



ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

# WTO Dispute Settlement: Case Summaries (2017)

---

May 2018

# CONTENTS

Introduction .....	2
Glossary of Terms .....	3
European Union — Measures Affecting Tariff Concessions on Certain Poultry Meat Products .....	4
Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products .....	7
Russian Federation — Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union .....	9
European Union — Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan .....	12
Indonesia — Importation of Horticultural Products, Animals and Animal Products .....	15
Indonesia — SAFEGUARD on Certain Iron or Steel Products .....	18
United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint .....	21
Russia — Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy .....	23
European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia .....	26
China — Anti-Dumping Measures on Imports of Cellulose Pulp from Canada .....	29
United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products Recourse to Article 21.5 of the DSU .....	32
Brazil — Certain Measures containing Taxation and Charges .....	36
United States — Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia .....	40
United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China .....	43
ELP International Trade and Customs Team Practice Heads .....	45

## INTRODUCTION

Settling trade disputes in a timely manner is important. It mitigates the negative effects of unresolved international trade conflicts. For this reason, the World Trade Organization (“WTO”) dispute settlement system – often called the jewel in the crown of the WTO – is frequently resorted to and has gained practical importance amongst WTO members. In other words, the WTO dispute settlement system matters.

The first edition of ‘WTO Dispute Settlement: Case Summaries’ has been prepared by the International Trade and Customs Team of Economic Laws Practice (“ELP”) to capture legal developments at the WTO in 2017. It analyzes all panel and Appellate Body reports adopted by the WTO dispute settlement body from 1 January 2017 till 31 December 2017 in a non-exhaustive manner.

This publication summarizes main facts and substantive findings contained in panel and Appellate Body reports for each decided dispute. The purpose of this publication is to act as a ready reference as you and your organization track developments in the WTO dispute settlement system.

This publication is provided for your convenience. It should not be considered as legal advice.

We would appreciate any comments or feedback that you have which will help make this publication and our continuing efforts more valuable to you and your organization.

## GLOSSARY OF TERMS

AOA	Agreement on Agriculture
AB	Appellate Body
ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ASF	African Swine Fever
BCI	Business Confidential Information
DIMD	Department for Internal Market Defense of the Eurasian Economic Commission
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT	General Agreement on Tariffs and Trade 1994
MBS	Manufacturing Bond Scheme
PET	Polyethylene Terephthalate
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRQ	Tariff Rate Quotas
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
VSF	Viscose Staple Fibre

## EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS ON CERTAIN POULTRY MEAT PRODUCTS

Dispute	Complainant	Respondent	Dispute
WT/DS492	China	European Union	Re-negotiation of tariff concessions under the General Agreement on Tariffs and Trade (1947).

### FACTS OF THE DISPUTE

This dispute arose from challenges to modification of tariff concessions on certain poultry products by the European Union (“EU”). These modifications take place in the form of negotiations which are to be held in accordance with Article XXVIII of GATT. China, who was the Complainant in this dispute, contended that modifications in EU’s schedule of commitments resulting from this change in tariff concessions had detrimentally impacted its exports of poultry products into EU’s market. EU modified its tariff schedules on poultry products in two phases. As per Article XXVIII of GATT, these modifications in schedules take place in the form of re-negotiation exercises. Countries that hold “principle substantial interest” in the products on which the modified tariffs will apply participate in these negotiations.

- **The first modification exercise** concluded in 2006 where *ad valorem* rates were replaced by Tariff Rate Quotas (“TRQ”) on three tariff lines for the concerned products.
- Subsequently, **the second modification** exercise took place in 2009 where *ad valorem* rates were replaced by TRQs on seven tariff lines.

During both rounds of modification exercises, EU identified Brazil and Thailand to hold “principle supplying interest”. Based on this assessment, EU proceeded to negotiate tariff concessions under Article XXVIII:5 of GATT. As expected, majority of the TRQs were allocated to Brazil and Thailand. EU arrived at this conclusion based the actual import data in the three years preceding the initiation period for both rounds of tariff negotiations. Notably, during this period, China’s imports to EU were negligible – a fact that China did not rebut.

At around the same time, EU had also imposed Sanitary and Phytosanitary (“SPS”) measures which had resulted in decrease in Chinese poultry products into EU. However, when these measures were removed in 2008, the Chinese poultry products increased significantly. EU’s withdrawal of the SPS measure overlapped with the second modification exercise. China contended at the WTO that the EU had not adjusted the TRQ rates to reflect the data which included an increase in poultry products from China.

Primarily, the WTO panel was tasked with the identification of two main issues:

<b>Issue 1: Article XXVIII:(1) of GATT</b>	Whether EU had acted inconsistently with Article XXVIII:(1) of GATT by not identifying China as holding “principal or substantial supplying interest”?
<b>Issue 2: Article XIII:2(d) of GATT</b>	Whether EU had acted inconsistently with Article XIII:2(d) of GATT as well as the chapeau to Article XIII:2 of GATT by failing to determine which country had “substantial interest” in supplying the concerned product?

## LEGAL ANALYSIS

### Substantial supply interest

On the first claim, China argued that the EU had acted inconsistently with Article XXVIII: (1) of GATT by not recognizing it as holding a principal or substantial supplying interest. After hearing the arguments of China and EU, the WTO panel formulated the legal question that it needed to address as:

“[w]hether, in the context of negotiations under Article XXVIII:5, the importing Member is under a legal obligation to re-appraise which WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations.”

The panel considered that a 10% import share benchmark is required for determining which WTO Member held a substantial supplying interest.

Based on an intensive analysis, the panel concluded that China could not sufficiently demonstrate that it had met this threshold of “substantial interest”. Further, the panel also disagreed with China’s contention that an importing WTO Member is under a legal obligation to re-appraise which WTO Member held a principal or substantial supplying interest to reflect changes in import shares taking place after the negotiations had been initiated. Therefore, it rejected China’s claim on this issue.

### Special Factor

On the second claim, China argued that EU had acted inconsistently with provisions of Article XIII:2(d) of GATT by allocating majority of the TRQs to Brazil and Thailand since it did not consider increase in imports by China during the same time-period after the SPS measure was removed in 2008. China also argued that EU had acted inconsistently with the *chapeau* of Article XIII:2 of GATT read in conjunction with Article XIII:2 of GATT. The *chapeau* states that:

“In applying import restrictions to any product, contracting parties should aim at a distribution of trade in such products approaching as closely as possible the shares which the various contracting parties might be expected to obtain in absence of such restrictions...”

China contended that EU had failed to consider the “special factor” of the SPS measure. This, according to China, violated the principles embedded in Article XIII:2(d) of GATT which states:

---

“[In] cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product...”

---

The panel agreed with China that increase in imports from China, following relaxation of SPS measures, was a “special factor” that EU should have taken into account while identifying the countries with “substantial interest”. In doing so, the panel held that EU had acted inconsistently with Article XIII:2(d) of GATT by not recognizing China as holding a substantial interest under two tariff lines.

## DECISION

---

China successfully demonstrated to the panel that increase in imports from China, following the relaxation of SPS measures, was a “special factor” that had to be considered when allocating TRQs based on “substantial interest”. As a result, the panel held that EU did not enter into “meaningful negotiations” with China on two-tariff lines where China had substantial share.

# INDONESIA – MEASURES CONCERNING THE IMPORTATION OF CHICKEN MEAT AND CHICKEN PRODUCTS

Dispute	Complainant	Respondent	Dispute
WT/DS484	Brazil	Indonesia	Import ban on chicken and chicken products affected through complex regulatory regime.

## FACTS OF THE DISPUTE

This dispute arose from challenges to certain measures implemented by Indonesia that resulted in decline of imports of chicken meat and chicken products from Brazil. These measures were introduced with a view to ensure that all chicken meat in Indonesia must be 'halal'. Consumption of halal meat is a requirement as per Islamic laws. Brazil did not contest the reasoning behind the imposition of import related measures based on halal-ness of the chicken meat; rather, it challenged the manner in which the import related measures was implemented, which it considered to be trade restrictive and violating WTO law.

Imports of chicken and chicken products from Brazil to Indonesia had dropped to almost zero since 2006 for chicken cuts and 2009 for whole chicken. This was a direct result of a general prohibition of *halal* meat in Indonesia after samples dating 1999 were found to be non-*halal* in nature. Primarily, Brazil challenged the following inconsistencies in Indonesia's implementation of the import ban:

- Chicken cuts were **not explicitly listed in Indonesia's import list**;
- Chicken cuts **could only be utilized in certain kitchens** in the hospitality sector;
- Time for filing application for import approval and the validity of import license obtained was minimal;
- **Undue certification delays** on part of the relevant authority of the Government of Indonesia.

## LEGAL ANALYSIS

### Nature of the measure

The panel began its analysis by trying to determine the design of the challenged measures to identify whether the measures were in the form of an import prohibition, a quota, a license, or an import ban. This resulted in the panel making an exhaustive inquiry into the nature of the measure. The panel's task was further complicated by the fact that some of the challenged measures had been revoked and replaced by other measures during the panel stage. The panel



concluded that the measures would best be categorized as a legal ban as the items had to be categorically mentioned in an import permission list (also called a 'positive list') which did not include chicken and chicken products.

### **No "General Exceptions" defense**

Brazil contended that while the measures to ban import of chicken cuts and chicken products were capable of securing *halal*-ness of meat, they also effectively disallowed Indonesian consumers the benefit of imported *halal* chicken cuts and chicken products. Brazil also presented the merits of introducing a certification procedure as an effective alternate measure to ensure of *halal*-ness. The Panel agreed with Brazil and held that Indonesian measures violated Article XI:1 of GATT. The panel also agreed with Brazil's contention that a justification could not be sought under Article XX(d) of GATT. In doing so, the panel categorically rejected Indonesia's argument that it had introduced the measures "which it considered was necessary to secure compliance with Indonesia's laws and regulations on public health, deceptive practices and customs enforcement". The panel noted that Indonesia had failed to provide any evidence that the measure contributed to these objectives.

One of the challenged Indonesian measures also restricted the use of the imported chicken meat to hotel, restaurant, catering, manufacturing and supermarket. This resulted in nearly 70% of the Indonesian markets becoming "*de jure*" inaccessible to importers. Indonesia unsuccessfully attempted to defend its measure under Article XX(b) of GATT which permits for exception to WTO law "to protect human, animal or plant life or health". Indonesia argued that "thawing frozen chicken at tropical temperatures" was a risk to human health and was, therefore, exempted from traditional markets. However, this effectively restricted the sale of frozen chicken in traditional markets with cold storage facilities. Therefore, the panel suggested that amendments should be made in the Indonesian law to permit for sale of "frozen chicken meat in markets with cold storage facilities".

