
SWISS REVIEW OF INTERNATIONAL AND EUROPEAN LAW

Schweizerische Zeitschrift
für internationales und europäisches Recht
Revue suisse de droit international et européen

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TABLE OF CONTENTS

FROM THE EDITORS

To What Extent May Hard Law Content Be Incorporated Into Soft Instruments? (Robert Kolb)	335
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ARTICLES

Diligence en matière de droits de l'homme et responsabilité de l'entreprise: Le point en droit suisse (Nicolas Bueno)	345
From ESM to EMF and Back: A Critical Analysis of the Euro Area Reform Proposals (Hannes Hofmeister)	367

RECENT PRACTICE

The Jurisprudence of WTO Dispute Resolution (2018) (Matthias Oesch, Aliénor Nina Burghartz & Rika Koch)	387
Chronique de droit pénal suisse dans le domaine international (2018) Schweizerische Praxis zum Strafrecht im internationalen Umfeld (2018) (Ursula Cassani, Sabine Gless, Maria Ludwiczak Glassey & Thomas Wahl)	419
La pratique suisse relative aux droits de l'homme 2018 (Michel Hottelier & Vincent Martenet)	461
Rechtsprechung zum internationalen Schuld- und Zwangsvollstreckungsrecht (Ivo Schwander)	497

DOCTORAL & POST-DOCTORAL THESES

Conflict between Security Council Counter-Terrorism Measures and Human Rights (Nicola Thomas Hofer)	515
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The Jurisprudence of WTO Dispute Resolution (2018)

Matthias Oesch, Aliénor Nina Burghartz & Rika Koch*

Table of Contents

- I. Introduction
- II. Indonesia – Safeguard on Certain Iron or Steel Products
 - A. Introduction and Facts
 - B. Findings
 - C. Commentary
- III. European Union – PET (Pakistan)
 - A. Introduction and Facts
 - B. Findings
 - C. Commentary
- IV. Brazil – Taxation
 - A. Introduction and Facts
 - B. Findings
 - C. Commentary

I. Introduction

This chronicle summarizes the jurisprudence of WTO dispute resolution in 2018. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective.¹ Three Appellate Body reports, all of which have been duly adopted by the WTO members in 2018, have attracted particular attention. The dispute in *Indonesia – Safeguard on Certain Iron or Steel Products* turned on safeguard measures imposed by Indonesia on imports of certain flat-rolled iron or steel products and the

* Professor and Research and Teaching Fellows, respectively, University of Zurich. All WTO panel and Appellate Body reports are accessible at <www.wto.org> (click the link for disputes). The websites which are referred to hereafter were accessed last on 1 July 2019.

1 Switzerland actively participated in WTO dispute resolution matters in 2018. In particular, it initiated dispute resolution proceedings against the United States with respect to safeguard measures enacted by the United States to adjust imports of steel and aluminium products, including imposing additional ad valorem rates of duty and exempting selected WTO members from the measures (*United States – Certain Measures on Steel and Aluminium Products*, WT/DS556); the establishment of a panel is expected to be accomplished in 2019. Moreover, Switzerland has been participating in various WTO disputes as a third party; most of these cases concern disputes between WTO members and the United States on the compatibility of additional duties imposed by the United States on various products with WTO law.

investigation and determinations leading thereto, arguably violating the most-favoured-nation (MFN) treatment obligation pursuant to Article I of the General Agreement on Tariffs and Trade (GATT 1994), Article XIX of the GATT 1994 and the Agreement on Safeguards. The *European Union – PET (Pakistan)* case concerned countervailing measures on certain polyethylene terephthalate from Pakistan; Pakistan claimed that these measures were not compatible with Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (SCM Agreement). In the *Brazil – Taxation* case, the European Union and Japan challenged certain measures concerning taxation and charges in the automotive sector, the electronics and technology industry, and tax advantages for exporters by Brazil, arguing that they violated the GATT 1994, the SCM Agreement and the Agreement on Trade-Related Investment Measures (TRIMs Agreement). These three cases will each be dealt with in turn. Various panel and Appellate Body reports on trade remedy matters were issued, primarily turning on anti-dumping measures; these cases are not discussed here.² Various panel and Appellate Body reports concerned compliance matters; they are not dealt with either.³ In the *Australia – Tobacco Plain Packaging* dispute, Honduras, the Dominican Republic, Cuba and Indonesia challenged Australian laws and regulations that imposed restrictions on trademarks, geographical indications and other plain packaging requirements on tobacco products and packaging. In 2018, a panel found that the complainants had not demonstrated that the Australian measures violated the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) or the GATT 1994.⁴ Cuba and Indonesia appealed the panel report. The findings of the panel will be discussed once the Appellate Body will have issued its ruling.

Overall, 2018 was an extraordinarily busy year for the WTO dispute resolution mechanism with respect to both the number of new requests for consultations and

2 *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, Appellate Body Report circulated on 22 March 2018, WT/DS479/AB/R; *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, Panel Report circulated on 14 November 2017, WT/DS488/R; *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, Panel Report circulated on 7 December 2017, WT/DS491/R; *European Union – Anti-Dumping Measures on Biodiesel from Indonesia*, Panel Report circulated on 25 January 2018, WT/DS480/R.

3 *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United State)*, Appellate Body Report circulated on 15 May 2018, WT/DS316/AB/RW; *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (Recourse to Article 21.5 of the DSU by the United States)*, Panel Report circulated on 18 January 2018, WT/DS427/RW; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Second Recourse to Article 21.5)*, Appellate Body Report circulated on 14 December 2018, WT/DS381/AB/RW[2].

4 *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, Panel Report circulated on 28 June 2018, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R.

the establishment of panels.⁵ There were 38 new consultation requests; this is the highest number since 1998 and one of the highest numbers since the entry into force of the WTO in 1995. The Dispute Settlement Body (DSB) established panels in 33 disputes. WTO dispute resolution on the level of consultations and panel proceedings seems to function well. The frequent recourse to these instruments by a wide variety of WTO members – including the United States – and the ongoing issuance of panel reports are proof of the point. At the same time, the WTO members remain divided on the selection process to appoint replacements for members of the Appellate Body whose term in office have expired. The United States has continuously refused to agree to appoint new members and/or to appoint existing members for a second term of office after they completed their first term. Therewith, the United States expresses its criticism of the Appellate Body's performance over the last two decades; it alleges that the Appellate Body has usurped powers not attributed to it, by «adding to or diminishing rights and obligations under the WTO Agreement».⁶ At the end of 2018, four of the seven Appellate Body positions remained vacant. During 2018, the Appellate Body was able to issue various reports although the reduced number of Appellate Body members led to delays in resolving disputes. Several Appellate Body proceedings have been on hold. Those panel reports which were appealed in 2018 could not be dealt with either. In these cases, the Appellate Body simply informed the DSB that it would communicate appropriately with participants and DSB members as soon as it knows more precisely when it can schedule the hearing in an appeal. Thus, the legal fate of these panel reports, which have been appealed, is, for the time being, *in limbo*. It is not possible for the DSB to adopt these reports duly.

The impasse in appointing new Appellate Body members was hotly debated in Geneva throughout 2018. The debates have been continuing until this very day, without any success. If the WTO members do not agree on a commonly acceptable solution until the end of 2019, the dispute resolution system – the «crown jewel» of the multilateral trading system, a term used by many advocates of a rules-based system – could be severely jeopardized. Without urgent action, there will be one single Appellate Body member left by December 11, 2019, namely Hong Zhao from China; too few Appellate Body members to hear appeals for which a minimum number of three members is required (at least, the Appellate Body will be able to finalise those appeals which are pending on that date). A variety of proposals for solving the impasse have been tabled. Amongst others, the EU, together with twelve other WTO members (including Switzerland), proposed to amend certain provisions of the Dispute Settlement Understanding (DSU) in 2018; these proposals are made to address such con-

5 WTO Annual Report 2018, 114 et seq., accessible at <www.wto.org> (click the link for Resources/WTO Publications).

6 Office of the United States Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report, 22, accessible at <<https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018>>; MICHAEL HAHN et al., *The Jurisprudence of the World Trade Organization in 2017*, SRIEL 2018, 269.

cerns as the transitional rules for outgoing Appellate Body members, the 90-day timeframe for appellate proceedings, the status of municipal law, findings unnecessary for dispute resolution and the issue of precedent.⁷ These proposals require an amendment of the DSU, *i.e.* the approval and ratification by all 164 WTO members. In April 2019, Taiwan submitted a document proposing to develop guidelines on the future functioning of the Appellate Body with the aim to clarify any explicit or implicit boundaries that the WTO members in the Uruguay Round have intended to impose on the Appellate Body.⁸ It is suggested that such guidelines could be implemented by an authoritative interpretation (*cf.* Article IX:2 of the WTO Agreement) or by a decision of the WTO General Council or the DSB; be it as it may, such action would still need the approval by all WTO members. The United States rejected all these proposals. Furthermore, it declined to present its own proposals as it «considers that, when the WTO dispute settlement system functions according to the rules as agreed by the United States and other WTO Members, it provides a vital body to enforce WTO rights and uphold a rules based trading system.»⁹ So far, the United States has not suggested to formally revise the DSU. However, it remains a mystery as to what other action on the part of the WTO membership might be necessary for the United States to agree to appoint Appellate Body members anew.

