TEMPORAL SCOPE OF WTO DISPUTE SETTLEMENT: CHARTING THE CURRENTS OF A TURBULENT SEA

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ABSTRACT

The WTO Dispute Settlement system, like other dispute settlement fora, may be facing jurisdiction arguments arising from a debate about temporal scope. In fact, there are numerous panel and Appellate Body Reports that have addressed a wide variety of temporal scope arguments. However, it is difficult to build up an overview of these rulings due to the lack of a systematic summary in the rulings, not to mention the lack of academic work on this issue. This Paper seeks to address this vacuum by presenting to the readers a systematic summary of these practices based on the following four factors: (1) the identification of critical dates; (2) classification of the measure in light of its temporal nature; (3) special considerations arising from specific provisions of the covered agreements; and (4) other considerations that may have a bearing on the dispute. In addition, this Paper will also point out flaws in the approach of the panels and the Appellate Body.

KEYWORDS: *Appellate Body, Dispute Settlement, Jurisdiction, Procedural Issue,* rationale temporis, *Temporal Scope, terms of reference, WTO*

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I. INTRODUCTION

The notion of jurisdiction *rationale temporis* is an important procedural factor in dispute settlement.[1] Relevant dates and facts may have legal implications for the mandate of the tribunal in adjudicating the dispute. This issue also exists in respect of defining the jurisdiction of the panel[2] in WTO dispute settlement, albeit in a more specific form: whether a measure is within the scope of a panel's terms of reference may be put into question by the parties due to temporal concerns, leading to possible results such as barring the review power of the panel or limiting its scope of review.

It is without doubt that this procedural issue is important. First of all, there are numerous rulings under the WTO that addressed a wide variety of temporal claims raised by the parties. Also, the issue itself is in no means negligible for the parties: temporal scope challenges, when raised by the Respondent and accepted by panels, have the potential of ruining the Complainant's goal for raising the dispute due to the limitations on the panel's jurisdiction. But despite the extensive practice and importance to the parties, the full breadth and depth of this issue is nearly inaccessible to practitioners and experts in the field of WTO law. This is because WTO practice did not build up through a common coherent approach.

I do not seek to make a general accusation that panels and the Appellate Body (hereinafter "AB") disregard prior rulings, which would put the stability and predictability of the dispute settlement system[3] at risk. In fact, as I will explain in the following, it is the contrary. The problem here is that these case references are not built upon a common delineation

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[1] *See, e.g.*, SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1902-2005, VOL. II, 562-67 (4th ed. 2006) (on the practice regarding temporal scope of jurisdiction under the International Court of Justice). For cases in other fields of international law that touched upon temporal scope issues, see for example *Ping An Life Ins. Co., Ltd. v. Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award, ¶¶ 203-33 (Apr. 30, 2015) (the tribunal analyzed whether the 2009 BIT between the People's Republic of China and the Belgium-Luxembourg Economic Union accords jurisdiction to ICSID in respect of disputes that arise before the coming into force of that treaty).

[2] Here I refer only to "panels" because, as I will later explain, one of the critical dates for the review of temporal scope challenges is the "date of the establishment of the panel"; see *infra* Part IV.A.2 of this Paper. The Appellate Body [hereinafter AB], when involved in a temporal scope debate, only verifies whether the panel's determinations are in line with relevant provisions of the DSU based on relevant facts and arguments on the jurisdiction of the panel. In my view, to the extent that the AB is the first instance of dispute settlement, it is unlikely that there will be one.

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes Art. 3.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; *see also* Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (adopted May 20, 2008) ("Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.").

of terms and qualifications. The AB has never attempted to build a unified system for the purpose of temporal scope review, and it is impossible to expect a panel to take up such an endeavor. This makes any effort to grasp a clear picture exceedingly difficult. For example, if a researcher seeks to look up cases on temporal scope, he or she cannot just rely on the term "temporal scope",[4] as other terms, such as "temporal application"[5] or "temporal limitation"[6] are also being used in certain cases—this is itself an obstacle for identifying cases on this subject. As if such variance is not challenging enough, in certain cases where there was a ruling on a temporal scope, even the above terms are not mentioned: for instance such as only making a general assertion that it is dealing with a "preliminary issue".[7] Since at this point there is no specific academic work that seeks to present a systematic summary of the numerous AB and panel rulings, for those who seek to have a grasp on the issue of temporal scope by reading past rulings, he or she is doomed to face an arduous task that demands extensive time and effort.