### **Undue delay in certification**

According to Indonesia, the country of origin certificate and the business unit approval certificate – both of which were mandatory requirements – were introduced to verify the health of the animal to be imported. The panel, however, observed that these requirements did not address the aspect of *halal*-ness of the meat. Moreover, the panel noted that information on *halal*-ness was not necessary to ensure fulfilment of sanitary requirements. Based on this assessment, the panel concluded that delay by Indonesian authorities to issue health certificate because of information on *halal* assurance was undue since it is not related to sanitary and phytosanitary measures.

## **DECISION**

---

Brazil's challenge of Indonesia's import measure was upheld by the panel in accordance with Article XI:1 of GATT. Indonesia decided not to challenge the panel report. At the Dispute Settlement Body ("DSB") meeting on 22 November 2017, Indonesia informed the DSB that it would need a reasonable period of time to bring the measures found to be inconsistent into conformity with its WTO obligations.

## RUSSIAN FEDERATION - MEASURES ON THE IMPORTATION OF LIVE PIGS, PORK AND OTHER PIG PRODUCTS FROM THE EUROPEAN UNION

Dispute	Complainant	Respondent	Dispute
WT/DS475	European Union	Russian Federation	Import ban of pork and pork products from an outbreak of African Swine Flu.

### FACTS OF THE DISPUTE

This dispute arose after the Russia applied a general prohibition on live pigs, pork and other pig products from all EU following reported cases of African Swine Fever (“ASF”) in Estonia, Latvia, Lithuania and Poland. Four relevant EU Member States implemented measures to contain the spread of ASF but Russia continued to maintain its prohibition and decided not to apply the concept of ‘regionalisation’ (i.e., excluding imports only from affected areas and allowing imports from all non-affected areas or processing facilities). On 23 February 2017, the Appellate Body issued its report where it, for most part, upheld findings of the panel report. To recall, the panel had earlier concluded that Russia’s prohibition of imports of live pigs, pork and other pig products from the EU violated its obligations under the SPS Agreement.

#### Panel finding

EU challenged Russia’s measures under the following provisions of the SPS Agreement:

- Article 3 of SPS Agreement relating to the **harmonization of SPS measures with international standards**;
- Article 6 of SPS Agreement relating to **regionalization conditions**;
- Article 5 of SPS Agreement relating to the use of **scientific evidence when applying SPS measures**;
- Articles 2.3 and Article 5.5 of SPS Agreement on **discriminatory treatment**.

Russia argued that its decision to ban imports from parts of EU which were considered to be unaffected by ASF was implemented on an “objective basis”. The panel had disagreed with the Russia’s submissions and concluded that the measures were more trade restrictive than what was necessary to prevent the spread of ASF. Further, evidence submitted by the EU to the WTO panel also demonstrated that Russia had continued to import “like” products from other neighbouring countries, including Belarus, which were also affected by ASF.

## Legal analysis

The Appellate Body upheld majority of the panel's findings. However, an important finding by the panel relating to Article 6 of SPS Agreement was reversed. Article 6 of SPS Agreement discusses the concept of "regionalization". This article is further sub-divided into three parts:

- Article 6.1 of the SPS Agreement indicates that WTO Members must adapt SPS measures to the area from which the good originated;
- Article 6.2 of the SPS Agreement states that WTO Members must recognize disease-free areas, which are determined based on geography, ecosystems and the effectiveness of SPS controls;
- Article 6.3 of the SPS Agreement placed burden of the exporting WTO Member to provide evidence of a "disease-free" status for relevant areas, whereas the importing WTO Member has the right to reasonable access to the area for inspecting, testing, and other relevant procedures.

The Appellate Body agreed with the EU that the panel had erred in finding that Russia recognized the concept of "pest- or disease-free areas" or of "low pest or disease prevalence" in respect of ASF. EU, as part of its cross-appeal, argued that the panel had wrongly considered that Article 6(2) of SPS Agreement required an "abstract" recognition of the concept of regionalization. The Appellate Body found that the panel had failed to analyze if Russia's practice with respect to SPS measures provided an effective opportunity for the EU to claim that certain areas within its territory were "pest- or disease free or of low pest or disease". In other words, the Appellate Body upheld a robust interpretation of the concept of "regionalization". Therefore, the Appellate Body reversed the panel's findings and found that the EU ban was inconsistent with Article 6(2) of SPS Agreement.

Besides this, Russia had argued that the panel had erred in interpreting Article 6(3) of SPS Agreement. It argued that Article 6(3) of SPS Agreement contemplated a certain period of time for Russia to evaluate and verify evidence provided by the EU. The Appellate Body rejected this argument. Instead, it interpreted the provision of Article 6(3) of SPS Agreement to mean that while all evidence in respect of SPS characteristics of the relevant areas were needed to be evaluated, the specific requirement of considering the evidence provided by the importing WTO Member was not contained in Article 6(3) of SPS Agreement.

Further, the Appellate Body held that the obligation of the importing WTO member in connection to the process of adapting measures to regional SPS characteristics are set forth in Articles 6(1) and Article 6(2) of SPS Agreement. Article 6(3) of SPS Agreement sets out the duties of an exporting Member claiming that areas within its territory are "pest- or disease-free". Based on this determination, the Appellate Body considered that the panel's primary task was to evaluate whether the evidence provided by the EU – in this case, the exporting country – was sufficient to enable Russia to decide regarding the "pest status" of the relevant areas. Therefore, the Appellate Body upheld the panel's interpretation of Article 6(3) of SPS Agreement.

## DECISION

---

The Appellate Body report was adopted on 21 March 2017. EU and Russia agreed on a reasonable period of time of 8.5 months for Russia to comply with the report. In December 2017, EU requested authorization from the DSB to suspend concessions at the level of EUR 1.39 billion. Russia informed the DSB that it had complied with the Appellate Body

report. The matter has now been referred to arbitration in line with Article 22.6 of the Dispute Settlement Understanding (“DSU”).

## EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

Dispute	Complainant	Respondent	Dispute
WT/DS486	Pakistan	European Union	Method of calculation of quantum of “subsidy”. This case deals with <i>PET</i> products but the implications are industry-wide.

### FACTS OF THE DISPUTE

This dispute arose from countervailing duties imposed by the EU on imports of certain polyethylene terephthalate (“PET”) from Iran, Pakistan and United Arab Emirates. Pakistan claimed that EU had improperly countervailed the products under investigation. *Novatex*, a producer/exporter of PET products based in Pakistan, received remission of import duties on products marked for exports. Pakistan agreed with the EU’s determination that more amount had been remitted than that which had been utilized in the inputs into the export-marked products. However, Pakistan disagreed with the EU’s determination that all duties remitted to the company, and not those that were in excess, would constitute a countervailing subsidy. The EU, however, considered that it was appropriate to countervail all remissions, rather than excess remissions since Pakistan lacked a reliable system to confirm the inputs used in producing products linked for exports.

Pakistan’s primary claims were as follows:

- EU had acted inconsistently with Articles 1 (along with the text of footnote 1) and 3 and Annex I of the SCM Agreement in finding an export subsidy to exist with respect to Pakistan’s Manufacturing Bond Scheme (“MBS”);
- EU had acted inconsistently with Article 14(b) of the SCM Agreement since it had incorrectly determined the benefit for the Long-Term Financing of Export-Oriented Projects programme;

### LEGAL ANALYSIS

#### Excess Remission Principle

EC had determined that the MBS program provided a financial contribution in the form of revenue foregone as it permitted import of duty-free input material under the condition that it is used for subsequent exports; Pakistan did not contend that a subsidy existed.

However, the EC treated the entire amount of import duties that was otherwise payable as revenue foregone since it found that Pakistan did not have an effective implementation and monitoring system. Pakistan relied on footnote 1 of the SCM Agreement to explain that the MBS program granted a WTO-inconsistent subsidy only where the subsidy was

“in excess of those which have accrued.” Further, Pakistan argued that the EC, however, failed to identify the quantum of excess remission of duties paid on imports. The legal basis for this assertion was Annex I, items (i) and (h), Annex II and Annex III of the SCM Agreement.

The primary disagreement between the parties was whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as a financial contribution under Article 1.1 of the SCM Agreement where the exporting Member:

- Did not have an effective system or procedure in place to monitor the inputs consumed in the production of the exported product;
- Failed to carry out a further examination based on the actual inputs involved in determining whether an excess payment occurred under the duty drawback scheme;
- EU acted inconsistently with Article 12.6 of the SCM Agreement since it failed to meet its transparency obligations; and,
- EC had acted inconsistently with Article 15.5 of the SCM Agreement since it had not conducted a non-attribution analysis.

---

Footnote 1 to the SCM Agreement and the Ad Note to Article XVI of the GATT 1994 contemplate that a duty drawback scheme “shall not be deemed to be a subsidy” so long as there is no “excess” remission of duties or taxes from those which have accrued. Consequently, if a duty drawback system were to provide for exemption or remission of duties or taxes in amounts that exceed the amounts of “duties or taxes that have accrued,” then such a system may be “deemed to be a subsidy” under the terms of Article 1.1 of the SCM Agreement.

---

EU agreed to the existence of the excess remission principle within the SCM Agreement. However, EU considered that where purported remission of duties did not satisfy the requirements listed in the Annexes then the investigating authority was permitted to, **firstly**, examine whether the measure was a financial contribution under Article 1.1 of the SCM Agreement; and **secondly**, to countervail the full amount of the financial contribution.

The panel, however, rejected EU’s argument. Instead, it agreed with Pakistan’s argument that the excess remissions principle provided the only legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constituted a financial contribution in the form of revenue forgone that was otherwise due. Therefore, even if Pakistan had no reliable system of tracking inputs consumed in the production of a relevant exported product, the panel considered that it was EU responsibility to determine if an excess remission had occurred.

### Benchmark of benefit

The panel found that the EU had acted inconsistently with Article 14(b) of the SCM Agreement as it had incorrectly determined the benefit for the Long-Term Financing of Export-Oriented Projects programme (“LTF-EOP”). The panel also found that EU had applied an incorrect benchmark in violation of Article 14(b) of the SCM Agreement. This is because EU had failed to identify the amount the exporter would have paid on “comparable commercial loans” while calculating the benefit received through the LTF-EOP loan.