In 2018, a special facilitator has been appointed to coordinate the proposals and initiatives to resolve the current differences on the functioning of the Appellate Body between the WTO members.¹⁰ To ensure the functioning of the system irrespective of the ongoing impasse, lawyers have suggested to using arbitration under Article 25 of the DSU to ensure the availability of appeals.¹¹ Moreover, WTO members have begun to sign «non-appeal pacts» in advance so as to agree reciprocally not to appeal WTO panel reports; by doing so, they waive the right to appeal a panel report *ex ante*,

7 Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore, Mexico and Costa Rica to the General Council, dated 11 December 2018, WT/GC/W/752/Rev. 2; see, for an account of the Appellate Body crises and the arguments of the United States, CAROLINE GLÖCKLE, *Die Appellate Body-Krise der WTO – eine Analyse der US-Kritikpunkte*, EuZW 2018, 976–982; JENNIFER HILLMAN, *Three Approaches to Fixing the World Trade Organization’s Appellate Body: the Good, the Bad and the Ugly*, IEL Issue Brief 2018, accessible at <<https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf>>; TETYANA PAYOSOVA, GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, Peterson Institute for International Economics Policy Brief no.18-5(2018), accessible at <<https://www.piie.com/system/files/documents/pb18-5.pdf>>.

8 Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu to the General Council, dated 8 April 2019, WT/GC/W/763/Rev. 1.

9 US 2018 Trade Policy Agenda, *supra*, n. 6, at 22.

10 WTO Annual Report 2018, *supra*, n. 5, at 127.

11 SCOTT ANDERSEN *et al.*, *Using arbitration under Article 25 of the DSU to ensure the availability of appeals*, CTEI Working Paper 2017, at 17.

so to speak.¹² However, from a legal viewpoint, the enforceability of such a non-appeal pact is uncertain should a party change its mind after a panel report has been issued. Lastly, it would be possible to appoint Appellate Body members not by consensus, as has traditionally been the case so far, but by voting (*cf.* Article 9 of the WTO Agreement); an audacious – and hardly promising – action in light of the fact that, by doing so, the United States would be boldly outvoted. At the time of writing, it is far from clear whether the WTO members, acting jointly or as a coalition of the willing, will arrive at a satisfactory solution. It is indeed possible that the WTO dispute resolution system has to cope with another *annus horribilis*.¹³

II. Indonesia – Safeguard on Certain Iron or Steel Products

A. Introduction and Facts

Article XIX of the GATT 1994 and the Agreement on Safeguards set out the rules pursuant to which WTO members may take safeguard measures. According to Paragraph 1 of Article 2 of the Agreement on Safeguards, such measures can be defined as «emergency» actions with regard to increased imports of particular products under such conditions as to cause or threaten to cause serious injury to the importing WTO member's domestic industry. Safeguard measures, one of three types of contingent trade protection measures available to WTO members, may consist of quantitative import restrictions or duty increases to higher than bound rates. The guiding principles of the Agreement on Safeguards are: (i) safeguard measures must be temporary; (ii) they may only be imposed if imports are held to cause or threaten to cause serious injury to a competing domestic industry; (iii) they (generally) be applied on a non-selective (*i.e.* MFN) basis; (iv) they be progressively liberalized while in effect; and (v) the WTO member imposing them (generally) must pay compensation to the WTO members whose trade is affected.¹⁴

The *Indonesia – Iron or Steel Products* case primarily dealt with the question whether a specific duty applied by Indonesia on imports of galvalume constituted a safeguard measure to which the disciplines of the Agreement on Safeguards applied.¹⁵

12 This has been done, *e.g.*, by Viet Nam and Indonesia in the case *Indonesia – Safeguard on Certain Iron or Steel Products*, Appellate Body Report circulated on 15 August 2018, WT/DS496, with respect to procedures under Article 21 and Article 22 of the DSU (Understanding between Indonesia and Viet Nam, WT/DS496/14, para. 7); see for such «non-appeal pacts» STEVE CHARNOVITZ, *The WTO Appellate Body Crisis: A Critique of the EU's Article 25 Proposal*, accessible at <<https://ielp.worldtradelaw.net>>.

13 *Cf.* HAHN *et al.*, *supra*, n. 6, at 269, with respect to the year 2017 as *annus horribilis* for the WTO.

14 See PETER VAN DEN BOSSCHE & WERNER ZDOUC, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, 4th ed., Cambridge 2107, 631 *et seq.*, 647 *et seq.*

15 *Indonesia – Safeguard on Certain Iron or Steel Products*, adopted on 27 August 2018, WT/DS490 and WT/DS496.

In 2014, Indonesia imposed a specific duty on imports of galvalume, defined as flat-rolled products of iron or non-alloy steel, following an investigation by Indonesia's competent authority under its domestic safeguards legislation. The three-year duty is applicable to imports of galvalume from all over the world, with the exception of 120 countries, listed in Indonesia's notification to the WTO Committee on Safeguards, which Indonesia considers to be developing countries. The complainants in this dispute, Chinese Taipei and Viet Nam, argued that the specific duty was a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, and that Indonesia adopted and applied this duty inconsistently with Article XIX:1(a) of the GATT 1994 as well various Articles of the Agreement on Safeguards. In the alternative, if the duty were not be qualified as a safeguard measure, the complainants argued that it violated Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994. Indonesia agreed that the measure was a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, but submitted that it was adopted and applied consistently with Indonesia's obligations under both the GATT 1994 and the Agreement on Safeguards.

The panel was composed on 9 December 2015. Australia, Chile, China, the European Union, India, Korea, the Russian Federation, Ukraine and the United States reserved their rights to participate in the panel proceedings as third parties. In addition, Chinese Taipei reserved its right to participate in the panel proceedings concerning the dispute between Indonesia and Viet Nam (DS496) as a third party, while Viet Nam reserved its right to participate in the panel proceedings concerning the dispute between Indonesia and Chinese Taipei (DS490) as a third party. The panel report was delivered on 18 August 2017.¹⁶ On 27 August 2018, the DSB adopted the Appellate Body report, which largely confirmed the panel's findings.¹⁷

B. Findings

1. Qualification as a Safeguard Measure

Before the panel, both parties argued, «albeit for somewhat different reasons», that Indonesia's specific duty on imports of galvalume constitutes a safeguard measure to which the disciplines of the Agreement on Safeguards apply (panel report, para. 7.10). Recalling its duty under Article 11 of the DSU to undertake «an objective assessment of the matter», including «an objective assessment of the applicability of the covered agreements invoked in this dispute» (para. 7.10 and fn. 33 thereto), the panel took as point of departure the text of Article 1 of the Agreement on Safeguards,

¹⁶ Panel Report, circulated on 18 August 2017, WT/DS490/R, WT/DS496/R.

¹⁷ Appellate Body Report, circulated on 15 August 2018, WT/DS490/AB, WT/DS496/AB.

which establishes its scope of application by referring to Article XIX of the GATT 1994. Looking at the text of Article XIX of the GATT 1994, the panel held that:

«(...) one of the defining features of the <measures provided for> in Article XIX:1(a) (*i.e.* safeguard measures) is the suspension, withdrawal, or modification of a GATT obligation or concession that *precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury*, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied.» (para. 7.15)

Applying this reasoning to the case at hand, the panel first found that Indonesia has no binding tariff obligations under Article II of the GATT 1994 with regard to the products subject to the specific duty, meaning that Indonesia's specific duty does not «suspend, withdraw or modify Indonesia's obligations under Article II of the GATT 1994» (para. 7.18). Second, the panel rejected the respondent's argument that the GATT obligation being suspended by the alleged «safeguard measure» was an exception under Article XXIV of the GATT 1994, since that provision does not stipulate a positive obligation to enter into a regional trade agreement (RTA) or to provide a certain level of market access to RTA partners; rather, it is a «*permissive provision*» which allows members to depart from their GATT obligations to establish a customs union and/or free trade area (para. 7.20). Third, the panel held that the developing countries' exception by virtue of Article 9.1 of the Agreement on Safeguards did not lead to the suspension of the MFN treatment obligation pursuant to Article I:1 of the GATT 1994 for the purpose of Article XIX:1(a) of the GATT 1994. Referring to the General Interpretative Note to Annex 1A of the WTO Agreement, the panel argued that «the question of suspension simply does not arise in this context, because the obligation in Article 9.1 to exclude the qualifying imports of developing country Members from the scope of a safeguard measure prevails *as a matter of law* over the MFN obligation in Article I.1» (para. 7.29).

With regard to Indonesia's safeguards investigation, the panel determined that, «while a WTO-consistent investigation is a necessary prerequisite for the application of a WTO-consistent safeguard measure», such investigation does not signify that «any measures adopted as a result of the conclusions in that investigation suspend, modify or withdraw any GATT obligation or concession and, therefore, constitute <safeguard measures> within the meaning of Article 1 of the Agreement on Safeguards» (para. 7.39). For all these reasons, the panel found that the specific duty does not constitute a safeguard measure within the meaning of the Agreement on Safeguards and dismissed all claims under that Agreement.

On appeal, Indonesia submitted that the panel exceeded its terms of reference by carrying out an independent assessment of the question whether the measure at issue is a safeguard measure despite the parties' concurring positions in this regard. The Appellate Body rejected this argument and held that:

«(...) a panel is not only entitled, but indeed *required*, under Article 11 of the DSU to carry out an *independent and objective assessment of the applicability* of the provisions of the covered agreements invoked by a complainant as the basis for its claims, regardless of whether such applicability has been disputed by the parties to the dispute.» (Appellate Body report, para. 5.33, emphasis added)

The Appellate Body further confirmed its case law that «the description of a measure proffered by a party and <the label given to it under municipal law> are <not dispositive> of the proper legal characterization of that measure under the covered agreements» (para. 5.32 and fn. 118 and 119 thereto).