In light of the above, this Paper is essentially a map-charting exercise that seeks to fill the intellectual vacuum. Since nothing in practice has provided a clear categorization of various temporal elements, I would like to use this Paper to suggest one that can help learners of WTO Law understand the approaches adopted by panels and the AB regarding the review of temporal scope. Since panels and the AB did not provide a unified system of review, all the categorizations, qualifications and comparisons are based on what I perceive would be helpful in making sense of the numerous rulings in WTO practice, and on that basis identify any unresolved issues in WTO practice in this respect.

The following analysis will cover all aspects of the debate between the parties regarding the possible expansion or limitation of a panel's terms of reference based on dates and time involved in a dispute, whether it be

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[4] *See, e.g.*, Appellate Body Report, *European Communities — Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 650-90, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011) [hereinafter EC and certain Member States — Large Civil Aircraft Appellate Body Report] (which is titled "The Temporal Scope of Article 5 of the SCM Agreement").

[5] *See, e.g.*, Panel Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, ¶¶ 9.42-44, WTO Doc. WT/DS70/R (adopted Aug. 20, 1999) [hereinafter Canada — Aircraft Panel Report] (which is titled "Temporal application of the SCM Agreement").

[6] *See, e.g.*, Appellate Body Report, *European Communities — Selected Customs Matters*, ¶¶ 177-89, WTO Doc. WT/DS315/AB/R (adopted Dec. 11, 2006) [hereinafter EC — Selected Customs Matters Appellate Body Report] (which is titled "Temporal Limitations of the Panel's Terms of Reference").

[7] *See, e.g.*, Panel Report, *United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, ¶¶ 6.6-17, WTO Doc. WT/DS99/R (adopted Mar. 19, 1999) [hereinafter US — DRAMS Panel Report]. In this case the panel was specifically addressing the temporal scope of application of the AD Agreement; however the title of this part is "preliminary issues".

factual or legal. A factual temporal element refers to the time elements that are present in the facts of the case, such as the date that the measure comes into force; the legal temporal element refers to the identification of time factors under the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") or the covered agreements, such as the date of the establishment of the panel as a critical date, or the limit of temporal application of the Anti-Dumping (hereinafter "AD") Agreement as seen in Art. 18.3 of the AD Agreement. As a final note, to ensure that there will be no confusion in the use of terms, I will use the term "temporal scope" throughout this Paper when referring to the temporal scope debate.

The structure of this Paper will be divided as follows: first, this Paper will point out the main provisions that set the stage for the temporal scope debate, namely DSU Arts. 6.2 and 7.1. Second, I will explain the legal issues arising from the temporal scope debate, and point out why it may significantly affect the outcome of a case. Third, this Paper will introduce the four temporal factors, elements which are essential in understanding the different approaches devised in WTO practice. Finally, despite being able to identify a quite coherent approach from the numerous panel and AB rulings, I will provide my analysis of persisting problems that have been left unaddressed, and provide my views on possible solutions based on the four temporal factors, before coming to the conclusion of this Paper.

II. DSU ARTS. 6.2 AND 7.1: THE KEY PROVISIONS FOR THE REVIEW OF TEMPORAL SCOPE

A proper analysis of a temporal scope debate necessitates the review of two provisions under the DSU: Arts. 6.2 and 7.1. This is due to the fact that these are the two provisions that regulate the terms of reference of a panel. The scope of the terms of reference is important because they set the parameters of the panel's jurisdiction and define the measures that are the object of findings and recommendations pursuant to DSU Arts. 11, 12.7 and 19.[8]

Art. 6.2 lays down the requirements of a proper request for the establishment of a panel. This provision plays a significant role for the review of temporal scope in three respects. (1) The date of the establishment of the panel decides which measure may be included in a panel's terms of reference.[9] (2) Measures and claims identified in the

[8] Panel Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶ 7.10, WTO Doc. WT/DS394/R, WT/DS395/R, WT/DS398/R (adopted Feb. 2, 2012) [hereinafter China — Raw Materials Panel Report].
[9] *Id.* ¶ 7.19.

request for establishment of the panel govern the terms of reference,[10] thus any review of the terms of reference will necessarily involve a review of the request for establishment of the panel, in order to decide whether the measure at issue and the legal basis are clearly identified.[11] (3) The requirement of identification of the "specific measure at issue" implies that "the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel"[12]—this lays down the principle rule regarding what is a reviewable measure under the WTO.[13] In this respect, disputes may arise as to whether there is an "exceptional situation" that allows a panel to review a measure that does not exist at the time of the establishment of the panel.[14]

Art. 7.1, the other key provision, regulates the standard terms of reference. Art. 7.1 states that panels will have standard terms of reference within 20 days from the establishment of the panel, unless the parties to the dispute agree otherwise.