Pakistan also contended that EU's analysis was inconsistent with its obligations under Article 1.1(b) of the SCM Agreement as it had improperly analyzed the existence of benefit. The panel, in agreeing with Pakistan, held that EC had acted inconsistently with Article 1.1(b) of the SCM Agreement because of having acted inconsistently with Article 14(b) of the SCM Agreement.

### Verification visits

The panel held that EU acted inconsistently with Article 12.6 of the SCM Agreement since it failed to meet its transparency obligations. The disclosure of the verification visit results by EU was not considered sufficient to disclose the outcome of the verification. Moreover, the panel held that EU's failure to adequately provide the results of the verification visit to *Novatex* was also a violation to Article 12.6 of the SCM Agreement.

### Causation and flawed non-attribution analysis

Pakistan also argued that EU had failed to properly assess the effects of certain known factors such as rising oil prices and the 2008-financial crisis in its analysis. The panel agreed with Pakistan that EU had acted inconsistently with Article 15.5 of the SCM Agreement since it had not conducted non-attribution analysis vis. a vis. competition from non-cooperating EU producers and oil prices. However, it determined that Pakistan had failed to establish non-attribution analysis with respect to the financial crisis and ensuing economic downturn.

### Conclusion

The panel report was in favour of Pakistan on majority of the issues. The role of the investigating authority in determining excess remission even in cases where the verification system is not reliable has now been appealed by the EU. A cross-appeal has also been filed Pakistan on the limited point of causation.

## INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS

Dispute	Complainant	Respondent	Dispute
WT/DS487	United States & New Zealand	Indonesia	Import ban and onerous regulatory requirements restricting imports of horticultural products, animals and animal products to Indonesia.

### FACTS OF THE DISPUTE

This dispute arose from import licensing regimes implemented by Indonesia. New Zealand and United States, the Complainants in this dispute, contended that the challenged regime-imposed restrictions on the importation of horticultural products and animal products that were contrary to WTO law. Based on the design of the framework legislation, the purpose of these import licensing regimes was to “control the import and export” of products and provide priority to the selling of local products. New Zealand and United States argued that Indonesia has created and imposed import licensing regimes that limited the importation of covered products through numerous prohibitions and restrictions. These measures included:

- Application windows on import permits that prevent importation for several months in one year;
- Limitations that were established at the start of each three and/or a six month import period that are conditioned upon types of products that can be imported, quantity of imported products, origin of the products, and through which Indonesian port they are permitted to enter from;
- Seasonal bans on imports of horticultural products during the harvest period in Indonesia;
- Prohibitions on imports of certain products when their market prices fall below a certain government-set level;
- Ban on the importation of animal products that are not listed in Indonesia’s import licensing regulations; and
- Requirement that importers purchase local products, as a condition of importation.

In total, the New Zealand and United States challenged eighteen measures through which Indonesia prohibited and restricted the importation of horticultural products and animals and animal products. The panel found each of the challenged measures to restrict or prohibits imports of the covered products resulting in violation of Article XI:1 of GATT. The panel did not accept Indonesia’s defense on general exception listed under Article XX of the GATT.



There were two primary challenges in Indonesia's appeal:

<b>Challenge 1: Article XI:1 of GATT</b>	Whether the panel was correct in sequencing the analysis of the challenged measures under Article XI:1 of GATT rather than Article 4.2 of the Agreement on Agriculture
<b>Challenge 2: Article XX of GATT</b>	Whether the burden of proof under Article XX of GATT lay with Indonesia.

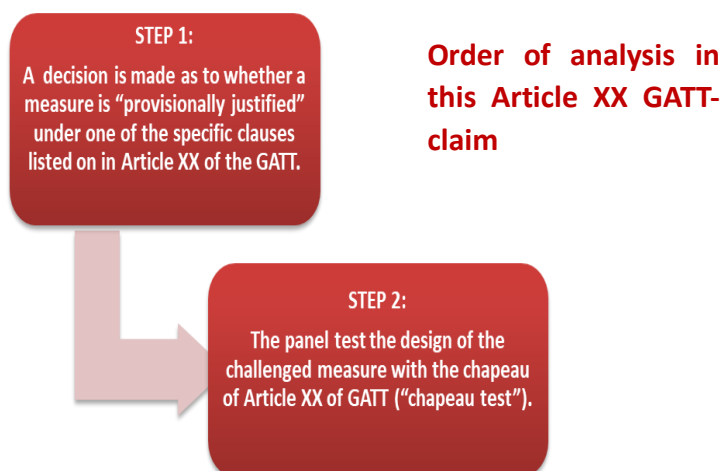
## LEGAL ANALYSIS

### Sequencing

The first ground of appeal that Indonesia took related to the order of analysis of claims. The panel had made the analysis under Article XI:1 of GATT whereas Indonesia had contended that the analysis under Article 4.2 of Agreement on Agriculture ("AOA") should take primacy over the relevant GATT provision. According to Indonesia, Article 4.2 of AOA dealt more specifically with quantitative import restrictions on agricultural products and should have been applied to the exclusion of Article XI:1 of GATT. Indonesia was essentially arguing the *lex specialis* of the relevant provision of AOA over GATT. Upon scrutinizing the text of the provisions, the Appellate Body concluded that both provisions contained the same substantive obligations. Further, the Appellate Body noted that there was no mandatory sequence of analysis between Article 4.2 of AOA and Article XI:1 of GATT. On this basis, the Appellate Body upheld the Panel's decision to commence its examination with Article XI:1 of GATT and not Article 4.2 of AOA.

### Burden of proof

Indonesia challenged the panel's finding that Indonesia bore the burden of proof with regard to Article XX of GATT. The Appellate Body recalled that Article XX of GATT has consistently been considered as an affirmative defense. As a result, the respondents were bound to demonstrate the burden of proof. It also analyzed that footnote 1 to Article 4.2 of AOA includes an exception to Article XX of GATT. Yet, there is no mention of how burden of proof under Article XX of GATT is modified by such incorporation. On this basis, the Appellate Body upheld the panel's finding that Indonesia had to bear the burden of proof under Article XX, even if its implementation was by way of incorporating footnote 1 to Article 4.2 of the Agreement on Agriculture.



### General exceptions analysis

An interesting jurisprudential development in this dispute relates to the order of analysis for an Article XX GATT- claim. The traditional two-fold approach for panels and Appellate Body has been as follows: *firstly*, a decision is made as to whether a measure is “provisionally justified” under one of the specific clauses listed on in Article XX of the GATT. *Secondly*, the panel test the design of the challenged measure with the *chapeau* of Article XX of GATT (“*chapeau* test”). The panel, in this dispute, digressed from the traditional analysis method and tested the applicability of the measure with the *chapeau* test without provisionally justifying the measure since the challenged measure failed the *chapeau* test. Indonesia challenged this order of analysis, but the Appellate Body upheld the panel’s approach by noting that:

---

“[deviation] from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of *chapeau*”.

---

### DECISION

---

Indonesia failed to demonstrate to the Appellate Body that the panel report was contrary to WTO. Indonesia had also failed to demonstrate that its measures were justified under Article XX of GATT.

## INDONESIA – SAFEGUARD ON CERTAIN IRON OR STEEL PRODUCTS

Dispute	Complainant	Respondent	Dispute
WT/DS496	Viet Nam	Indonesia	Imposition of safeguard duties on certain flat-rolled iron or steel products by Indonesia.

### FACTS OF THE DISPUTE

This dispute arose from a specific duty imposed by Indonesia on galvalume -- a type of flat-rolled iron or steel product. These duties were applied on import of galvalume from all WTO members except developing countries. Chinese Taipei and Viet Nam argued that the duties were in violation of the WTO Safeguards Agreement. In the alternate, the respondent countries argued that the duties would be inconsistent with most-favored nation clause under the GATT.

Failing consultations between both parties resulted in the initiation of the dispute. Indonesia requested the panel to find that the specific duty was a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards. Indonesia argued that it had adopted and applied the measure under challenge consistently with its obligations under the GATT 1994 and the Agreement on Safeguards.

### LEGAL ANALYSIS

#### Both countries say “Safeguards”; panel disagrees

Safeguard duties are emergency tariffs that a WTO member can temporarily impose to protect a specific sector from a sudden surge in imports. In this dispute, Indonesia agreed with Chinese Taipei and Viet Nam that the measure was a safeguard with the definition of the WTO Safeguard Agreement. However, the panel considered that the measure at issue could not be considered as a safeguard as per WTO law. In doing so, the panel noted that:

“[a]lthough both sides maintain, albeit for somewhat different reasons, that the challenged measure is a safeguard measure within the scope of the Agreement on Safeguards, their arguments have led us to conclude, in discharging our duty to undertake ‘an objective assessment of the matter’, that we must examine this issue for ourselves, rather than simply proceeding on the basis of the parties’ concurring positions”.

The panel then proceeded to making an assessment of Article 1 of the Safeguards Agreement. This article refers to those measures provided for in Article XIX of GATT 1994. Provisions of Article XIX:1(a) are invoked where a GATT obligation is suspended, or a GATT concession is modified in such cases where a product is imported into the member’s territory in such increased quantities to cause or threaten serious injury to domestic producers.

The panel, in its assessment, stated that merely suspending, withdrawing or modifying a GATT obligation would not fall within the scope of Article XIX:1(a) of GATT. Only measures that suspend, withdraw or modify GATT obligations or concessions and have been introduced temporarily so as to pursue a course of action that was necessary to prevent or to remedy serious injury is a safeguard measure. However, since Indonesia had no tariff obligations on galvalume, there was no “release” from any WTO commitment and, thus, no temporary adjustment. The panel concludes:

---

“[o]ne 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”.

---

According to panel, since Indonesia had not introduced any binding tariff obligation on galvalume in its Schedule of Concessions, it was, in principle, free to impose any amount of duty on imports of galvalume. In that regard, the specific duty that Indonesia imposed did not withdraw or modify Indonesia’s obligations under Article II of GATT 1994.

The panel also noted that while the specific duty imposed by Indonesia was conducted under its domestic safeguards legislation does not necessarily mean that the measures imposed on the investigated product at the end of that process are ‘safeguard measures’ within the meaning of Article XIX of GATT and Safeguards Agreement.