Turning to the substantive issue of whether the panel erred in its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994, the Appellate Body first recalled that «all parties have consistently argued that the duty at issue *is* a safeguard measure» (para. 5.52) and then examined Article 1 of the Agreement on Safeguards, which specifies that «safeguard measures» are measures provided for in Article XIX of the GATT 1994. More specifically, the Appellate Body determined that Article XIX:1(a) of the GATT 1994 requires the suspension, in whole or in part, of a GATT obligation and/or the withdrawal from or modification of a GATT concession, and stressed that «[a]bsent such a suspension, withdrawal, or modification, we fail to see how a measure could be characterized as a safeguard measure» (para. 5.55). It considered that Article XIX:1(a) of the GATT 1994 further indicates that «the suspension of a GATT obligation or the withdrawal or modification of a GATT concession must be designed to pursue a specific *objective*, namely preventing or remedying serious injury to the Member's domestic industry» (para. 5.56). Furthermore, the Appellate Body underlined that, in carrying out the case-by-case analysis required to determine whether a particular measure constitutes a safeguard measure for purposes of WTO law, a panel needs to separate between «the *features* that determine whether a measure can be properly characterized as a safeguard measure» and «the *conditions* that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994» (para. 5.57, emphasis added). In order to determine whether a measure presents the constituent features necessary for the application of the WTO safeguard disciplines, a panel is required to «objectively assess the design, structure, and expected operation of the measure as a whole, identify all the aspects of the measure that may have a bearing on its legal characterization, and recognize which aspects are the most central to the measure» (para. 5.64).

In light of these considerations, the Appellate Body found the panel's reasoning to be «problematic» as it «conflated the constituent features of a safeguard measure with the conditions for the conformity of a safeguard measure with the Agreement on Safeguards» (para. 5.62). While the panel was of the view that, in order to qualify as a safeguard measure, a measure must operate «to the extent and for such a time as may be necessary to prevent or remedy (...) injury» (panel report, paras. 7.15 and 7.16), the Appellate Body held that «[this] issue is not relevant to determining

whether that measure is a safeguard measure for purposes of the *applicability* of the Agreement on Safeguards [but] relates to the separate question whether a safeguard measure is in *conformity* with the procedural and substantive requirements of [that] Agreement» (para. 5.62). The same holds true for the panel's suggestion that, in assessing whether a measure is a safeguard measure, it is relevant to consider whether a measure was adopted «in a situation where all of the conditions for the imposition of a safeguard measure are satisfied» (panel report, para. 7.15). Here again, the Appellate Body held that such considerations are only «pertinent to the question of whether a WTO Member has applied a *safeguard* measure in a WTO-consistent manner» (para. 5.62). Nevertheless, the Appellate Body affirmed the panel's legal characterization of the measure at issue as «the imposition of the specific duty does not suspend any of Indonesia's GATT obligations, nor does it withdraw or modify any of Indonesia's GATT concessions» (para. 5.65). It confirmed the panel's finding that «Indonesia <has no binding tariff obligation with respect to galvalume in its WTO Schedule of Concessions> and is, therefore, <free to impose any amount of duty it deems appropriate> on that product» (para. 5.65). With regard to the exemption of the 120 countries listed in Regulation No. 137.1 from the scope of application of the measure at issue, the Appellate Body determined that this exemption «appears to constitute an ancillary aspect of the measure, which is aimed at according S&D treatment to developing countries», and further held that «[t]he disciplines of Article 9.1 [of the Agreement on Safeguards] set out conditions for the WTO-*consistent* application of safeguard measures», but do not address «the question of whether a measure constitutes a safeguard measure for purposes of the *applicability* of the WTO safeguard disciplines» (para. 5.70, emphasis added).

2. MFN Treatment

Having upheld the panel's finding that Indonesia's specific duty does not constitute a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards, the Appellate Body turned to the panel's finding on the Article I:1 of the GATT 1994 claim against the specific duty as «a stand-alone measure». The panel shared the complainants' view that said duty is a «customs duty» within the meaning of Article I:1 of the GATT 1994 inconsistent with Indonesia's MFN treatment obligation, since «the exclusion of imports of galvalume from the 120 countries listed in Regulation No. 137.1/PMK.011/2014 constitutes an <advantage> granted to <like products> that is not <immediately and unconditionally accorded> to imports of galvalume from all WTO Members» (panel report, para. 7.44).

On appeal, Indonesia only challenged the scope of the panel's terms of reference (but not the panel's substantive analysis or application of Article I:1 of the GATT 1994), by arguing that the MFN claim was outside the panel's terms of reference. Article 6.2 of the DSU, the relevant legal standard in this regard, stipulates two prin-

principal requirements: (i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly (Appellate Body report, paras. 5.77 and 5.78).¹⁸ In assessing whether these two requirements are met, «a panel request [must] be <read as a whole, and on the basis of the language used>» (para. 5.91),¹⁹ «on the face of the panel request as it existed at the time of the filing» (para. 5.79),²⁰ taking into account «the factual background [which] forms part of the narrative in each panel request» (para. 5.92).²¹ The Appellate Body further underlined «that it is the *claims* not the *arguments*, that are to be set out in a panel request in a way that is sufficient to present the problem clearly» (para. 5.80). Applying these considerations to the case at hand, the Appellate Body concluded that «we do not read the reference to the <specific duty imposed as a safeguard measure> [in the panel requests] to connote a *legal* characterization of the measure at issue that narrows the scope of the claims under Art. I:1 of the GATT 1994» (para. 5.93), but rather that «the formulations used in the panel requests in this dispute (...) are sufficient (...) to articulate a claim against the specific duty irrespective of its characterization as a non-safeguard measure» (para. 5.96). Hence, the Appellate Body upheld the panel's finding that the application of Indonesia's specific duty on imports of galvalume originating in all but the 120 countries exempted by Regulation No. 137.1 to be inconsistent with Indonesia's MFN treatment obligation under Article 1:I of the GATT 1994.

C. Commentary

The *Indonesia – Iron or Steel Products* dispute raised the question of the scope of application of Article XIX of the GATT 1994 and the Agreement on Safeguards. More specifically, the panel's definition of a «safeguard measure» was the first attempt in WTO jurisprudence to provide a comprehensive definition of such a measure. This observation starkly contrasts with the quantity of disputes before WTO panels and/or the Appellate Body that concerned measures whose qualification as «safeguard

18 See also Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, circulated on 14 December 1999, WT/DS98/AB/R, para. 120.

19 The Appellate Body referred to its report in *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, circulated on 18 May 2011 WT/DS316/AB/R, para. 641.

20 The Appellate Body referred, *inter alia*, to its report in *China – Measures Related to the Exportation of Various Raw Materials [China – Raw Materials]*, circulated on 30 January 2012, WT/DS394/AB/R, para. 220.

21 The Appellate Body referred, *inter alia*, to its reports in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from Japan* (WT/DS454/AB/R) / *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from the EU*, circulated on 14 October 2015, WT/DS460/AB/R, para. 5.13.

measure» was neither disputed by the parties nor second-guessed by a panel and/or the Appellate Body.²² Against this background, three aspects are noteworthy.

First, while the Appellate Body affirmed the panel's legal characterization of the measure at issue since the imposition of Indonesia's specific duty does not suspend any of Indonesia's GATT obligations nor does it withdraw or modify any of Indonesia's GATT concessions, it did not (fully) uphold the panel's general definition of a safeguard measure. Would the Appellate Body have done so and thus would have confirmed that one of the defining features of a safeguard measure «is the suspension, withdrawal, or modification of a GATT obligation or concession that *precludes a Member from imposing a measure to the extent necessary to prevent or remedy serious injury*, in a situation where all of the conditions for the imposition of a safeguard measure are satisfied» (panel report, para. 7.15, emphasis in the original), the scope of application of the Agreement on Safeguards would have been significantly narrowed. Rather, the Appellate Body stressed the fundamental importance of properly distinguishing between the question of *applicability* of the Agreement on Safeguards, on the one hand, and the question of a *safeguard* measure's *conformity* with the procedural and substantive requirements of that Agreement, on the other hand.

Second, this dispute was rather unusual in that the Appellate Body dismissed the concurring views of all disputing parties on the critical threshold question of whether Indonesia's specific duty was a safeguard measure. The Appellate Body reinforced the importance of a panel's independent and objective assessment of the applicability of the covered agreements' provisions invoked by a complaining party as the basis for its claims, no matter whether such applicability has been disputed by the parties of the dispute or not.

Third, the Appellate Body's findings could be of importance for the current challenge by nine WTO members, including Switzerland, to certain measures imposed by the United States to allegedly adjust imports of steel and aluminium into the United States (*United States – Certain Measures on Steel and Aluminium Products*).²³ The nine complaining parties submitted, *inter alia*, that the additional import duty of 25% on certain steel products and the additional import duty of 10% on certain aluminium products imposed by the United States are inconsistent with a number of the United States' obligations under the Agreement on Safeguards. The United States strongly denied the applicability of the Agreement on Safeguards. In a June 2018 press release, the U.S. Trade Representative Robert E. Lighthizer argued as follows:

«The United States has not taken a safeguard measure. (...) The U.S. duties were imposed by the President pursuant to Section 232 of the Trade Expansion Act of 1962 (...). This is a national security action, plain and simple. The United States is not invoking Article XIX of the GATT, permit-

22 See, for an overview of the case law on safeguard measures, VAN DEN BOSSCHE & ZDOUC, *supra*, n. 14, at 631 *et seq.*

23 See, for the Swiss request to establish a panel in this case, *supra*, n. 1.

ting emergency safeguard actions, to justify its duties. So any assertion that others' retaliatory duties are a justified response to a U.S. <safeguard measure> is, on its face, ridiculous.»²⁴

However, the Appellate Body's decision in the *Indonesia – Iron or Steel Products* dispute underpinned previous WTO case law, according to which WTO panels and the Appellate Body have the final word on whether or not a measure falls within the scope of a covered agreement, including the Agreement on Safeguards. The *United States – Certain Measures on Steel and Aluminium Products* cases will provide the next opportunity for a panel to confirm this stance and to apply the definition of a «safeguard measure», coined by the Appellate Body in the *Indonesia – Iron or Steel Products* dispute, to the measures at issue in the *United States – Certain Measures on Steel and Aluminium Products* cases, namely the additional import duties on certain steel and aluminium products.