Both Arts. 6.2 and 7.1 serve as the source provision that can guide the determination of a panel's terms of reference. Furthermore, the AB in the *Brazil — Desiccated Coconut* case identified two main functions of the terms of reference:

> First, terms of reference fulfil an important due process objective—they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[15]

Due process provides for a special consideration for a temporal scope

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[10] EC — Selected Customs Matters Appellate Body Report, *supra* note 6, ¶ 131.

[11] *See* Appellate Body Report, *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶ 72, WTO Doc. WT/DS60/AB/R (adopted Nov. 25, 1998) [hereinafter Guatemala — Cement I Appellate Body Report].

[12] Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 156, WTO Doc. WT/DS269/AB/R (adopted Sept. 27, 2005) [hereinafter EC — Chicken Cuts Appellate Body Report]; EC — Selected Customs Matters Appellate Body Report, *supra* note 6, ¶ 184; *see also* Guatemala — Cement I Appellate Body Report, *supra* note 11, ¶ 72 (identifying the substantive requirement of Art. 6.2 by finding that the request of the establishment of the panel is usually identified as the document setting out the "matter referred to the DSB" in the panel's terms of reference).

[13] EC — Chicken Cuts Appellate Body Report, *supra* note 12, ¶ 156.

[14] *See, e.g.*, *id*.

[15] Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut*, at 22, WTO Doc. WT/DS22/AB/R (adopted Mar. 20, 1997) [hereinafter Brazil — Desiccated Coconut Appellate Body Report]; *see also* Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, ¶ 142, WTO Doc. WT/DS27/AB/R (adopted Sept. 25, 1997).

review, as "a [Complainant] should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'."[16] Thus due process considerations should not be overlooked in a temporal scope debate. In sum, the notion of temporal scope is about the scope of the terms of reference. The main conflict between the parties will be whether the terms of reference provide sufficient basis to allow a panel to deviate from the principle practice of reviewing only existing measures.

One interesting side issue is how the consultation fares in the review process. Current practice is clear that the consultation process has little bearing in affecting the scope of the terms of reference.[17]

III. THE LEGAL ISSUES ARISING FROM A TEMPORAL SCOPE DEBATE

Based on the existing practices, a temporal scope debate would require a panel to address two issues: first, whether the panel's terms of reference cover the measure at issue in light of the temporal elements in the dispute, and second, if the measure at issue is reviewable and found to be inconsistent with the covered agreements, whether the panel's power to issue recommendation and rulings is affected by the temporal element raised in the dispute. The outcome of both legal issues can have legal ramifications for the Complainant: the former can effectively bar the panel from reviewing the measure at issue, while the later issue can hamper the objective of the Complainant in acquiring a ruling against the measure at issue. The following analysis shows that the various elements all circle around these legal issues.

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[16] *See* Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶ 144, WTO Doc. WT/DS207/AB/R (adopted Oct. 23, 2002) [hereinafter Chile — Price Band System Appellate Body Report]. In light of this consideration, the AB ruled that if the terms of reference in a dispute are broad enough to include amendments to a measure, and if it is necessary to consider an amendment in order to secure a positive solution to the dispute, then it is appropriate to review the amended measure.

[17] In the *Brazil — Aircraft* case, a case under the context of the SCM Agreement, Brazil claims that certain measures enacted after Canada's request for consultation do not fall within the scope of the terms of reference because these later measures were not and have not been the subject of consultation (Panel Report, *Brazil — Export Financing Programme for Aircraft*, ¶ 7.4, WTO Doc. WT/DS46/R (adopted Aug. 20, 1999)); however, the panel rejected this contention by stating that a panel is sufficiently established if it is established to address the same "dispute" as was discussed in the consultation process (*id.* ¶¶ 7.9-11). This ruling was further affirmed by the AB by stating that "the regulatory instruments that came into effect in 1997 and 1998 *did not change the essence* of the export subsidies for regional aircraft under PROEX." (Emphasis added.) Appellate Body Report, *Brazil — Export Financing Programme for Aircraft*, ¶ 132, WTO Doc. WT/DS46/AB/R (adopted Aug. 20, 1999).