### Most-Favored Nation Obligations

Indonesia argued that it was permitted to provide an exemption to developing countries based on Article 9.1 of the WTO Safeguards Agreement. This article provides that safeguard measures shall not be applied to products that originate in developing WTO members as long as the import volumes remain below *de minimis* level. According to Indonesia, Article 9.1 of the WTO Safeguards Agreement would supersede Article I of the GATT.

The panel rejected the argument by noting that Article 9.1 of the WTO Safeguards Agreement would only be applied if a safeguard measure was in force. However, given that the panel had already established that the specific duty imposed by Indonesia was not a safeguard measure, Article 9.1 of the WTO Safeguard Agreement would not apply. This is because the discrimination created through Article 9.1 of the WTO Safeguard Agreement was intended to provide the same access as would have been provided prior to the imposition of the safeguard measure.

Further, the panel also disagreed with the panel report in Dominican Republic – *Safeguard Measures*. In that dispute, the panel held that imposition of Article 9.1 of the Safeguard Agreement would result in suspension of Article I of GATT. However, in this dispute, the panel noted that:

---

“[t]he 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”.

---

Flowing from this analysis, the panel considered that Indonesia violated Article I of GATT. This was because the specific duty imposed by Indonesia was a customs duty. Exclusion of imports of galvalume from the 120 developing countries,

therefore, constituted an advantage to 'like' products that was not granted to all WTO members. As a result, the panel concluded that:

---

"[t]he application of the specific duty on imports of galvalume originating in all but the 120 countries is inconsistent with Indonesia's obligation to afford MFN treatment under Article I:1 of the GATT 1994".

---

## DECISION

---

The panel concluded that the specific duty is not a safeguard measure within the meaning of Article 1 of the Safeguards Agreement. However, the specific duty was a customs duty for the purposes of Article I of GATT and the exclusion of 120 developing countries from the safeguard measures violated MFN principle embedded in Article I of GATT.

## UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT – SECOND COMPLAINT

Dispute	Complainant	Respondent	Dispute
WT/DS353	European Communities	United States	Subsidies contingent upon export performance and subsidies contingent upon use of domestic over imported goods in the large civil aircraft sector.

### FACTS OF THE DISPUTE

This dispute arose after EU had challenged certain tax breaks that were granted by the United States for production of large civil aircrafts. These incentives were available to producers of large civil aircrafts in the state of Washington. *Boeing's 777-X* programme met these requirements.

EU characterized the challenged tax breaks as import substitution subsidies which were prohibited under SCM Agreement. According to them, these measures would violate Article 3.1(b) of the SCM Agreement. However, in 2016, a WTO panel dismissed this contention by EU. Nevertheless, the panel upheld EU's second claim that another aerospace tax rate granted for the manufacturing or sale of commercial airplanes under the 777-X programme was *de facto* contingent upon the use of domestic over imported goods. Both EU and United States cross-appealed the panel report.

EU argued that the US had carefully designed subsidies to enhance *Boeing's* competitiveness which, in turn, caused harm to its only competitor in the Large Civil Aircrafts ('LCA') market, the Airbus. It was EU's contention that *Boeing* and the United States government had collaborated closely to advance the state of United States aeronautics technology, and to improve the competitive position of *Boeing vis-à-vis* international competition. EU also contended that United States' state and local governments also aided this partnership in a very significant way by adding to the wealth of grants, tax breaks, and other support *Boeing*. LCA market is a duopolistic market. Given this fact, EC stated that Airbus had no viable commercial alternative but lower its pricing in response to the price depression effects of the subsidies granted by the United States.

### LEGAL ANALYSIS

EU argued that the geographical requirements of being sited in the State of Washington for availing the subsidies for makers of large civil aircrafts should be considered as subsidies contingent upon the use of domestic over imported goods. EU considered the panel's ruling on this point to be erroneous since the recipient of the subsidy would necessarily be a domestic producer and not an importer. The Appellate Body, however, agreed with the panel ruling on this point. In doing so, it made a distinction between "complete exclusion of imported goods from using the subsidy"

and “providing subsidy based on use of domestic or imported goods”. The fundamental question that the Appellate Body formulated could be re-structured as:

---

“Whether the measure – by way of its terms or through implications flowing from its design – sets out a condition requiring the use of domestic over imported goods”.

---

Based on this formulation, the Appellate Body considered that even if *Boeing* were to use some amount of domestically produced wings and fuselages, this would not be sufficient to demonstrate the use of domestic over imported goods. Instead, the Appellate Body determined that it was necessary for EU to demonstrate a condition for requiring use of domestic over imported goods. This was absent from the construction of the tax breaks available within the State of Washington to manufacturers of LCA. The key term embedded with the text of Article 3 of the SCM Agreement, as per the Appellate Body, was “contingent upon”. “Contingent upon” means “a condition for receiving subsidies”. Since the Appellate Body did not identify any such condition in the structure of the tax breaks available within the State of Washington, it rejected EU’s argument on this issue.

Through this analysis, the Appellate Body also provided clarity on *de jure* and *de facto* contingency of domestic over imported goods. It determined that a subsidy will be *de jure* contingent upon the use of domestic over imported goods: “[w]hen the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure.” On the other hand, a *de facto* contingency “[m]ust be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.”

On the challenge to United States Business & Occupation (“B&O”) aerospace tax, the Appellate Body reversed the findings by the panel. It did so by noting, based on the reasoning mentioned above, that the location of production will result in the loss of B&O aerospace tax. The Appellate Body also noted that:

---

“[a]lthough conditions for eligibility and access to a subsidy may entail certain consequences for a domestic producer’s sourcing decisions between domestic and imported goods, this alone does not equate to a condition requiring the use of domestic over imported goods”.

---

After undertaking a factual analysis of the measure, the Appellate Body reversed the Panel’s finding that the measure was inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

## DECISION

---

EU was unsuccessful in demonstrating that the subsidies granted by the US were contingent on domestic over imported goods. In fact, the US can claim victory as one of the measures that the panel found to be inconsistent with Article 3.1(b) and Article 3.2 of the SCM Agreement was held to be WTO law compatible.

## RUSSIA – ANTI-DUMPING DUTIES ON LIGHT COMMERCIAL VEHICLES FROM GERMANY AND ITALY

Dispute	Complainant	Respondent	Dispute
WT/DS479	European Union	Russian Federation	Imposition of anti-dumping duties on light commercial vehicles from Germany and Italy.

### FACTS OF THE DISPUTE

This dispute arose after the EU challenged the anti-dumping duties imposed by Russia on light commercial vehicles from Germany, Italy and Turkey. These measures were adopted by the Eurasian Economic Union (“EEU”) and were applied by all its countries, i.e. Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia.

In 2011, *Sollers-Elabuga LLC* had requested for imposition of anti-dumping duties on imports of light commercial vehicles from Germany, Italy and Turkey on the territory of the Customs Union of Belarus, Kazakhstan and Russia. *Sollers-Elabuga LLC* argued that its output during the first half of 2011 amounted to 85.2% of the total production of the ‘like’ product, and identified another producer of the like product, *Gorkovsky Avtomobilny Zavod* (“GAZ”), for the period concerned. Based on this application, anti-dumping investigation was initiated on 16 November 2011. The period of investigation was identified as 1 July 2010 till 30 June 2011. The injury investigation period was 1 January 2008 till 31 December 2011. A decision was passed on 14 May 2013 which introduced anti-dumping duties on imports of light commercial vehicles from Germany, Italy and Turkey on the territory of the Customs Union of Belarus, Kazakhstan and Russia. The Decision was published on 16 May 2013 and entered into force on 15 June 2013. The anti-dumping duties are 29.6% for imports from Germany, 23% for imports from Italy and 11.1% for imports from Turkey.

These duties were challenged by the EU at the WTO. However, this case concerns challenge to Russia specifically since at the time that the EU had brought the case to the WTO (in 2014), Russia was the only member of the Eurasian Economic Union bound by the WTO rules.

EU made the following challenges:

<b>Challenge 1: Articles 3.1 and 4.1 of the Anti-Dumping Agreement</b>	Whether the investigating authority had improperly determined the domestic industry, as required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement
<b>Challenge 2: Articles 3.1 and 3.2 of the Anti-Dumping Agreement</b>	Whether the investigating authority had failed to make an objective examination based on positive evidence of whether price suppression took place to a significant degree, in violation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement
<b>Challenge 3: Articles 3.1 and 3.5 of the Anti-Dumping Agreement</b>	Whether the investigating authority had improperly analyzed causation in accordance with Articles 3.1 and 3.5 of the Anti-Dumping Agreement



## LEGAL ANALYSIS

---

### Definition of 'Domestic Industry'

Domestic industry is defined in Article 4.1 of the Anti-Dumping Agreement. This definition includes “those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products”. A concern in defining domestic industry is that leaving out producers of like domestic products could impact – possibly distort – the injury determination.

In this dispute, the panel found that Department for Internal Market Defense of the EEC (“DIMD”) had defined the domestic industry as consisting of a single producer. This single producer had accounted for 87% of domestic production. However, the panel found that DIMD has not excluded a known producer of the ‘like’ product in its definition of domestic industry even though the said producer had cooperated with the investigating authorities and had also provided data. The panel believed that this gave rise to the appearance that the domestic producers were selected based on their data to ensure a certain outcome. This, according to the panel, would result in risk of material distortion in the subsequent injury analysis. Resultantly, the panel held that DIMD had acted inconsistently with Article 4.1 of the Anti-Dumping Agreement.

### Assessment of Price Suppression during Financial Crisis

According to Article 3 of the Anti-Dumping Agreement, an investigating authority is required to make its injury determination based on “positive evidence” and an after undertaking an “objective examination”. The Russian Investigating Authority would also be tasked with assessing significant price undercutting by the dumped imports as compared to the price of a ‘like’ product of the importing WTO member. Article 3.2 of the Anti-Dumping Agreement states:

---

“[t]he investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree”.

---

The panel found that DIMD acted inconsistently with Articles 3.1 and 3.2 by not accounting for the impact of the financial crisis in its price suppression analysis. Restated, the panel held that the DIMD should have constructed a hypothetical domestic price accounting for the financial crisis if the dumped imports had not taken place. Moreover, the panel stated that the DIMD should have explained why the extraordinary financial conditions would not have been applicable in its counterfactual analysis.