III. European Union – PET (Pakistan)

A. Introduction and Facts

The SCM Agreement deals with two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, on the one hand, and the use of countervailing measures to retaliate against injury caused by subsidized imports, on the other hand. Part I of the SCM Agreement stipulates that the agreement only applies to subsidies that are provided *specifically* to an enterprise or industry or group of enterprises or industries. The detailed and comprehensive definition of a subsidy in Article 1 of the SCM Agreement comprises of three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a WTO member that (iii) confers a benefit. Article XVI of the GATT 1994 as well as Parts II and III of the SCM Agreement impose disciplines on the use of subsidies: certain subsidies, *e.g.* export and import substitution subsidies, are *prohibited*; many other subsidies, at least if they are specific rather than generally available, may be challenged when they result in adverse effects to the interests of other WTO members (*actionable* subsidies). Part IV of the SCM Agreement deals with *non-actionable* subsidies.²⁵ Pursuant to Article VI of the GATT 1994 and Part V of the SCM Agreement, WTO members may respond to subsidised trade causing injury to the domestic industry producing the like product by imposing countervailing measures against subsidised imports in order to offset the subsidisation. However, countervailing measures can only be imposed if the investigating authority proves the following three requirements: (i) subsidised imports; (ii) material injury (or threat thereof) to a domestic

²⁴ Statement by Ambassador Robert E. Lighthizer on Retaliatory Duties, dated 26 June 2018, accessible at <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/june/statement-ambassador-robert-e->>.

²⁵ See VAN DEN BOSSCHE & ZDOUC, *supra*, n. 14, at 773 *et seq.*

industry; and (iii) a causal link between the subsidised imports and the injury. The conduct of countervailing investigations as well as the imposition and maintenance in place of countervailing measures are subject to in-depth procedural requirements.²⁶

The *EU–PET (Pakistan)* dispute concerned countervailing measures imposed by the EU in 2010 on imports of certain polyethylene terephthalate (PET) from Pakistan pursuant to the Council Implementing Regulation (EU) No. 857/2010 imposing a definitive countervailing duty (CVD) and collecting definitively the provisional duty imposed on imports of certain PET originating in Iran, Pakistan and the United Arab Emirates.²⁷ The previously applicable provisional measure challenged by Pakistan had been imposed pursuant to Council Regulation (EU) No. 473/2010 imposing a provisional countervailing duty on imports of certain PET originating in Iran, Pakistan and the United Arab Emirates. The complaining party, Pakistan, argued that the EU's countervailing measures are inconsistent with various provisions of the SCM Agreement and the GATT 1994. More specifically, Pakistan challenged the EU Commission's findings that Pakistan's Manufacturing Bond Scheme (MBS), a so-called duty drawback scheme permitting licensed companies to import duty-free production input materials on condition that such materials are consumed in the production of a product which subsequently is exported, and its Long Term Financing of Export-Oriented Projects (LTF-EOP) were countervailable subsidies contingent upon export performance (panel report, para. 3.1.a and b). In addition, Pakistan claimed that the EU Commission, with respect to its causation analysis, acted inconsistently with Article 15.5 of the SCM Agreement (para. 3.1.c), and further, with respect to its obligation to disclose results of the verification visit to the exporting producer in Pakistan, acted inconsistently with Article 12.6 of the SCM Agreement (para. 3.1.d).

The panel was composed on 25 March 2015. Its report, which upheld the majority of the claims set forth by Pakistan, was delivered on 6 July 2017.²⁸ In September 2017, the United States and China reserved their rights to participate in the proceedings for appellate review as third parties. The Appellate Body report, mainly confirming the panel's findings, was adopted on 28 May 2018.²⁹

26 See VAN DEN BOSSCHE & ZDOUC, *supra*, n. 14, at 846 *et seq.*

27 *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, adopted on 28 May 2018, WT/DS486/AB/R.

28 Panel Report, circulated on 6 July 2017, WT/DS486/R.

29 Appellate Body Report, circulated on 16 May 2018, WT/DS486/AB/R.

B. Findings

1. Expiry of the Measure at Issue

On 3 March 2016, the EU filed a request for a preliminary ruling asking the panel to terminate all work in this dispute since the relevant EU countervailing measures on PET from Pakistan had expired on 30 September 2015, at which time the associated countervailing duties on certain PET from Pakistan had been removed. Referring to Article 3.4, Article 3.7 and Article 11 of the DSU, the EU submitted that «as the measure at issue had expired, it could be understood to have been <withdrawn> within the meaning of Article 3.7 of the DSU, and thus a positive solution had been secured» (panel report, para. 7.10, referring to the EU's request for a preliminary ruling). Pakistan argued that the EU's request «lacks any basis in the text of the DSU or the practice of panels and the Appellate Body» (para. 7.11, referring to Pakistan's response to the EU's preliminary ruling request at para. 1.3) and hence asked the panel to reject the EU's termination request.

On 19 May 2016, the panel informed the parties about its denial of the EU's request to cease all work in this dispute. The panel acknowledged that the measure at issue had ceased to have legal effect due to its expiry on 30 September 2015, which, according to the panel, meant that it was impossible for the EU to «withdraw» the measure at issue pursuant to Article 3.7 of the DSU. However, taking note of WTO panel and Appellate Body jurisprudence stating «that panels have discretion in deciding whether to make findings regarding expired measures»,³⁰ the panel decided to continue its work in the present dispute based on the following three considerations: first, the panel noted that the measure at issue expired after the establishment of the panel; second, the panel had regard to the fact that Pakistan continued to request the panel to make findings with respect to the expired measure; and third, the panel considered «it a reasonable possibility that the European Union could impose CVDs on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute» (para. 7.13). With respect to the third consideration, the panel took into account that Pakistan claimed «that a wide range of Pakistani exports benefit from the MBS and that the parties dispute, on a fundamental level, how investigating authorities should determine the extent to which duty drawback schemes like the MBS may constitute countervailable subsidies within the meaning of the SCM Agreement» (para. 7.13).

On appeal, the EU submitted that the panel disregarded its «basic obligations under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to make findings on Pakistan's claims despite the expiry of the measure at issue», and hence requested the Appellate Body to reverse the entirety of the panel report and to

³⁰ The panel in para. 7.31 referred, *inter alia*, to the Appellate Body Report in *China – Raw Materials*, supra, n. 20, para. 263.

declare the panel's findings and legal interpretations moot and of no legal effect (Appellate Body report, para. 5.12). The Appellate Body rejected the EU's request. With regard to a panel's duty under Article 11 of the DSU, as informed by Article 3 of the DSU, the Appellate Body stated:

«Panels have a margin of discretion in the exercise of their inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure. Rather, a panel, in the exercise of its jurisdiction, has the authority to assess objectively whether the <matter> before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue.» (para. 5.51)

Applying these considerations to the case at hand, the majority of the Appellate Body concluded that the panel's reasoning reflected an objective assessment of «the matter» before it, according to which «the matter» still required to be examined since the parties continued to disagree «as to the <applicability of and conformity with the relevant covered agreements> with respect to the [EU] Commission's findings underpinning the expired measure at issue» (paras. 5.38 et seq. and para. 5.51). In a separate opinion, one Appellate Body member disagreed with the majority's finding on the objective assessment.³¹ This member held that «the European Union's assertion, regarding the absence of a risk of re-imposition of the same measure, (...) warranted a detailed examination by the Panel. Yet the Panel dismissed this assertion summarily» (para. 5.57). He highlighted that a panel should first make the objective assessment of whether the «matter» before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue, before undertaking its duty pursuant to Article 11 of the DSU to «make an assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements» (para. 5.58). Against this background, the disagreeing Appellate Body member concluded that «none of the three considerations relied upon by the Panel, at paragraph 7.13 of its Report, sufficiently demonstrates that the Panel objectively assessed whether 'the matter' before it (...) had been fully resolved or still required to be examined, following the expiry of the measure at issue in this dispute» (para. 5.59).

2. Duty Drawback Scheme – Government Revenue Foregone

As mentioned in the introductory part above, the SCM Agreement deems a subsidy to be given if there is a financial contribution by a government that confers a benefit

31 See, with respect to the rising number of separate opinions of WTO panelists and Appellate Body members over the last years, *infra* IV.C.

on the recipient. Article 1.1 of the SCM Agreement provides for an exhaustive list of types of financial contribution, including «government revenue, otherwise due, that is forgone or not collected». Footnote 1 of the SCM Agreement, however, stipulates that «the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts *not in excess* of those which have accrued, *shall not be deemed to be a subsidy*» (emphasis added). The panel in the current dispute referred to this as the «excess remissions principle» (panel report, para. 7.37).

In the case at hand, a Pakistani PET producer and exporter, named Novatex, used Pakistan's MBS to obtain remissions of import duties on imported PET production inputs. As mentioned, duty drawback schemes allow domestic producers to obtain reductions on import duties otherwise payable on production inputs if such inputs are consumed in the production of finished goods destined for export. Under the MBS, a licensing company that imports inputs posts securities in the amount of import duties due on those inputs. Upon export of the company's products, Pakistan remits the security to that company if it presents documents indicating that said inputs were used in its production of the exports (para. 7.29). The EU argued that «all duties remitted to Novatex – rather than any purported excess remission – constituted a countervailable subsidy, contingent on export performance, in the form of revenue forgone otherwise due that conferred a benefit to Novatex», essentially since, in the EU's view, «Pakistan lacked a reliable system to confirm what inputs Novatex used in producing its exported PET and because Pakistan conducted no further examination regarding that issue» (para. 7.30). Pointing at the context provided by Annexes I to III of the SCM Agreement, the EU held that, with respect to duty drawback schemes, investigating authorities must not always equate the amount of the subsidy with excess remissions, but rather that, if the conditions set out in Annexes II and III are not given, footnote 1 cannot be interpreted to stipulate that a subsidy can only exist by reason of excess remissions (para. 7.32). Pakistan challenged this approach. It asserted that «footnote 1 of the SCM Agreement limits the financial contribution that may be found to exist to the excess remission» (para. 5.75) and submitted that «by finding that all remitted duties, rather than excess remissions [only], constituted a financial contribution and thus a countervailable subsidy, the Commission violated, *inter alia*, Articles 1.1(a)(1)(ii) and 3.1(a) of the SCM Agreement» (para. 7.31).