IV. TEMPORAL SCOPE REVIEW UNDER THE WTO: THE FOUR TEMPORAL FACTORS

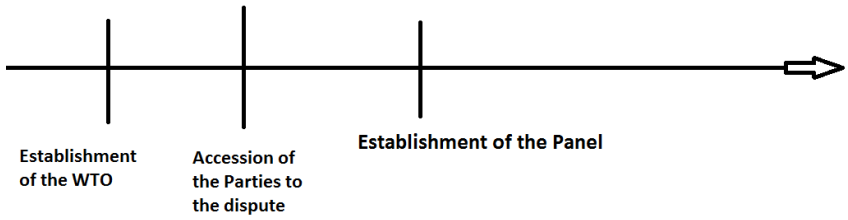
The main difficulty in the debate of temporal scope is the classification of the temporal scope debate for the purpose of conducting a proper review. Panels and the AB have identified differences in the facts and applicable law, adopting different approaches and reasoning to support their rulings. In what follows, this Paper will provide an overview of these practices based on the following four factors: (1) the critical dates under WTO dispute settlement; (2) different measure qualification based on its temporal character; (3) special considerations arising from the applicable law; and (4) other considerations that have a bearing on the understanding of temporal scope claims.

A. First Factor: The Critical Dates Under WTO Dispute Settlement

There are two types of critical dates that are relevant to a temporal scope review under the WTO: (1) the date of the establishment of the WTO / accession of one of the Members, and (2) the date of the establishment of the panel. Regarding accession, it must be noted that this can refer to either the Complainant *or* the Respondent, depending on who joined the WTO later. The consideration is different for each side: for the Respondent, it is after the date of accession that the Respondent starts to bear legal obligations under the covered agreement, while the Complainant is only entitled to the treatments provided by the covered agreements after accession to the WTO.[18] To give an example: if the Complainant joined the WTO on 1 January 2002, and the Respondent joined the WTO on 1 January 2005, the critical date for dispute settlement is 1 January 2005. Thus for the purpose of this Paper, when I use the term "accession of the parties to the dispute", I am referring to the latter date when the covered agreements come into force for one of the parties. The above can be summarized into the following chart:

[18] Art. II:2 of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") states that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members." Annex 2 specifically refers to the DSU Understanding. Also, Art. XII:1 of the WTO Agreement, being a provision on accession, states that "[s]uch accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto."

CHART 1: The Standard Timeline Chart



From these critical dates, we can identify two types of effect:

1. A Measure That Ceased to Exist Before the Establishment of the WTO / Accession of the Complainant Is, in Principle, Not Subject to Review — The date of the establishment of the WTO and the accession of the Complainant and the Respondent, being different dates, are listed here under the same category because of the legal effect the two dates represent: it is generally perceived that WTO covered agreements do not apply to measures that ceased to exist before this date, thus they are not subject to review by the panel or the AB.[19] For the situation of accession, I have explained that the latter date is the critical date for temporal scope review. In practice, in respect of the later accession of the Complainant, there are examples where the parties form an agreement to withdraw such claims.[20] For the Respondent, there are no relevant rulings that I can find on this matter, but this may be because it is quite clear why conduct before the Respondent's accession should in principle not be subject to review.

The only ground that allows a deviation from this general rule is when a dispute that involves the individual adverse effect as specified under Art. 5 of the SCM Agreement is subject to review. I will explain this in Part IV.C.1 of this paper.

[19] *See, e.g.*, Canada — Aircraft Panel Report, *supra* note 5, ¶ 9.42.
[20] *See id.* ¶¶ 9.42-44; Panel Report, *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶¶ 7.35-37, WTO Doc. WT/DS404/R (adopted Sept. 2, 2011) [hereinafter US — Shrimp (Viet Nam) Panel Report].

CHART 2-1: Measure that Ceased to Exist Before the Establishment of the WTO[21]

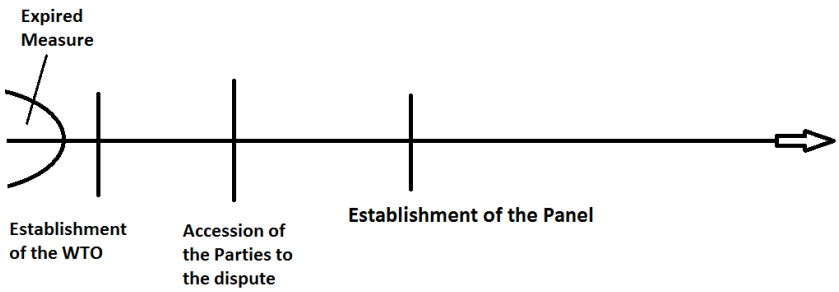
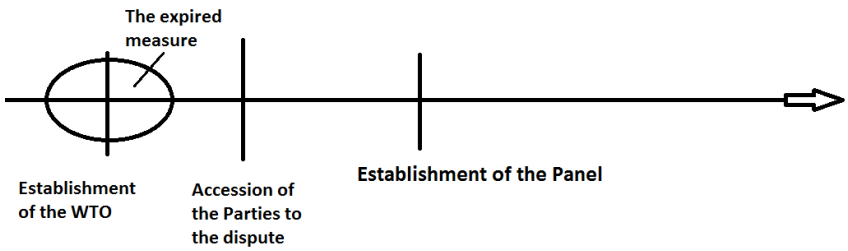