### State of Domestic Industry

According to Article 3.4 of the Anti-Dumping Agreement, it was incumbent upon the DIMD to examine the impact of the dumped imports on the domestic industry concerned. This evaluation was to be made after analyzing all relevant

economic factors that could affect the state of the industry. EU had made ten claims related to this aspect of the injury determination. Of these, nine claims of EU's claims were dismissed whereas one was upheld since the panel considered that DIMD had incorrectly calculated the dumping margin. In making this assessment, the panel also noted that all factors listed in Article 3.4 of Anti-Dumping Agreement were required to be assessed. In case where the investigating authorities concluded that some of the factors were not relevant, then reasons for this conclusion must be illustrated.

### **Financial Crisis and Causation**

The panel noted that Article 3.5 of the Anti-Dumping Agreement laid down the requirement for "causation". The panel further noted that the investigating authority must demonstrate a relationship of cause and effect, such that dumped imports are shown to have contributed to the injury to the domestic industry. The panel also clarified that the dumped imports don't necessarily have to be "the" cause of injury as long as they were "a" cause of injury. Further, the panel recalled the requirement of "non-attribution" which means that an investigating authority is not permitted to attribute injury caused by "other factors" to dumped imports. As a result, the panel concluded by not accounting for the financial crisis, DIMD had undermined the cause link determination between dumped imports and injury caused.

## **DECISION**

---

Overall, the panel report contained a mixed ruling. Most of EU's claims were refused. Only 8 out of 31 claims made by the EU were upheld by the panel. The panel also found Russia to have breached certain procedural obligations related to the treatment of confidential information. Both Russia and EU have appealed the findings of the panel on 20 February 2017. It remains to be seen whether the Appellate Body will uphold, modify or reverse the findings of the panel.

## EUROPEAN UNION - ANTI- DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA

Dispute	Complainant	Respondent	Dispute
WT/DS442	Indonesia	European Union	Imposition of anti-dumping duties on fatty alcohol.

### FACTS OF THE DISPUTE

This dispute arose from Indonesia's complaint of EU's anti-dumping measures on the imports of certain fatty alcohols from Indonesia. Certain aspects of the anti-dumping investigations were also raised by Indonesia.

This was based on provisions embedded in EU's Basic Anti-Dumping Regulation. One such adjustment made was with respect to a payment made by Indonesian producer, *PT Musim Mas*, to a related trading company, *ICOF-S*. EU authorities found that there was no corresponding price component of the payment in service on the domestic side for the mark-up paid by *PT Musim Mas* to *ICOF-S*. The authorities characterized this as a commission paid with respect to the export sales to the EU and accordingly made a downward adjustment to the export price. On this basis, a provisional anti-dumping duty on imports on fatty alcohols from *PT Musim Mas* and *PT Ecogreen*, at the rate of 4.3% and 6.3% respectively, was imposed. Consequently, EU authorities imposed definitive anti-dumping duties on both companies at 4.2% for *PT Musim Mas* and 7.3% for *PT Ecogreen*. In its Revised Determination, the duty imposed on *PT Ecogreen* was terminated. In 2015, the EU General Court rejected action for annulment introduced by *PT Musim Mas*.

Indonesia, aggrieved by the imposition of the duty, entered into consultations with the EU. Subsequently, a WTO panel was formed on 25 June 2013. The panel report was cross-appealed by EU and Indonesia.

The following issues were determined by the Appellate Body:

- EU considered that the panel wrongly interpreted Article 6.7 of the Anti-Dumping Agreement with respect to the investigations;
- EU also raised **procedural inconsistencies** regarding the treatment of **Business Confidential Information** ("BCI");
- Indonesia, on the other hand, argued that the panel had erred in its interpretation of Article 2.4 of Anti-Dumping Agreement on the **issue of price comparability**.

---

## LEGAL ANALYSIS

---

### Interpretation and application of Article 2.4 of the Anti-Dumping Agreement

The panel had concluded that EU authorities had acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an improper deduction. The Appellate Body agreed with the panel that the existence of a single economic entity, by itself, is not relevant to the due allowances to be made, unless it affects the price comparability under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body observed that the Panel had correctly identified that an inquiry under Article 2.4 of the Anti-Dumping Agreement is dependent on a ‘particular situation’ and that, in this dispute, Indonesia was not able to demonstrate the existence of a single economic entity resulting in a difference affecting price comparability.

Indonesia used the Appellate Body’s findings in *US – Hot-Rolled Steel* to argue that the prices charged within the single economic entity might not show any commercial effect. Indonesia also argued that the existence of a single economic entity indicated that adjustments for the mark-up shouldn’t have been made; that the allowance resulted in asymmetrical evaluation with the normal value. The Appellate Body, however, noted that the related trading company was considered not to be a part of the internal sales department of Indonesian producer as majority of its sales were to unrelated entities. The Appellate Body also observed that the Sales and Purchase Agreement concluded between PT Musim Mas and ICOF-S showed functions “similar to those of an agent working on commission basis”. Therefore, the markup did affect the price comparability and, accordingly, due allowance was necessary. As a result, Appellate Body held the panel had not erred in its interpretation or application of Article 2.4 of Anti-Dumping Agreement to facts of this dispute.

### Inconsistency with Article 11 of the DSU and Article 17.6(i) of the ADA

The Appellate Body found that the analysis by the panel was not inconsistent with Article 11 of the DSU and Article 17.6(i) of Anti-Dumping Agreement in its assessment of the EU authorities’ determination. The Appellate Body also held that the panel did not conduct a *de novo* review while examining the evidence present on the record. The panel possessed the discretion to consider all relevant pieces of evidence. Therefore, the Appellate Body concluded that Indonesia had not demonstrated the Panel’s inconsistency with Article 11 and Article 17.6(i) of Anti-Dumping Agreement.

### Article 6.7 of the Anti-Dumping Agreement

EU contended that disclosure requirements under Article 6.7 of the Anti-Dumping Agreement had not been complied with. While analyzing the interpretation of this article, the Appellate Body stated that there are two groups of recipients with respect to the results of the on-the-spot investigations: *first*, the investigated firms; *second*, entities that requested the investigation. The Appellate Body held that the results of the on-the-spot investigations must be communicated to the investigated firms, given that the availability of this information is connected to the ability of the firm to defend its interests under Article 6.2 of the Anti-Dumping Agreement. The Appellate Body agreed with the panel that the scope of these results is not limited to those that are simply “essential” – instead, they vary from case to case. The Appellate Body also upheld the panel’s finding that the results disclosed to PT Musim Mas by EU authorities was insufficient as it did not clarify which aspects of the questionnaire responses were verified. Therefore, the Appellate Body upheld the Panel’s interpretation and application of Article 6.7 of the Anti-Dumping Agreement.

### Expiration of the measure

EU requested the panel to dismiss Indonesia's appeal as inconsistent with Article 3 and Article 19.1 of the DSU as the measure in question expired on 12 November 2016. The Appellate Body noted that it would be within the panel's discretion to factor in subsequent modifications or to remove of the measure at issue. In the absence of any findings by the panel that the measure at issue had expired, there was no basis for the panel to depart from the requirement in Article 19.1 of the DSU to make recommendation after having found that measure to be inconsistent with the covered agreements. Accordingly, the Appellate Body found that Indonesia is not barred from an appeal under Article 3 or Article 19.1 of the DSU since the measure at issue has expired.

### DECISION

---

The Appellate Body upheld the panel's interpretation and application of Article 2.4 of the Anti-Dumping Agreement. It noted that the existence of a single economic entity would only be relevant to the extent that it affects the comparability of the export price and normal value. The Appellate Body also upheld the panel's finding that Indonesia had not demonstrated that the EU authorities had acted inconsistently with Article 2.4 of the Anti-Dumping Agreement. However, the Appellate Body held that the EU authorities had acted inconsistently with Article 6.7 of the Anti-Dumping Agreement by not disclosing the results of the on-the-spot investigations. Lastly, the Appellate Body found that the panel had acted in accordance with Article 3, 11, 12.12 and 19 of DSU.

## CHINA - ANTI-DUMPING MEASURES ON IMPORTS OF CELLULOSE PULP FROM CANADA

Dispute	Complainant	Respondent	Dispute
WT/DS483	Canada	China	Imposition of anti-dumping duties on cellulose pulp.

### FACTS OF THE DISPUTE

This dispute arose from challenges to anti-dumping measures imposed by China on imports of cellulose pulp originating from Canada. Specifically, Canada challenged China's Ministry of Commerce ("MOFCOM") ruling on five issues:

<b>Issue 1: Article 3.1 and Article 3.2 of the Anti-Dumping Agreement</b>	Whether MOFCOM's determination of volume of dumped imports was consistent with Article 3.1 and Article 3.2 of the Anti-Dumping Agreement
<b>Issue 2: Article 3.1 and Article 3.2 of the Anti-Dumping Agreement</b>	Whether MOFCOM's determination of price effect was consistent with Article 3.1 and Article 3.2 of the Anti-Dumping Agreement
<b>Issue 3: Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and</b>	Whether MOFCOM's examination of the impact of dumped imports was consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement
<b>Issue 4: WTO Practice</b>	Whether MOFCOM's examination of other known factors allegedly causing injury and non-attribution was consistent with WTO practice

### LEGAL ANALYSIS

#### Volume of dumped imports

MOFCOM found that the volume of dumped imports increased by 43.82% in absolute terms over the POI. Canada argued that MOFCOM had failed to assess the significance of this increase in light of certain evidence. On the other hand, Canada alleged that this increase was not significant.

The panel held that there was a difference between the consideration of the volume of dumped imports required under Article 3.2 of the Anti-Dumping Agreement (first sentence) and the demonstration of the effects of the volume of dumped imports in the context of the demonstration of a causal relationship between dumped imports and material injury to the domestic industry under Article 3.5 of the Anti-Dumping Agreement.

The panel also held that there is no requirement under Article 3.2 of the Anti-Dumping Agreement for an investigating authority to determine whether an observed increase in imports, absolute or relative, is significant. In fact, the investigating authority may ultimately find injury caused by dumped imports even in the absence of a significant increase in such imports. In such a case, it would be inappropriate to impose requirements for the analysis of the significance of any increase in imports that are duplicative of elements of the analysis of causation relevant to determining whether the dumped imports, whatever their volume, in absolute or relative terms are causing injury to the domestic industry. The obligation, instead, is to consider – and not to determine – whether there was a “significant increase” in dumped imports in absolute terms. In the absence of a requirement to make any determination in this regard, the panel held that there is no obligation to provide a reasoned and adequate explanation under Article 3.2 first sentence.