The panel rejected the EU's position and found that nothing in Annex II and/or Annex III to the SCM Agreement provides a relevant reason to deviate from the «excess remissions principle». The panel held that this principle «provides the legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constitute a financial contribution in the form of revenue forgone otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement», and further considered that «even if the exporting Member has no reliable system of

tracking inputs consumed in the production of a relevant exported product (...) investigating authorities should still determine [on the basis of the information available] if an excess remission occurred» (para. 7.56). Therefore, the panel concluded that «by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties (...) was <in excess of those which have accrued> within the meaning of footnote 1 of the SCM Agreement, the Commission acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement» (para. 7.60). Since there was thus no valid determination of a financial contribution, the panel further found that the EU «incorrectly identified the existence of a subsidy», and hence «acted inconsistently with Article 3.1(a) by improperly finding the existence of a 'subsidy' that was contingent on export performance» (para. 7.60).

On appeal, the Appellate Body held that a harmonious reading of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement, Annexes II and III to the SCM Agreement and Ad Note to Article XVI of the GATT 1994 confirmed the following:

«[D]uty drawback schemes can constitute an export subsidy that can be countervailed only if they result in a remission or drawback of import charges <in excess> of those actually levied on the imported inputs consumed in the production of the exported product. Thus, in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is limited to the *excess* remission or drawback of import charges on inputs and does not encompass the entire amount of the remission or drawback of import charges.» (para. 5.138)

Accordingly, the Appellate Body concluded that the panel did not err in its interpretation of these provisions. It upheld the panel's findings that the EU erred under Article 1.1(a)(1)(ii) of the SCM Agreement and violated Article 3.1(a) of the SCM Agreement due to its failure «to provide a reasoned and adequate explanation for why the entire amount of remitted duties was <in excess of those which have accrued> within the meaning of footnote 1 of the SCM Agreement» (para. 5.143).

3. Government-financed Loan – Benefit

Pakistan further provided, through its LTF-EOP program, government-financed loans through pre-approved banks for certain qualifying companies. The banks were not allowed to charge interest rates above a specified level, which consisted of a base interest rate determined by the State Bank of Pakistan (SBP) on an annual basis, plus a further mark-up of up to three percentage points. In June 2005, Novatex concluded a loan under the LFT-EOP with a consortium of five banks (panel report, para. 7.62). The EU submitted that the LFT-EOP loan was a countervailable subsidy, arguing that, based on the EU Commission's comparison of the amount of interest Novatex paid on the total outstanding amount of the LFT-EOP loan during the investigation period with the relevant commercial benchmark interest rate, the LFT-EOP loan conferred a «benefit» to Novatex (para. 7.62). In this context, Pakistan raised two

related claims, one under the *chapeau* of Article 14 of the SCM Agreement and one under Article 14(b) of the SCM Agreement. Pakistan held that the EU Commission's determination, according to which the LFT-EOP Loan conferred a «benefit» to Novatex within the meaning of Article 1.1(b) of the SCM Agreement, is inconsistent with the *chapeau* of Article 14 since the EU Commission failed to «adequately explain the application of its method of calculating the benefit in light of its own guidelines on this subject» (para. 7.63). Pakistan also argued that the EU Commission's method of calculating the «benefit» was not consistent with Article 14(b) of the SCM Agreement, «i.e. <because the application of its method was not <consistent with [the] guidelines [in Article 14(b)]>, because the EU failed to identify a comparable commercial loan>» (para. 7.63, referring to Pakistan's first written submission, para. 6.25).

As mentioned above, a financial contribution by a government or a public body is a subsidy within the meaning of Article 1.1 of the SCM Agreement only if it *confers a benefit* which must be received or enjoyed by a beneficiary or a recipient. Panels and the Appellate Body have established that a benefit arises when the recipient is «better off» than he or she would be «absent the [financial] contribution». ³² This interpretation of a «benefit» within the meaning of Article 1.1(b) of the GATT 1994 is supported by Article 14 of the SCM Agreement. In order to determine the – often hypothetical scenario – of a beneficiary's situation without the financial contribution, it is necessary to conduct a benchmark comparison with the situation of other economic actors in the same market.

In casu, the panel started its evaluation by looking at the relevant parts of Article 14 of the SCM Agreement. In particular, the panel determined that, according to the guidelines in Article 14(b), «a benchmark under Article 14(b) is a «comparable commercial loan», which «should have as many elements as possible in common with the investigated loan to be comparable» such that the comparison is meaningful», and further that «[i]n the absence of a commercial loan actually available in the market, a proxy may be used» (para. 7.66). ³³ A key question before the panel was thus whether the SBP interest rate is associated with a comparable commercial loan. Upon an extensive review of the arguments and evidence submitted, the panel concluded that the EU's determinations «[left] serious and systemic doubts as to whether the SBP Rate is associated with comparable commercial loans in terms of structure, maturity, and size, and the identities of borrowers» (para. 7.101), and hence found that the EU Commission, in calculating the benefit conferred to Novatex by the LFT-EOP Loan, acted inconsistently with Article 14(b) of the SCM Agreement due

32 See, e.g., Panel Report in *United States – Tax Treatment for «Foreign Sales Corporations»*, *Recourse to Article 21.5 of the DSU by the European Communities*, circulated on 14 January 2002, WT/DS108/RW, para. 8.46.

33 The panel referred to the Appellate Body Report in *United States – Anti-Dumping and Countervailing Duties (China)*, circulated on 11 March 2011, WT/DS379/AB/R, paras. 476 and 487.

to its failure to properly identify what Novatex would have paid on a «comparable commercial loan» in calculating the benefit conferred (para. 7.102). Consequently, the panel found that the EU acted inconsistently with Article 1.1(b) of the SCM Agreement (para. 7.102). Furthermore, the panel concluded that the EU acted inconsistently with the *chapeau* of Article 14 of the SCM Agreement due to «the absence of any meaningful explanations in the [EU Commission's] Determinations as to why the loans with which the SBP Rate was associated were comparable to the LTF-EOP Loan» (para. 7.104). The panel's findings regarding the LTF-EOP loan were not appealed against.

4. Causation Analysis

Causation is an important requirement in the context of trade remedies and hence also of the SCM Agreement. Article 15.5 of the SCM Agreement requires the demonstration of a causal link between subject imports and the injury to the domestic industry. It further calls for a «non-attribution» analysis proving that the injury caused by «any known factors other than the subsidized imports» is not attributed to subsidised imports under investigation.

In the investigation leading to the present dispute, the EU Commission began its causation analysis, as expected, by determining that a causal link existed between the subsidised imports and the material injury to the EU industry (Appellate Body report, paras. 5.146 *et seq.*). The EU Commission then examined the «effect of other factors», namely of (i) the export activity of the EU industry, (ii) the imports from Korea and other third countries, (iii) competition from the non-cooperating producers in the EU, (iv) the economic downturn in 2008 and the contraction in demand that accompanied this downturn, (v) the geographical location of the EU industry and (vi) the lack of vertical integration, and found that none of these six factors broke this causal link (paras. 5.151 and 5.152). Consequently, the EU argued that the imports from Pakistan caused material injury to its domestic industry (paras. 5.153 *et seq.*). Before the panel, Pakistan submitted two claims under Article 15.5 of the SCM Agreement: first, that the EU Commission's «approach to causation», more specifically its use of the «break the causal link» approach, was not consistent with the requirements of Article 15.5 of the SCM Agreement; and second, that the EU Commission had failed to conduct a proper «non-attribution» analysis with respect to four specific «other known factors». On appeal, Pakistan only challenged the panel's findings on the first claim (para. 5.156).

The panel began its analysis of Pakistan's claims by setting out its understanding of the relevant legal standard:

«It is well-established that Article 15.5 [of the SCM Agreement] requires an investigating authority to demonstrate the existence of a causal link between subject imports and the injury to the domestic industry. This causal link must involve a genuine and substantial relationship of cause

and effect> between these two elements. The third sentence of Article 15.5 calls for a <non-attribution> analysis which requires the authorities to ensure that the injury caused by <known factors other than the subsidized imports> is not attributed to the subsidized imports under investigation. The non-attribution analysis in Article 15.5 calls for an assessment that involves separating and distinguishing the injurious effects of the other factors from the injurious effects of the subsidized imports and requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.» (para. 7.111)³⁴

With regard to Pakistan's argument that the EU Commission's «break the causal link» approach is inconsistent with the three-step analysis laid down by the Appellate Body in *US – Wheat Gluten*,³⁵ the panel held, based on the Appellate Body's clarification in *US – Lamb*, that «the <three steps> identified in *US – Wheat Gluten* <simply describe a logical process for complying with the obligations relating to causation>»,³⁶ and further found «nothing in either the SCM Agreement or jurisprudence indicating that the three-step methodology described in *US – Wheat Gluten* is mandatory in any circumstances presented in this case» (para. 7.115). The panel thus rejected Pakistan's argument that the Appellate Body report in *US – Wheat Gluten* prescribes a methodology regarding causation analysis to which the European Commission improperly failed to adhere (para. 7.116). Concerning Pakistan's argument that the Commission's approach prejudged its analysis of other known factors, the panel, although agreeing with Pakistan that there were certain deficiencies in the EU Commission's analysis of specific other known factors, essentially found that «the Commission sufficiently separated and distinguished the effects of two known factors, demonstrating that the Commission did not simply <dismiss> the role of other known factors because the Commission had earlier considered that a causal link existed between subject imports and injury to the domestic industry» (para. 7.119). The panel thus rejected Pakistan's claim that the use of the «break the causal link» methodology by the European Commission in this case was not consistent with Article 15.5 of the SCM Agreement (para. 7.127).

