R, WT/DS48/AB/R).

para. 7.385), the panel concluded that the US also violated Article 8 of the SPS Agreement.

Lastly, the panel turned to China's claims under the GATT 1994. China argued that the US violated the principle of most-favoured-nation (MFN) treatment pursuant to Article I of the GATT 1994. The panel sympathised with this argumentation. It found that the 'funding restriction imposed by Section 727 is origin-based in respect of the products it affects, *i.e.* poultry products from China, and not from any other WTO Member' (panel report, para. 7.431). By 'targeting only China, Section 727 imposes origin-based discrimination' (panel report, para. 7.431), thus being inconsistent with Article I of the GATT 1994. Moreover, the panel also established that the US violated the general ban on quantitative restrictions pursuant to Article XI of the GATT 1994, as 'Section 727 operated as a prohibition on the importation of poultry products from China to the United States' (panel report, para. 7.456). The US tried to justify the violation of Articles I and XI of the GATT 1994 by invoking Article XX(b) of the GATT 1994, arguing that Section 727 was enacted in order to 'protect human and animal life and health from the risk posed by the importation of poultry products from China' (panel report, para. 7.458). The Panel considered 'whether it is possible to justify Section 727 under Article XX(b) of the GATT 1994 as necessary to "protect human and animal life and health from the risk posed by the importation of poultry products from China" when we have found that it is an SPS measure which is inconsistent with Articles 2.2, 2.3, 5.1, 5.2 and 5.5 of the *SPS Agreement*' (panel report, para. 7.465). The panel noted that the SPS Agreement explains in detail the provisions of Article XX(b) with respect to SPS measures, concluding that an SPS measure which is found inconsistent with provisions of the SPS Agreement – 'such as Articles 2 and 5, which are explanations of the disciplines of Article XX(b)' (panel report, para. 7.481) – cannot be justified under Article XX(b) of the GATT 1994. The panel arrived at this conclusion by considering, *inter alia,* the wording of various provisions of the SPS Agreement, its negotiating history and its Preamble ('*Desiring* therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary and phytosanitary measures, in particular the provisions of Article XX(b)'). On this basis, the panel found that, because Section 727 is inconsistent with Articles 2 and 5 of the SPS Agreement, the disciplines of Article XX(b) of the GATT 1994 cannot be applied so as to justify this measure.

The panel report was not appealed by any party and accordingly was adopted by the Dispute Settlement Body (DSB) on 25 October 2010.

Commentary

The panel's findings are not surprising and had been expected by most commentators. The US did not base its temporary import ban on poultry products from China on a proper risk assessment, as provided for under the SPS Agreement. Therefore, after the threshold determination that Section 727 constituted an SPS measure, the panel had little difficulty in concluding that the US acted inconsistently with the substantive provisions of the SPS Agreement.

From a practical viewpoint, however, the final outcome of the dispute is unsatisfactory. Section 727 expired at the end of the US 2008–2009 fiscal year on 30 September 2009, *i.e.,* after China duly requested the establishment of a panel to examine the WTO-consistency of Section 727 on 23 June 2009, but before the panel issued its verdict on 29 September 2010. In line with prior WTO jurisprudence, the panel hence refrained from recommending that the Dispute Settlement Body (DSB) request the US to bring the challenged measures into conformity with its WTO obligations.[30] The panel decided not to do so although China formally asked the panel 'to issue a recommendation that the United States does not revert to language similar to that in Section 727 in its future legislation' (panel report, para. 8.8). The panel explained that 'we are not to make recommendations on measures other than Section 727 itself because these other measures, including future measures, are outside our terms of reference' (panel report, para. 8.9). In particular, China was concerned with Section 743 of the AAA which was put into force on 21 October 2009 in order to succeed Section 727. Section 743 allows 'that funding to establish or implement a rule permitting the importation of poultry products from China can be restored if the Secretary complies with certain conditions set forth in that provision' (panel report, para. 2.29). The panel made it clear that Section 743 'already includes language different from that of Section 727' (panel report, para. 8.9). During the panel proceedings, China explicitly reserved its right to argue the WTO inconsistency of Section 743 in a separate dispute settlement proceeding (panel report, para. 2.29 and fn. 62). Therefore, it might well be that the final word has not yet been spoken in the ongoing saga on (restricted) access to the US market for Chinese poultry products.

[30] See, *e.g.,* the Panel Report in *EC – Measures Affecting the Approval and Marketing of Biotech Products,* adopted on 21 November 2006 (WT/DS291/R, WT/DS292/R, WT/DS293/R).