### Price effects

The requirement for carrying out a contextual analysis with respect to price effect is derived from the requirement to consider the effects of dumped imports on prices in the second sentence of Article 3.2 of the Anti-Dumping Agreement. This is because Article 3.5 of the Anti-Dumping Agreement specifically states that dumped imports causing injury are, in part, dependent on the effects of dumped imports on prices.

#### ♦ *Parallel Price Trends*

The panel held that while MOFCOM reasonably found that there were parallel trends between dumped import and domestic ‘like’ product prices, it failed to explain the role of those parallel price trends in the decline of domestic ‘like’ product prices and how changes in the prices and volume of the dumped imports affected the domestic like product prices.

#### ♦ *Dumped Import Prices*

The panel also determined that MOFCOM did not adequately explain how it arrived at the conclusion that, despite the higher prices of dumped imports -- particularly in the latter part of the POI when prices were declining for both dumped imports and the domestic like product -- the dumped imports had the effect of significant price depression.

#### ♦ *Imports’ Market Share*

The question as to whether an increase in market share of 2% over the POI is described as an increase in market share or whether the market share remaining essentially stable is a question of judgment and interpretation, not a question of fact. Therefore, the panel held that MOFCOM’s description and examination of the change in dumped imports’ market share was both reasonable and objective, particularly in view of the fact that it relied primarily on the increase in the absolute volume of imports in its consideration of price effects.

### Impact of dumped import

Neither Article 3.4 of the Anti-Dumping Agreement nor any other provision of the Anti-Dumping Agreement provides any guidance regarding a specific methodology on how the economic factors and indices shall be evaluated. The “evaluation” required under Article 3.4 of the Anti-Dumping Agreement suggests that an investigating authority must undertake an analysis and assessment of all relevant economic factors and indices. There is no requirement that all

relevant factors, or even most, or a majority of them reflect negative developments in order to point to an overall assessment of negative impact on the relevant domestic industry

♦ **Market Share**

The panel held that the characterization of the domestic market share had “remained low” was not unreasonable in light of the fact that the demand for cellulose pulp had grown considerably by 35.26% over the POI. In addition, although domestic production capacity had been increased to meet the increased demand, the domestic industry’s market share had not increased commensurate with the available production capacity. In these circumstances, MOFCOM’s characterization of domestic industry market share as having “remained low” was found by the panel to be reasonable and objective.

♦ **Injury Factors**

Article 3.4 of the Anti-Dumping Agreement does not require the investigating authorities to demonstrate that the dumped imports are causing injury to the domestic industry. That analysis is specifically mandated by Article 3.5 of the Anti-Dumping Agreement. The panel found that MOFCOM evaluated the mandatory economic factors and indices set forth in Article 3.4 of the Anti-Dumping Agreement. In doing so, it noted that some of the factors were negative and some were positive. MOFCOM considered these factors and indices in its demonstration of the causation relationship between dumped imports and material injury

### **Causation and other factors**

MOFCOM failed to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry consistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement for two reasons: *firstly*, MOFCOM failed to adequately explain both the role of parallel price trends in its consideration of price depression and how the effect of dumped imports was to depress domestic prices in a situation where dumped import prices were higher than those of the domestic like product during the second part of the POI. *Secondly*, MOFCOM failed to explain, the relevance of the “high proportion” of total imports accounted for by the dumped imports, to its causation demonstration.

### **Other known factors**

The panel held that MOFCOM failed to properly examine the injuries caused by cotton (raw material), VSF prices (downstream), domestic industry overexpansion, overproduction and inventory build-up, impact of non-dumping imports, and shortage of cotton liner.

## **DECISION**

---

The panel held that China had acted inconsistently with Article 1 of the Anti-Dumping Agreement. The panel report was adopted in May 2017 and on 1 June 2017, Canada and China informed the DSB that they had agreed 11 months to be a reasonable period of time to implement the DSB’s recommendations.



## UNITED STATES - MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS RECOURSE TO ARTICLE 21.5 OF THE DSU

Dispute	Complainant	Respondent	Dispute
WT/DS381	Mexico	United States	Testing consistency of the “dolphin-safe” tuna label as amended based on recommendations by earlier panels and Appellate Body reports.

### FACTS OF THE DISPUTE

The panel was established based on cross-appeals by United States and Mexico. United States had requested the panels in both Article 21.5 of the Dispute Settlement Understanding proceedings – also known as compliance proceedings – to assess whether the United States has brought its measure to comply with the earlier Dispute Settlement Body recommendations and rulings. Mexico’s primary request was that the panels should find the ‘2016 Tuna Measure’ to be:

- Inconsistent with Article 2.1 of the Technical Barriers to Trade (“TBT”) Agreement; and
- Articles I:1 and III:4 of the GATT 1994.

The origins of this dispute can be traced back to 2008, when the original panel was established. This panel issued its recommendations in 2011. The challenged measures at issue in that dispute were:

- United States Code, Title 16, Section 1385 – “Dolphin Protection Consumer Information Act” (DPCIA);
- Code of Federal Regulations, Title 50, Section 216.91 “Dolphin-safe labelling standards” and Section 216.92 “Dolphin-safe requirements for tuna harvested in the Eastern Tropical Pacific Ocean by large purse (“ETP”) seine vessels”;
- Ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

Together, these measures set out the conditions under which tuna products sold in the United States may be labelled as “dolphin-safe”. Based on recommendation made by the original panel, and amended by subsequent dispute settlement proceedings, the United States made several amendments to the original measure. The measure at issue in the present dispute was the ‘2016 Tuna Measure’. This measure specified certain conditions that were required to be fulfilled for tuna products sold in the United States to be labelled “dolphin-safe”.

Mexico argued that the '2016 Tuna Measure' modified the conditions of competition to the detriment of Mexican tuna products in the United States market. The four elements from the Tuna Measure 2016 that were analysed in light of United States obligations under Article 2.1 of the TBT Agreement are as follows:

- **"Eligibility criteria":** Driftnets in the high seas are disqualified from accessing a dolphin-safe label, while tuna products made from tuna caught by other fishing methods are provisionally eligible;
- **"Certification requirements":** Certain documentation requirements to accompany tuna intended to be labelled as dolphin-safe;
- **"Tracking and verification requirements":** Impose certain conditions concerning the segregation of dolphin-safe and non-dolphin-safe tuna from the time of catch through off-loading, processing, and sale;
- **"Determination provisions":** Allow for additional certification and tracking and verification requirements to be imposed in respect of tuna caught outside the ETP large purse seine fishery under certain circumstances.

## LEGAL ANALYSIS

### Methodology for analyzing the measure at issue

The panel employed a "calibration test" which looked at whether the relevant regulatory distinctions were "tailored to", "commensurate with", or "explained" by differences to which the 2016 Tuna Measure seeks to address. The Appellate Body, in the original proceeding, explained that a panel should conduct an analysis in two-steps: *firstly*, an identification of whether different tuna fishing methods in different areas of the oceans posed different risks to dolphins; and, *secondly*, an examination of whether, in the light of the rules flowing from step one, different treatment created by the relevant regulatory distinctions to demonstrate that the treatment accorded to each group of tuna products is commensurate with the relevant risks while taking into account of the objectives of the measure.

### Risk profile of individual fishing methods

There were six alternative fishing methods that were analyzed by the panel. These included gill-netting, trawl fishing, purse seine fishing without setting on dolphins, longline fishing, handling and pole and line fishing. According to the panel, none of these six methods caused "unobservable harm" to dolphins. The panel also considered the differences between "setting [nets] on dolphins" and each of the other six methods with respect to observable harms to dolphins. Eventually, the panel concluded that the risk profile of "setting [nets] on dolphins" is much higher than that of each of the other six fishing methods used to catch tuna.

### Whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement

#### ♦ Eligibility criteria

The panel noted that the eligibility criteria of the 2016 Tuna Measure contained substantive conditions for access to the "dolphin-safe" label. It also made a distinction between tuna caught by certain fishing methods which are ineligible to receive a "dolphin-safe" label, and tuna caught by fishing methods that are provisionally eligible to receive a "dolphin-safe" label. Moreover, two fishing methods are disqualified i.e. setting on dolphins, and driftnet in the high

seas. Based on this, the panel found that the eligibility criteria were calibrated because of significant difference in risk between “setting on dolphins”, on the one hand, and the fishing methods that are conditionally qualified for the label, on the other hand.

♦ ***Certification and Determination Provisions***

The panel analyzed that the certification requirements enforce the eligibility criteria by providing two sets of certification requirements. These take account of the differences in the levels of harms caused to dolphins by different fishing methods in different areas of the ocean. The panel noted that certification requirements also created a more sensitive detection mechanism in respect of the ETP large purse seine fishery, which has a relatively high-risk profile, and a less sensitive mechanism in other fisheries where the risks to dolphins are relatively lower.

Further, the panel also assessed the determination provisions. It noted that a fishery other than the ETP large purse seine fishery may be subject to more stringent certification requirements and, in particular, maybe required to have an observer certification, where that fishery has a regular and significant tuna-dolphin association or mortality or serious injury of dolphins. The determination provisions help to ensure that the 2016 Tuna Measure treats similar situations similarly. Together, the certification requirements and the determination provisions reinforce the eligibility criteria.

♦ ***Tracking and Verification Requirement***

Tracking and verification requirements provide two sets of procedures: one for tuna caught in the ETP large purse seine fishery and another for tuna caught in all other fisheries. The imposition of more stringent tracking and verification requirements for tuna caught in a fishery that has been designated under the determination provisions as having a regular and significant tuna-dolphin association or dolphin mortality or serious injury. In this way, they provide flexibility and ensure that under the 2016 Tuna Measure similar situations are treated similarly. In making this distinction between fisheries based on their relative risk profiles, the design and architecture of the tracking and verification requirements also complements, and is consistent with, the design and architecture of the eligibility and certification requirements which the tracking and verification requirements reinforce and with which they work together to achieve the objectives of the 2016 Tuna Measure.

Based on the above analysis, the panel held that the 2016 Tuna Measure has calibrated risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Therefore, the distinctions made by that measure between setting on dolphins and the other fishing methods stem exclusively from legitimate regulatory distinctions. Consequently, the panel concluded that the 2016 Tuna Measure accorded to Mexican tuna products treatment no less favourable than that accorded to ‘like’ products from the United States and other countries. As an extension, the measure was also deemed to be consistent with Article 2.1 of TBT Agreement.