Upon appeal, the Appellate Body upheld the panel's findings. In particular, it concluded that:

«While an investigating authority must complete a non-attribution analysis *before* it reaches an overall conclusion as to the existence of a <causal relationship>, Article 15.5 does *not* prescribe any particular methodology an investigating authority must use in carrying out such analysis. Thus, it

34 The panel referred to the Appellate Body Report in *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, circulated on 6 October 2016, WT/DS473/AB/R, para. 6.125.

35 Pakistan relied on the observation of the Appellate Body in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, circulated on 22 December 2000, WT/DS166/AB/R, para. 69.

36 The panel referred to the Appellate Body Report in *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, circulated on 1 May 2001, WT/DS177/AB/R and WT/DS178/AB/R, para. 178.

is possible for an investigating authority to address the two components of causation in two separate steps. In doing so, an investigating authority can consider a <causal link> to exist between the subsidized imports and the injury on the basis of the first step of its analysis, provided that the authority compares the significance of such a <causal link> with the significance of the injurious effects of other known factors and objectively assesses whether this link qualifies as <genuine and substantial> causal relationship in light of those other factors.» (para. 5.227, emphasis added)

With regards to the EU Commission's analysis of «other known factors», Pakistan argued that the Commission failed to perform a proper «non attribution» analysis with respect to each of the following four factors (panel report, para. 7.128): (i) imports from Korea; (ii) economic downturn; (iii) competition from non-cooperating EU producers; and (iv) oil prices. The panel examined Pakistan's arguments concerning the Commission's analysis of each of these four factors in turn, and came to the following conclusion: Pakistan was not able to establish that the EU acted in violation of Article 15.5 of the SCM Agreement by failing to conduct a proper «non-attribution» analysis of imports from Korea and the economic downturn (paras. 7.135 and 7.145). Reversely, the Commission's analysis of competition from non-cooperating EU producers as well as of oil prices was inconsistent with Article 15.5 of the SCM Agreement (paras. 7.152 and 7.160).

5. Verification Visits

Article 12.6 of the SCM Agreement provides, in relevant part, that «[t]he investigating authorities may carry out investigations in the territory of other Members as required (... and ...) on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object», and further that «the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to [Article 12.8], to the firms to which they pertain and may make such results available to the applicants». Article 12.8 of the SCM Agreement stipulates, in relevant part, that «[t]he authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures».

In December 2009, the EU Commission conducted a verification visit at Novatex's premises in Karachi, Pakistan. Pakistan claimed that the EU Commission failed to provide the results of said verification visit in violation of Article 12.6 of the SCM Agreement (panel report, para. 7.161). The panel upheld this claim. It determined that neither the SCM Agreement nor any other covered agreement defines the term «results» of verification visits nor has it yet been extensively defined in any adopted panel or Appellate Body report, and further held that the verification's main purpose is «to enable investigating authorities to confirm the accuracy of information supplied» (para. 7.168). The panel concluded that «the <results> of a verification visit

should reflect the extent to which information supplied was ascertained to be accurate» (para. 7.168) and rejected the EU's argument that the term «results» of verification visits in Article 12.6 of the SCM Agreement should be interpreted in light of Article 12.8 of the SCM Agreement and its obligation to disclose «essential facts», reasoning, *inter alia*, that Article 12.6 and Article 12.8 of the SCM Agreement are «substantively distinct» (para. 7.172). Since «the <results> that were provided to Novatex via the disclosure documents related only to certain observations concerning the MBS» (para. 7.181), the panel concluded that the EU Commission acted inconsistently with Article 12.6 of the SCM Agreement as it failed to adequately provide the «results» of the Novatex verification visit to Novatex (para. 7.182).

C. Commentary

The *EU – PET (Pakistan)* dispute dealt with some fundamental questions of what constitutes a «subsidy» under WTO rules in the context of duty drawback schemes permitting domestic producers to import duty-free production input materials on condition that such materials are consumed in the production of products which are subsequently exported. Both the panel's and the Appellate Body's findings are accurate and mostly based on established case law. From a legal point of view, the following two aspects are noteworthy.

First, with respect to the legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement, both the panel and the Appellate Body held that, «in the context of duty drawback schemes, the financial contribution element of the subsidy (*i.e.* the government revenue foregone that is otherwise due) is limited to the *excess* remission or drawback of import charges on inputs and does not encompass the entire amount of the remission or drawback of import charges» (Appellate Body report, para. 5.138, emphasis in the original). This «excess remissions principle» is, according to the panel, «the final word in how remissions under duty drawback schemes (...) are to be identified as subsidies» (panel report, para. 7.52). The panel further underlined that «even if the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product (...) investigating authorities should still determine if an excess remission occurred» (para. 7.56). The panel and the Appellate Body applied the «excess remissions principle» rather strictly, permitting products to be countervailed under the SCM Agreement only insofar as the remission of import duties obtained by companies under duty drawback schemes is actually in excess of the duties accrued on imported inputs. Moreover, the *EU – PET (Pakistan)* dispute confirmed that investigating authorities are required to have an evidentiary basis that is appropriate for their determinations.

Second, both the panel and the Appellate Body confirmed the validity of the traditional «break the causal link» approach and its consistency with Article 15.5 of the SCM Agreement. As mentioned, they both found that while it is well established

that Article 15.5 requires an investigating authority to demonstrate the existence of a causal link between subject imports and the injury to the domestic industry, this provision does not prescribe any particular methodology an investigating authority must use in undertaking this causation analysis. Nevertheless, the Appellate Body stressed that the wording of Article 15.5 of the SCM Agreement points out that «an investigating authority must separate and distinguish the injurious effects of other known factors from the injurious effects of the subsidized imports *before* it reaches an *overall* conclusion as to the existence of a <causal relationship> between the subsidized imports and the injury to the domestic industry» (Appellate Body report, para. 5.172, emphasis added).³⁷

IV. Brazil – Taxation

A. Introduction and Facts

The principle of non-discrimination lies at the heart of WTO law. The two pillars of this principle are the MFN treatment obligation, which prohibits discrimination between foreign goods and services, on the one hand, and the national treatment obligation, which prohibits discrimination between domestic and foreign goods and services, on the other hand. With respect to trade in goods, Article I and Article III of the GATT 1994 contain the relevant provisions to this effect; they apply across the board, subject only to explicitly provided exceptions, such as the general exceptions pursuant to Article XX of the GATT 1994. Taxation schemes of WTO members run the risk of being discriminatory and henceforth violating the MFN treatment obligation and/or the national treatment obligation, when imported goods from one WTO member are levied with a higher tax than imported goods from another WTO member and/or when imported goods are levied with a higher tax than domestic goods. Specifically, Article III:2 of the GATT 1994 stipulates a national treatment obligation with respect to «internal taxes». Moreover, some taxation schemes may have the same effect as subsidies and may thus become relevant under the SCM Agreement.

The *Brazil – Taxation* case concerned a set of tax measures enacted by Brazil.³⁸ The complainants, the EU and Japan, challenged the following three Brazilian tax programs:

37 Cf. also MARC BENITAH, Pakistan Challenges the «Break the Causal Link» Approach as inconsistent with Article 15.5 of the SCM: Unlikely to succeed?, International Economic Law and Policy Blog, posted on 13 November 2017, accessible at <<https://ielp.worldtradelaw.net>>.

38 Appellate Body Report, *Brazil – Certain Measures Concerning Taxation and Charges*, circulated on 13 December 2018, WT/DS472/AB/R.

- ICT programs: tax reduction or exemption schemes for the production, technological development and sale of certain information communication technology (ICT) goods, such as semiconductors and digital television equipment;
- INOVAR-AUTO program: a tax regime to incentivize technological innovation in the car sector through reducing taxes for certain motor vehicles; and
- PEC and RECAP programs: two tax programs granting tax advantages to exporting companies.

The EU and Japan argued that these programs were inconsistent with the GATT 1994 and the SCM Agreement. In particular, they argued that the tax incentives provided by the ICT programs and the INOVAR-AUTO program favoured domestic goods and goods from MERCOSUR countries, while treating goods imported from other countries less favourably. They concluded that, by doing so, Brazil acted inconsistently with both the MFN treatment obligation and the national treatment obligation, violating Article I:1, Article III:2 and Article III:4 of the GATT 1994 as well as Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement). Moreover, they concluded that the ICT programs, the INOVAR-AUTO program and the PEC and RECAP programs amounted to prohibited export subsidies, violating Article 3.1(b) of the SCM Agreement.

Brazil brought forward various arguments in order to defend the ICT programs, the INOVAR-AUTO program and the PEC and RECAP programs: First, Brazil argued that these measures do not concern products *per se*, but rather production and process methods (PPMs), and henceforth fall outside the scope of the GATT 1994 and the SCM Agreement. Second, Brazil submitted that the measures at issue are subsidies within the meaning of Article III:8(b) of the GATT 1994; therefore, they are exempted from the national treatment obligation. *Eventualiter*, Brazil argued that any violation of obligations under the GATT 1994 were justified under one of the general exceptions pursuant to Article XX of the GATT 1994 or under the Enabling Clause. The Enabling Clause exempts certain measures from the MFN treatment obligation by allowing to entertain preferential arrangements between developing and least-developed countries.³⁹

The panel was composed on 17 December 2014. Argentina, Australia, Canada, China, Colombia, India, Japan, Korea, Russia, South Africa, Chinese Taipei, Turkey and the United States reserved their third-party rights. The panel issued its report on 30 August 2017.⁴⁰ The Appellate Body report and the (modified) panel report were adopted by the DSB on 11 January 2019.⁴¹

39 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903, dated 28 November 1979.

40 Panel Report, circulated on 30 August 2017, WT/DS472/R.

41 Appellate Body Report, circulated on 13 December 2018, WT/DS472/AB/R.

B. Findings

1. Scope

The panel first addressed the scope of, and the relationship between, the invoked provisions of the GATT 1994 and the SCM Agreement. With regard to the subparagraphs of Article III of the GATT 1994 (national treatment), the panel stated that a violation of Article III:2 of the GATT 1994 does not *per se* exclude the possibility of an additional violation of Article III:4 of the GATT 1994, reiterating established case law according to which a single measure can be inconsistent with two or more subparagraphs of Article III of the GATT 1994 at the same time (para. 7.34).⁴² Thus, the panel accepted to examine the claims under both of these provisions.

The panel then turned to the question whether the scope of the relevant provisions of the GATT 1994 and the SCM Agreement is limited to products as such, or whether it also encompasses PPMs. The issue of PPMs has been debated hotly in WTO law for years within the context of the «likeness test» pursuant to Article I:1 and Article III:4 of the GATT 1994. This test is decisive for determining whether two products are «like» and, therefore, whether Article I:1 and Article III:4 of the GATT 1994 apply. While, in the context of the likeness debate, it is still not clear whether, and if so to what extent, PPMs are relevant for an assessment of whether two products are «like» or not, the PPM issue in the case at hand proved to be less controversial. The panel stated that the notion of «products» as used in the GATT 1994 and the SCM Agreement could not be interpreted overtly formalistically as being «limited to measures directed at products only once they are in the market» (para. 7.63). Accordingly, the measures at issue can be subjected to the disciplines of the GATT 1994, the SCM Agreement and the TRIMs Agreement, even if they relate to the respective PPMs within the sense of «pre-market» requirements. This finding of the panel was not appealed.

Brazil did not challenge either of these findings of the panel on the scope and applicability of the relevant provisions of the GATT 1994 and the SCM Agreement on appeal.

2. Non-Discrimination

The panel then examined the complainants' claim that the ICT programs and the INOVAR-AUTO program are not consistent with Article I and Article III of the GATT 1994. Starting with the national treatment obligation, it recalled that Article III:2 of the GATT 1994 contains three relevant criteria: first, the domestic and for-

⁴² The panel referred to the Appellate Body Report in *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, circulated 17 June 2011, WT/DS371/AB/R, para. 114 and footnote 144.

eign products at issue have to be «like» or «directly competitive or substitutable» (*cf.* Ad Note to Article III:2 of the GATT 1994); second, imported products shall not be subject to internal taxes «in excess» of those applied to like domestic products; and third, the last sentence of Article III:2 refers to Article III:1 of the GATT 1994 which states that taxes should not be applied «so as to afford protection to domestic production». The panel examined the ICT programs and the INOVAR-AUTO program, respectively, in light of these three criteria. It concluded that both measures violated Article III:2 of the GATT 1994 by taxing «like» foreign products «in excess» of domestic ones, since foreign ICT products and motor vehicles cannot benefit from the same tax reduction and exemptions and are subject to a higher tax burden (paras. 7.154, 7.174 and 7.688). Furthermore, the panel held that the ICT programs and the INOVAR-AUTO program impose higher administrative burdens on foreign products and henceforth are not consistent with the national treatment obligation pursuant to Article III:4 of the GATT 1994 (paras. 7.230 and 7.255). Since both programs also qualified as trade-related investment measures, they were further found to violate Article 2.1 of the TRIMs Agreement, in analogy to Article III of the GATT 1994 (paras. 7.365 and 7.806). On appeal, the Appellate Body upheld these findings of the panel.

The panel turned to assess the claim that the INOVAR-AUTO program violated the MFN treatment obligation. It concluded that the INOVAR-AUTO program violated Article I:1 of the GATT 1994, since «the tax reductions accorded to imported products from MERCOSUR members and Mexico under the INOVAR-AUTO program are advantages granted by Brazil to products originating in those countries, which are not accorded immediately and unconditionally to like products originating in other WTO Members» (para. 7.1048). Brazil submitted as a defense that the preferential treatment of these countries was justified under the Enabling Clause. The panel found, however, that the INVOAR-AUTO program could not be justified under the Enabling Clause, since MERCOSUR and the other regional trade agreements (RTAs) invoked under Article 2(c) of the Enabling Clause did not contain any regulation on internal taxation and, therefore, lack the necessary nexus (para. 7.1112).⁴³ On appeal, the Appellate Body upheld these findings of the panel.

The panel rejected Brazil's argument that the violations of Article I and Article III of the GATT 1994 could be justified by recourse to Article XX of the GATT 1994. Some aspects of the ICT programs – namely the social inclusion tax – could preliminarily be justified under Article XX(a) of the GATT 1994 by reasons of public moral (para. 7.583); however, they did not meet the standard of necessity enshrined in Article XX(a) of the GATT 1994, since less trade restrictive and even more effec-

43 One panelist submitted a dissenting opinion, basing his/her dissent on procedural issues concerning questions of notification under the Enabling Clause as well as the burden of proof (Panel Report, paras. 7.1123 *et seq.*).

tive alternatives would have been readily available (para. 7.622). Similarly, the panel rejected Brazil's arguments with respect to the INOVAR-AUTO program. It accepted that the tax benefits under this program relate to car safety and thus to public health according to Article XX(b) of the GATT 1994 as well as to the reduction of CO₂ emissions and thus to the conservation of natural resources according to Article XX(g) of the GATT 1994. However, again, Brazil failed to prove that no less trade restrictive alternative measures would have been available. Therefore, Brazil could not successfully invoke Article XX of the GATT 1994. Article XX of the GATT 1994 was not at issue before the Appellate Body.

Brazil further submitted that the contested measures were exempted from the MFN treatment obligation by means of the exception clause in Article III:8(b) of the GATT 1994. This article states that «the provisions of Article III shall not prevent the payment of subsidies exclusively to domestic producers». Regarding the legal nature of this provision, the Appellate Body found that Article III:8(b) of the GATT 1994 is «akin to an *exception* to the national treatment obligation and serves as a justification or affirmative defence for measures that would otherwise be inconsistent with that obligation»; contrarilywise, Article III:8(a) of the GATT 1994 «*precludes* the application of the national treatment obligation in Article III to government activities falling within its scope» (para. 5.84, emphasis in the original). Citing its own precedents to this effect, the Appellate Body rejected Brazil's claim according to which it could invoke Article III:8(b) of the GATT 1994, stating that the term «payment of subsidies» pursuant to this provision has to be interpreted to cover only public expenditures, *i.e.* the *payment* of subsidies, and thus does not encompass tax reduction (para. 5.91).⁴⁴ This finding was not undisputed, as the separate opinion issued by one member of the Appellate Body demonstrates. In this member's view, the overtly narrow interpretation of the term «payment of subsidies» unduly distinguishes between various forms of subsidies (payment of subsidies, tax reductions) irrespective of their practical effect and thus undermines the careful balance of rights and obligations under the SCM Agreement, being not consistent with Article 3.2 of the DSU and the fundamental principle of effectiveness in treaty interpretation (paras. 5.137 and 5.138).

3. Subsidy

Turning to the claims concerning the SCM Agreement, the panel noted at the outset that a preferential tax measure may be qualified as a «subsidy», according to Article 1 of the SCM Agreement, if (i) it is considered a «financial contribution by a public body» and (ii) «a benefit is thereby conferred». A preferential tax measure typically

⁴⁴ The Appellate Body referred to its report in *Canada – Certain Measures Concerning Periodicals*, circulated on 30 June 1997, WT/DS31/AB/R, p. 34.

falls within the scope of Article 1.1(a)(ii) of the SCM Agreement, according to which there is a benefit if «government revenue that is otherwise due is foregone or not collected».⁴⁵ However, the wording of «otherwise due» is vague. Therefore, the determination of whether a particular loan or tax reduction is a derogation from a generally applicable regime can be challenging. *In casu*, the assessment proved to be even more difficult due to the fact that the Brazilian measures involved a range of different tax arrangements. Following established case law, in particular the «otherwise due test» developed by the Appellate Body in the *United States – Foreign Sales Corporation* case,⁴⁶ the panel (i) identified the tax treatments at issue, including the policy reasons for their enactment, (ii) identified a benchmark for comparison, *i.e.* the tax treatment of a comparably situated taxpayer, and (iii) compared the tax treatment in the challenged programs with the (hypothetical) benchmark tax payer (para. 7.395). Based thereon, the panel concluded that all of the contested tax measures constitute «government revenue otherwise due», since the «Brazilian Government will not receive the amount of tax that would have otherwise been due (...) in the case of domestic products» (paras. 7.495, 7.842 and 7.1211).

With regard to the «benefit» determination and the necessary benchmark comparison, it is often challenging to delineate the relevant market.⁴⁷ *In casu*, however, the panel simply based its assessment on panel reports, which stated that «whenever there is revenue foregone by the government, a benefit is conferred».⁴⁸ In light of this, the panel held that a benefit was conferred by the contested tax measures at issue (paras. 7.491, 7.845 and 7.1213). Therefore, the panel found that the tax measures at issue met both criteria of a «subsidy» pursuant to Article 1 of the SCM Agreement.

However, the qualification as a subsidy does not automatically lead to a violation of the SCM Agreement. As the panel stressed at various occasions throughout its report, a WTO member is generally «allowed to grant subsidies exclusively to their domestic producers with the aim of fostering the development of their industries» (paras. 7.501 and 7.848). The panel underlined that «the SCM Agreement prohibits (only) subsidies contingent upon the use of domestic over imported goods, or upon export performance, because those types of subsidies are particularly trade-distorting» (para. 7.502). *In casu*, the contested tax measures contained the requirement to use domestic over imported goods (ICT-programs and INOVAR-AUTO program;

45 Cf. the «government revenue foregone» analysis in the *EU – PET (Pakistan)* case *supra*, III.B.

46 Appellate Body Report, *United States – Tax Treatment for «Foreign Sales Corporations»*, circulated on 24 February 2000, WT/DS108/AB/R, para. 90; cf. also Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, circulated on 12 March 2012, WT/DS353/AB/R, paras. 812–815.