**Consistency of 2016 Tuna Measure with Article I:1 and III:4 of GATT**

The panel found that the 2016 Tuna Measure was inconsistent with Articles I:1 and III:4 of GATT. Nevertheless, the measure could be provisionally justified under sub-paragraph (g) of Article XX of GATT. Therefore, the issue before the panel was whether the 2016 Tuna Measure was applied in a manner that would constitute a means of “arbitrary or unjustifiable discrimination” within the meaning of the chapeau of Article XX of GATT. Upon analysis, the panel noted that the 2016 Tuna Measure was calibrated to the levels of risks posed by different fishing methods in different parts of the ocean. Therefore, the panel concluded that the measure would not be applied in a manner that constitutes a

means of “arbitrary or unjustifiable discrimination” within the meaning of Article XX of the GATT. In other words, the measure was justified under sub-paragraph (g) of Article XX of GATT.

## DECISION

---

The Panel held that United States has implemented recommendations and rulings of the DSB in *US – Tuna II (Mexico)* and *US – Tuna II (Mexico) (Article 21.5 – Mexico)* to bring its labelling regime for dolphin-safe tuna products into conformity with its obligations under the WTO Agreement. Therefore, the 2016 Tuna Measure was consistent with Article 2.1 of the TBT Agreement and the measure was also justified under Article XX(g) of the GATT 1994.

## BRAZIL – CERTAIN MEASURES CONTAINING TAXATION AND CHARGES

Dispute	Complainant	Respondent	Dispute
WT/DS472	European Union	Brazil	Taxation regime implemented in the automotive sector, electronics and technology industry and goods produced in Free Trade Zones.

### FACTS OF THE DISPUTE

The dispute arose from claims brought by the EU and Japan concern certain tax treatment established under *inter alia* the following programmes:

- The Informatics programme provides for exemptions and reductions on the applicable Tax on Industrialized Products (“IPI tax”) on the sale of information technology goods. It also provides for suspensions of the IPI tax on the purchase or import of raw materials, intermediate goods and packaging materials used in the production of information technology and automation goods incentivized under the programme;
- Programme of Incentives for the Semiconductors Sector (“PADIS”);
- Programme of Support for the Technological Development of the Industry of Digital TV Equipment (“PATVD”);
- Programme for Digital Inclusion (“Digital Inclusion programme”); and,
- Programme of Incentive to the Technological Innovation and Densification of the Automotive Supply Chain (“INOVAR-AUTO”).

The measures at issue concern taxation and charges in the automotive sector, the electronics and technology industry, and tax advantages for exporters. The Informatics programme; PADIS programme; PATVD programme and the Digital Inclusion programme are collectively referred to as the ICT programmes.

The panel was primarily tasked with the assessment of the following questions:

- Whether the requirement of production or development of final products in Brazil to gain tax benefits under the ICT programmes inconsistent with Article III:2 and III:4 of the GATT 1994, and Article 2.1 of the TRIMs Agreement;
- Whether ICT programmes impose local content requirements (“LCRs”);
- Whether discriminatory aspects of the PATVD programme were justified under Article XX of the GATT 1994;
- Whether the INOVAR-AUTO programme is inconsistent with Brazil’s obligations under Article III:2 and III:4 of the GATT 1994, and Article 2.1 of the TRIMs Agreement?

- Whether certain aspects of the rules on accreditation and accrual of tax credits constitute LCRs inconsistent with Article III:2 and III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement?
- Whether discriminatory aspects of the INOVAR-AUTO programme were justified under either Article XX(b) or Article XX(g) of the GATT 1994?
- Whether favourable tax treatment accorded by Brazil to imports of motor vehicles under the INOVAR-AUTO programme from MERCOSUR countries and Mexico as against those from EU and Japan is justified under the Enabling Clause?

## LEGAL ANALYSIS

---

### Consistency of ICT programme with GATT

With respect to tax benefits under ICT programmes, the panel concluded that the requirement of production of final products in Brazil as a pre-condition to gaining such tax benefits, also known as production step requirement<sup>1</sup>, and the requirement for products to obtain the status of “developed” in Brazil resulted in various levels of taxation as well as modification of the conditions of competition to the detriment of ‘like’ imported products. Therefore, the panel concluded that tax benefits under ICT programmes impose tax and regulatory discrimination, inconsistently with Article III:2 and III:4 of the GATT, and Article 2.1 of the TRIMs Agreement.

### ICT programme and Local Content Requirement

On this issue, the Complainants took a position that the production step requirements constituted WTO-inconsistent Local Content Requirement (“LCRs”) which were discriminatory against imported products because any domestic-production-step requirement, by definition, cannot be fulfilled by imports. While Brazil did not take a position on this point and the panel refused to adjudicate this issue, the panel observed that since the production-step requirement can be performed by not only the recipient of the subsidy but also by another manufacturer in Brazil through third party clauses, such provisions favour national products and production to the detriment of foreign products. The panel, therefore, concluded that the third-party clauses are forms of LCRs inconsistent with Article III:2 and III:4 of the GATT, and Article 2.1 of the TRIMs Agreement. Moreover, the Panel concluded that such LCRs are contingent on the use of domestic over imported goods and therefore inconsistent with Article 3.1(b) of the SCM Agreement.

---

1 A production step requirement refers to performance of a minimum number of production-steps within Brazil, where the performance of a production-step would result in the creation of an input that is to be incorporated into the finished product.

### Consistency of PATVD programme with Article XX of the GATT?

Brazil raised a defense under Article XX(a) of the GATT, dealing with protection of public morals, and took the argument that digital television was a means of creating social inclusion and bridging the digital divide in Brazil. Based on this argument, the discriminatory aspects of the measure sought to be justified in order to ensure “continuity of supply” of digital television to the Brazilian market. The panel agreed with Brazil that social inclusion and bridging the digital divide are, in principle, public morals objectives in Brazil, within the meaning of Article XX of the GATT. However, Brazil did not demonstrate that the measures were necessary to ensure “continuity of supply” to the market. In particular, the panel considered that the WTO-consistent alternative approaches (such as non-discriminatory subsidies or the lowering of trade barriers to imported digital television equipment) suggested by the complaining parties would be more effective at achieving the stated objectives. The panel, therefore, concluded that the discriminatory aspects of the PATVD programme were not justified under Article XX of the GATT 1994.

### Test of consistency of INOVAR-AUTO programme with GATT and TRIMs Agreement

The panel concluded that the following aspects of the INOVAR-AUTO programme imposed a regime of tax and regulatory discrimination that was inconsistent with Article III:2 and III:4 of the GATT and Article 2.1 of the TRIMs Agreement since they result in different levels of taxation and detrimental conditions of competition for imported motor vehicles:

- Tax reductions for certain categories of motor vehicles under the INOVAR-AUTO programme are only available for motor vehicles produced in Brazil;
- The rules on accreditation to receive tax credits to offset taxes on the sale of motor vehicles impose a higher burden on foreign manufacturers than domestic manufacturers;
- The rules on accrual of tax credits favour those firms that purchase Brazilian strategic inputs and tools over that of foreign manufacturers;
- The rules on the use of tax credits (that are generated from expenditure in Brazil in strategic inputs and tools) favour domestic products, since such tax credits can only be used to offset taxes on sales of imported motor vehicles if any credits remain after offsetting the taxes on the sales of domestically manufactured motor vehicles, and also since such tax credits may only be used on a maximum of 4,800 imported motor vehicles per year.

### Accrual of tax credits

The panel considered that the rules governing accreditation for domestic manufacturers contain production step requirements constituting WTO-inconsistent LCRs. As in the case of ICT programmes, all relevant production steps under the INOVAR-AUTO programme could be outsourced to third-party manufacturers in Brazil. Similar to its analysis of the ICT programmes, the panel did not address the issue of whether such production-step requirements would be WTO-inconsistent if they were required to be performed exclusively in-house, i.e. by the company that is the producer of the final product. However, the panel concluded that such LCRs modify the conditions of competition to the detriment of like imported input products, inconsistently with Article III:2 and III:4 of the GATT and Article 2.1 of the TRIMs Agreement. Additionally, such LCRs constituted subsidies contingent upon the use of domestic over imported goods, inconsistent with Article 3.1(b) of the SCM Agreement.

### Justification of inconsistency of INOVAR-AUTO programme with GATT provisions

Brazil raised two defenses in respect of the INOVAR-AUTO programme: under Article XX(b) concerning protection of public health, and Article XX(g) concerning conservation of natural resources, respectively. Under Article XX(b) of GATT, Brazil argued that the programme aimed at improving vehicle safety and reducing CO<sub>2</sub> emissions, and, thus, contributed to the protection of public health. Under Article XX(g) of GATT, Brazil argued that the programme contributes to the conservation of petroleum and its by-products. The panel accepted that these objectives are within the scopes of Article XX(b) and XX(g) of GATT respectively. However, Brazil's arguments largely pertained to aspects of the programme that were not challenged by the Complainant. The panel considered that WTO-consistent alternative approaches such as non-discriminatory subsidies or the lowering of trade barriers to imported motor vehicles that meet certain vehicle safety and energy efficiency standards, suggested by the Complaints, would be more effective at achieving the stated objectives than the discriminatory aspects of the programme. The panel concluded that the discriminatory aspects of the INOVAR-AUTO programme were not justified under either Article XX(b) or Article XX(g) of the GATT.

### Favorable tax regime to imports of motor vehicles under the INOVAR-AUTO programme from MERCOSUR countries and Mexico v/s from EU and Japan

The panel concluded that the INOVAR-AUTO programme granted less favourable treatment to motor vehicles imported from the EU and Japan as compared to MERCOSUR countries and Mexico. The panel found this to be inconsistent with Article I:1 of the GATT. Brazil submitted that the differential and more favourable tax treatment accorded to motor vehicles from certain of those countries is justified under the *Enabling Clause* because such tax treatment implemented the obligations of certain regional trade agreements that were notified to the WTO as adopted under the *Enabling Clause* (specifically the 1980 Treaty of Montevideo, the MERCOSUR Agreement, and several Economic Complementarity Agreements).

The panel noted that the relevant RTAs did not refer to internal taxation measures or any other tax preferences provisions that could justify the INOVAR-AUTO programme. Since no link was demonstrated between the tax discrimination of this dispute and the relevant RTAs invoked by Brazil under paragraph 2(c) of the *Enabling Clause*, the panel concluded that the relevant tax discrimination could not be justified under the *Enabling Clause*.

## DECISION

EU succeeded in majority of its challenges to Brazil's measures. Brazil notified the DSB, on 28 September 2017, of its decision to appeal to the Appellate Body certain issues of law and legal interpretations in the panel report. Subsequently, the EU also notified the DSB of its decision to cross-appeal.



# UNITED STATES - ANTI-DUMPING AND COUNTERVAILING MEASURES ON CERTAIN COATED PAPER FROM INDONESIA

Dispute	Complainant	Respondent	Dispute
WT/DS497	Indonesia	United States	Imposition of anti-dumping and countervailing measures on coated paper products from Indonesia.

## FACTS OF THE DISPUTE

This dispute arose from challenge to certain aspects of the United States Department of Commerce ('USDOC') final determination in its CVD investigation on certain coated paper from Indonesia, as well as the United States International Trade Commission ('USITC') final threat of injury determination concerning subsidized and dumped imports from Indonesia and China. USDOC had selected the *Asia Pulp and Paper/Sinar Mas Group* ('APP/SMG') as the sole mandatory respondent in the CVD investigation. USDOC found that Indonesia had knowingly permitted an affiliate of APP/SMG, namely Orleans Offshore Investment Limited, to buy back its own debt in contravention of Indonesian law.

On 13 March 2015, Indonesia requested consultations with US concerning the imposition of anti-dumping and countervailing measures. Failing consultations, a panel was established. The panel had to deal with the following issues:

<b>Issue 1: Article 12.7 of the SCM Agreement</b>	Whether USDOC's subsidy determination was inconsistent with Article 12.7 of the SCM Agreement (facts available) with respect to the debt buy-back
<b>Issue 2: Article 14(d) of the SCM Agreement</b>	Whether USDOC's subsidy determination was inconsistent with Article 14(d) of the SCM Agreement
<b>Issue 3: Article 2.1(c) of the SCM Agreement</b>	Whether specificity criteria laid out in Article 2.1(c) of the SCM Agreement was met
<b>Issue 4: with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement</b>	Whether the USITC's threat of injury determination was inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement
<b>Issue 5: Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement</b>	Whether the USITC's threat of injury determination was inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement?

---

## LEGAL ANALYSIS

---

### Rejection of 'in-country' prices as benchmarks to calculate benefits

The panel observed that prices are not market-determined where the government is the only supplier or where government administratively controls all the prices for the subject goods in the country. The panel also noted that whenever the government is the predominant provider of the investigated goods, even if not the sole provider, an investigating authority may reject in-country private prices as a benchmark if it concludes that these prices are distorted due to the predominant participation of the government as a provider in the market. In these situations, it would not be possible to use in-country prices as the benchmark for a comparison required under Article 14(d) of the SCM Agreement.

In the present dispute, Indonesia was the pre-dominant supplier of timber harvested during the period of investigation comprising over 93% of the market share. This made it likely that private prices could be distorted and that owners of private land would align their prices for the harvesting of standing timber to those established by Indonesia since the Indonesian prices were not market-determined. Therefore, the panel held that Indonesia had failed to establish that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement by not using domestic prices for standing timber in Indonesia as the basis for calculating the benchmark. Indonesia also dominated the market for logs. A log export ban applied to all logs in Indonesia. Minimal import quantities (less than 1%) relative to domestic production made it possible that import prices would have to match the government prices and, consequently, could not be used as a benchmark. The Panel found that Indonesia failed to establish that the USDOC acted inconsistently with Article 14(d) of SCM Agreement by declining to use import prices for logs in Indonesia as the basis for calculating the benchmark.

### Facts available with respect to debt buy-back

The panel noted that the process of identifying "facts available" should be limited to identifying replacements for "necessary information" that may be missing while arriving at an accurate determination. The panel also observed that facts available should not be applied in a punitive manner. In this dispute, necessary information was missing on the issue of the affiliation between *APP/SMG* and *Orleans Offshore Investment Limited*. The panel found that the USDOC's use of an inference in light of the Indonesia's failure to cooperate logically could only lead it to conclude that Orleans was affiliated with *APP/SMG*.

### Specificity determination

The panel observed that the analysis for *de facto* specificity should focus on the actual use of, or access to, the subsidy. However, the panel rejected Indonesia's argument that an investigating authority is required to make an explicit finding of the existence of the relevant subsidy programme "before" proceeding to analyze the factors provided for in Article 2.1(c) of the SCM Agreement when examining whether subsidies are *de facto* specific. The panel held that USDOC's findings satisfied the obligation to identify the subsidy programme at issue as a preliminary step in considering whether that programme was used by a limited number of certain enterprises or industries.

### **Consistency of injury determination with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement**

The panel noted that USITC's explanation on the likely impact of the projected decline in demand for the domestic industry was reasonable. In arriving at this conclusion, the panel found that Indonesia had failed to establish that the USITC's threat of injury determination was inconsistent with Article 3.5 of the Anti-Dumping Agreement and Article 15.5 of the SCM Agreement as USITC attributed adverse effects caused by other factors to the subject imports.

### **Threat of injury determination**

The panel held that Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement required an investigating authority to apply a 'heightened level of attention' in considering whether the domestic industry is threatened with injury. Therefore, the consistency of an investigating authority's threat of injury determination must be considered on its own terms, and not by comparison to the investigating authority's evaluation of the impact of dumped or subsidized imports on the domestic industry during the period of investigation. On this basis, the panel found that Indonesia failed to establish that USITC's threat of injury determination was inconsistent with Article 3.8 of the Anti-Dumping Agreement and Article 15.8 of the SCM Agreement.

## **DECISION**

---

In this dispute, the panel supported USDOC's application of 'Adverse Facts Available'. However, it also noted that facts available should not be used in a punitive manner. On the issue of non-attribution, the panel made an important finding in rejecting Indonesia's argument that if a domestic industry is found to be vulnerable to future injury for reasons other than the effect of subject imports during the period of investigation, then it cannot be found to be threatened with injury by future subject imports. Therefore, the non-attribution analysis between subject imports and other factors need not be mutually exclusive. Since no appeal was filed against this panel report, it was adopted on 12 January 2018.

## UNITED STATES - CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

Dispute	Complainant	Respondent	Dispute
WT/DS471	China	United States	Challenge on use of certain methodologies in anti-dumping investigations involving products from China.

### FACTS OF THE DISPUTE

On 3 December 2013, China requested consultations with the United States regarding certain antidumping measures adopted by the USDOC. China's request for consultations listed thirty-two separate antidumping determinations made by the USDOC. These included, but were not limited to, USDOC determination for coated paper, certain oil country tubular goods, high pressure steel cylinders, polyethylene terephthalate film, sheet, and strip ("PET"), and diamond sawblades and parts thereof.

In particular, China challenged the USDOC's use of the exceptional weighted average-to-transaction ("WA-T") methodology and the use of zeroing under this methodology. The panel report was circulated on 19 October 2016 and majority of China's claim was dismissed. This report was cross-appealed by China and United States.

The primary question placed before the Appellate Body related to USDOC's application of the W-T methodology under Article 2.4.2 of the Anti-Dumping Agreement.

### LEGAL ANALYSIS

China's claims concerned the USDOC's application of the 'W-T' (weighted average-to-transaction) methodology in three anti-dumping investigations. The legal basis of this is the second sentence of Article 2.4.2 of the Anti-Dumping Agreement which permits investigating authorities to identify and address "targeted dumping". As per this provision, an investigating authority is permitted to use W-T methodology instead of W-W or T-T methodology if two conditions are required:

- Pattern of export prices which differ significantly among different purchasers, regions or time periods" is identified;
- Provision of explanation as to why such differences cannot be considered appropriately by using a W-W or T-T comparison.

China's claims on appeal related to these conditions. The Appellate Body held that Article 2.4.2 of the Anti-Dumping Agreement did not prescribe a specific method for identifying a "pattern". In other words, Article 2.4.2 of the Anti-

Dumping Agreement did not list out whether individual export transaction prices or average prices should be used in the determination. Therefore, an investigating authority may rely on prices to find a pattern as long as the pattern meets the requirements laid down in Article 2.4.2 of the Anti-Dumping Agreement. Based on this analysis, the Appellate Body upheld the panel's findings that China could not establish a violation to the Anti-Dumping Agreement.

Moreover, the Appellate Body also made certain alterations to the panel request. It noted that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement did not permit the combining of comparison methodologies. In effect, this would mean that the investigating authority could not apply W-T to the "pattern transactions" and W-W or T-T to the "non-pattern transactions".

## **DECISION**

---

The DSB adopted the Appellate Body report in May 2017. Subsequently, on 19 June 2017, the United States noted that it would need a reasonable period of time to implement the decision. China requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. In January 2018, the arbitrator determined 15 months to be a reasonable period of time.

## ELP INTERNATIONAL TRADE AND CUSTOMS TEAM PRACTICE HEADS

Mr. Suhail Nathani

Managing Partner

T: +91 22 6636700

E: [SuhailNthani@elp-in.com](mailto:SuhailNthani@elp-in.com)

Mr. Sanjay Notani

Partner

T: +91 22 6636700

E: [SanjayNotani@elp-in.com](mailto:SanjayNotani@elp-in.com)

### ***Follow us:***

Twitter: [@ELPIndia](https://twitter.com/ELPIndia)

LinkedIn: [Economic Laws Practice \(ELP\)](#)

Facebook: [Economic Laws Practice](#)

Instagram: [elp think act excel](#)



#### **MUMBAI**

109 A, 1st Floor  
Dalamal Towers  
Free Press Journal Road  
Nariman Point  
Mumbai 400 021

[mumbai@elp-in.com](mailto:mumbai@elp-in.com)

#### **NEW DELHI**

801 A, 8th Floor  
Konnectus Tower  
Bhavbhuti Marg  
Opp. Ajmeri Gate Railway Station  
Nr. Minto Bridge

[delhi@elp-in.com](mailto:delhi@elp-in.com)

#### **AHMEDABAD**

801, 8th Floor  
Abhijeet III  
Mithakali Six Road, Ellisbridge  
Ahmedabad 380 006  
T: +91 79 6605 4480/8

[ahmedabad@elp-in.com](mailto:ahmedabad@elp-in.com)

#### **PUNE**

[pune@elp-in.com](mailto:pune@elp-in.com)

#### **BENGALURU**

[bengaluru@elp-in.com](mailto:bengaluru@elp-in.com)

#### **CHENNAI**

[chennai@elp-in.com](mailto:chennai@elp-in.com)