47 See, e.g., Appellate Body Report in *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program [Canada – Renewable Energy]*, circulated on 6 May 2013, WT/DS412/AB/R and WT/DS426/AB/R, paras. 5.223–5.246.

48 The panel referred, *inter alia*, to the Panel Report in *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, circulated on 12 March 2012, WT/DS353/AB/R, paras. 7.169–7.171.

panel report, paras. 7.500 and 7.847) or the requirement for accreditation as an «exporting company» (PEC and RECAP programs; panel report, para. 7.1238). In light of these considerations, the panel concluded that the contested measures are prohibited under Article 3.1(a) and (b) of the SCM Agreement.

The Appellate Body partly reversed the panel's findings under the SCM Agreement. Regarding the definition of a subsidy, the Appellate Body found that the panel failed to convincingly demonstrate that the PEC and the RECAP programs amounted to «government revenue otherwise due» according to Article 1.1(a)(1)(ii) of the SCM Agreement (para. 5.172). In the Appellate Body's view, the panel limited its analysis to defining a general rule of taxation (to which the challenged tax programs are the exception) and neglected to make a proper comparison, *i.e.* to identify the «comparably situated tax payers» (paras. 5.167 *et seq.*). Moreover, the Appellate Body partly reversed the panel's findings under Article 3.1 of the SCM Agreement, stating that the panel did not refer to the proper basis of comparison to demonstrate that some tax measures under the ICT programs and the INOVAR-Auto program contained a contingency upon the use of domestic over imported goods (paras. 6.30 and 6.31). Consequently, only some sub-measures of the ICT programs were ultimately found to be prohibited under Article 3.1 of the SCM Agreement and thus to be incompatible with the SCM Agreement *per se*. However, the Appellate Body did not have sufficient factual findings to determine the benchmark, and it thus declined to complete the analysis under Article 1 and Article 3 of the SCM Agreement (para. 5.174).

C. Commentary

The *Brazil – Taxation* case forms part of a series of trade disputes relating to taxes. It shows, once again, that WTO members have to pay careful attention to the effects of their domestic tax measures and design them in line with WTO law, in order not to unduly distort international competition. This becomes even more important considering that tax law is often perceived as a field of national regulation, and states do not give enough consideration to the external effects of domestic taxation schemes. In this regard, the correlation of taxes and international trade law also bears relevance for Switzerland, since Swiss tax regimes have repeatedly been the focus of international attention (such as the tax privileges for companies that operate predominantly internationally – the so-called <ring-fencing> – which are in the process of being abolished with the introduction of a new system of corporate taxation by the Federal Act on Tax Reform and AHV Financing of 2019).⁴⁹

⁴⁹ See FEDERAL DEPARTMENT OF FINANCE, Factsheet Tax proposal and AHV financing (TRAF), accessible at <<https://www.efd.admin.ch/efd/en/home.html>> and Link to Documentation/Legislation/Votes/Referendum on the Federal Act on Tax Reform and AHV Financing.

The panel and the Appellate Body's findings do not break into new legal territory. They are based on established case law. From a legal viewpoint, four aspects are noteworthy. First, regarding the scope and applicability of the pertinent provisions under the different WTO agreements, the panel emphasized once again that tax measures can be challenged under more than one WTO agreement – *in casu* the GATT 1994 and the SCM Agreement – and may be considered to be inconsistent with more than one provision of an agreement at the same time – *in casu* Article III:2 and Article III:4 of the GATT 1994. Regarding the principle of non-discrimination, the panel and the Appellate Body reiterated the strict interpretation of Article III:2 of the GATT 1994, underlining that even the smallest degree of taxation «in excess» is «too much» (panel report, para. 7.147; Appellate Body report, para. 5.35). Regarding the general exceptions pursuant to Article XX of the GATT 1994 and the Enabling Clause, the panel and the Appellate Body followed the general tendency of the WTO adjudicators to apply these provisions in a stringent way, by not accepting the respondent's arguments for justifying deviations from GATT 1994 obligations too lightly.

Second, an interpretative issue where the Appellate Body added some clarification concerns Article III:8(b) of the GATT 1994. The Appellate Body considers this provision to provide a *justification* for measures that would otherwise be inconsistent with the national treatment obligation, contrary to Article III:8(a) of the GATT which establishes a *derogation* from the national treatment obligation for government procurement activities. Arguably, this finding primarily has procedural implications: it lies upon the respondent to bear the burden of proof to advance a justification, while the burden to successfully invoke a derogation may vary.⁵⁰ Moreover, the Appellate Body reiterated previous case law in which Article III:8(b) of the GATT 1994 had been interpreted narrowly, so as to encompass only «subsidies» in the sense of an active monetary contribution. This finding might give rise to controversial discussions, as the separate opinion of one member of the Appellate Body illustrates. This member pointed out, and rightly so, that the Appellate Body's finding neglects the practical effect of a measure which might be the same when a WTO member actively grants a payment compared to when a WTO member passively does not collect a revenue due.

Third, the Appellate Body reversed some findings of the panel regarding Article 3.1 of the SCM Agreement, stating that the panel did not apply the correct benchmark to determine whether the measures were «contingent (...) upon export performance» and/or «contingent (...) upon the use of domestic over imported goods».

50 See, e.g., the Appellate Body Report in *Canada – Renewable Energy*, supra, n. 47, where the Appellate Body stated that «the characterization [of Article III:8(a) of the GATT 1994] as a derogation does not pre-determine the question as to which party bears the burden of proof with regard to the requirements stipulated in the provision» (para. 5.56).

However, the Appellate Body did not propose an alternative legal test, nor did it offer any concrete results to the question whether the challenged measures were compatible with the SCM Agreement or not. This is somewhat unsatisfactory, since it leaves one of the core issues of the case unresolved and may, ultimately, provoke new disputes on this very issue; an unwelcomed prospect, in particular with a sideview to another case in which the panel and Appellate Body reports did not produce concrete findings with respect to the interpretation of Article 3.1 of the SCM Agreement, namely the *EC – Large Civil Aircraft* case, which has occupied a place on the WTO DSB agenda for 14 years already and marks the lengthiest case in WTO history.⁵¹

Fourth, both the *EU – PET (Pakistan)* case (Appellate Body report) and the *Brazil – Taxation* case (panel report and Appellate Body report) generated separate opinions of individual panelists and/or Appellate Body members. This is a noteworthy observation, considering that between 1995 and 2006, only 5% of all panel reports and 2% of all Appellate Body reports contained separate opinions.⁵² By 2017, this number has increased only slightly to meet the 10% threshold.⁵³ These low numbers have always stood in contrast to other judicial fora, most notably the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR), where individual judges have traditionally been issuing separate – concurring or dissenting – opinions often.⁵⁴ The reasons for the rising number of separate opinions rendered by WTO panelists and Appellate Body members over the last years – apparently having culminated in 2018 – are not easy at hand. At least with respect to the Appellate Body, perhaps the current refusal of the United States to agree to reappoint Appellate Body members plays a role: concerns about re-election cease to be high on the agenda of the Appellate Body members, and they might be more readily prepared to issue their personal views.⁵⁵ It remains to be seen whether, and if so how, the rising number of separate opinions will affect the functioning and effectiveness of WTO dispute resolution. On the one hand, separate opinions contribute to the transparency of the

51 See, for this case, MATTHIAS OESCH, *The Jurisprudence of WTO Dispute Resolution* (2011), 22 *Swiss Rev. Int' L. (SZIER/RSDIE)* (2012), at 176–188.

52 MEREDITH KOLSKY LEWIS, *The Lack of Dissent in WTO Jurisprudence*, 9 *J. Int'l Economic L.* (2006), at 899.

53 JEFFREY L. DUNOFF & MARK A. POLLACK, *The Judicial Trilemma*, 111 *American J. Int'l L.* (2017), at 236.

54 LEWIS, *supra*, n. 52, 901; see, for a detailed comparative analysis of the *modus operandi* of the Court of Justice of the European Union (CJEU), the ICJ, the ECtHR and the WTO dispute resolution mechanism, DUNOFF & POLLACK, *supra*, n. 53, at 225–276; cf. also HELEN KELLER & LAURA ZIMMERMANN, *Dissenting Opinions am Bundesgericht?*, 138 *I Zeitschrift für Schweizerisches Recht* (2019), at 141.

55 Both LEWIS, *supra*, n. 52, at 914, and DUNOFF & POLLACK, *supra*, n. 53, 237, list the short terms in office of the Appellate Body members as a possible reason for them to refrain from voicing separate opinions; DUNOFF & POLLACK, *supra*, n. 53, at 267, further point out that, although Article 14(3) of the DSU requires anonymity of separate opinions, it is difficult in practice to stick to the anonymity rule with a view to the fact that panels and the division of the WTO Appellate Body hearing appeals consist of only three members.

decision finding process within the adjudicatory forum; they ensure that the considerations among the judges and the rationales for their findings are disclosed and explained properly without the need to compromise behind closed doors. On the other hand, at times of high political polarization where WTO members find themselves under mounting pressure to disregard unwelcomed WTO rulings, WTO panelists and Appellate Body members might be well advised to issue separate opinions with caution. After all, separate opinions are proof of the point that a dissenting view on the authoritative findings of the majority of the judges might legitimately co-exist, *i.e.*, that more than one legally «correct» interpretation is possible. Therefore, against this background, separate opinions might undermine the authority of panel and Appellate Body reports and endanger legal security.