CHART 2-2: Measure that Ceased to Exist Before the Accession of the Complainant to the Dispute[22]



2. The Date of the Establishment of the Panel: Critical Date for Determining Whether the Measure Exists, and Its Legal Effect — As previously mentioned, DSU Art. 6.2 makes the date of the establishment of the panel the critical date for dispute settlement. In the GATT period, the critical date is the formation of the terms of reference due to the need to acquire the consent of the Respondent.[23] Although in the first ruling under

[21] *See, e.g.*, Canada — Aircraft Panel Report, *supra* note 5, ¶¶ 9.42-44.
[22] *See* US — Shrimp (Viet Nam) Panel Report, *supra* note 20, ¶¶ 7.35-37.
[23] WTO: INSTITUTIONS AND DISPUTE SETTLEMENT 338 (Rüdiger Wolfrum et al. eds., 2006). As an example, in the *EEC — Chile Apples* case, the panel has proceeded to review a measure that ceased to exist at the time of the confirmation of the terms of reference because the measure at issue, being a

the WTO, the *US — Gasoline* case, the panel followed the old GATT critical date,[24] later cases put more emphasis on the date of the establishment of the panel.[25] This date serves as a basic leverage point for the determination of whether a measure exists for the purpose of dispute settlement. As a final note, the determination of whether a measure exists will not be affected by a claim from the Respondent that the measure will be implemented at a later time.[26]

B. Second Factor: Different Measure Qualification Based on Its Temporal Character

After the determination of the critical dates, the next step is to determine the temporal characteristics of the measure at issue. This Paper identifies a total of 5 types of measure that have brought about different approaches of review, namely: (1) Expired Measure, (2) Continuing Measure, (3) Amended Measure, (4) Future Measure, and (5) Replacement and Renewal Measure. In what follows, I will provide a brief introduction to the definition of these categories and the effect of such qualification.

1. Expired Measure (Specifically on Measures That Expired Before or After the Establishment of the Panel) — An expired measure is a measure that has ceased to exist or to be in force, either before or after the establishment of the panel. Under this definition, there is no further action on the part of the Respondent to replace the expired measure with other measures.[27] Since I have explained the outcome of measures that ceased to exist before the establishment of the WTO or the accession of the Complainant, in this part, I will focus on measures that expired before and after the establishment of the panel.

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seasonal measure, is specifically mentioned in the GATT panel's terms of reference. *See* Report of the Panel, *EEC — Restrictions on Imports of Apples from Chile (I)*, ¶¶ 1.5, 2.4, L/5047 (Nov. 10, 1980), GATT BISD (27th Supp.), at 98 (1981).

[24] *See, e.g.*, Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.19, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter US — Gasoline Panel Report].

[25] *See, e.g.*, Panel Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶ 6.4, WTO Doc. WT/DS56/R (adopted Apr. 22, 1998) [hereinafter Argentina — Textiles and Apparels Panel Report].

[26] *See* Panel Report, *Russia — Tariff Treatment of Certain Agricultural and Manufacturing Products*, ¶ 7.81, WTO Doc. WT/DS485/R (adopted Sept. 26, 2016).

[27] This is what distinguishes it from an amended measure and a replacement and renewal measure, the other two types of measure that involve expiration of a measure (as will be discussed later).

CHART 3-1: Timeline of Expired Measure, not in Force *Before* the Establishment of the Panel

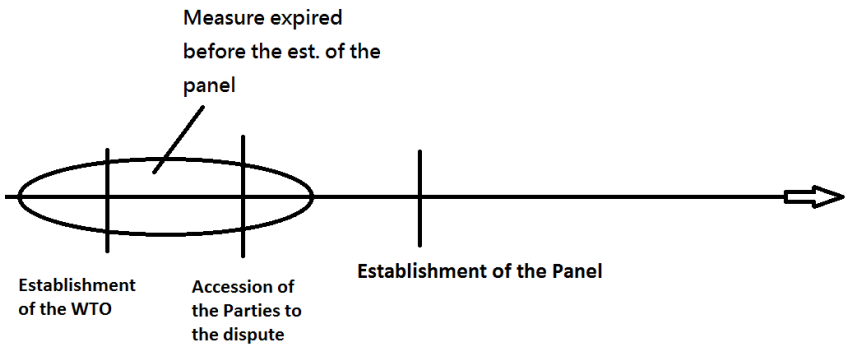
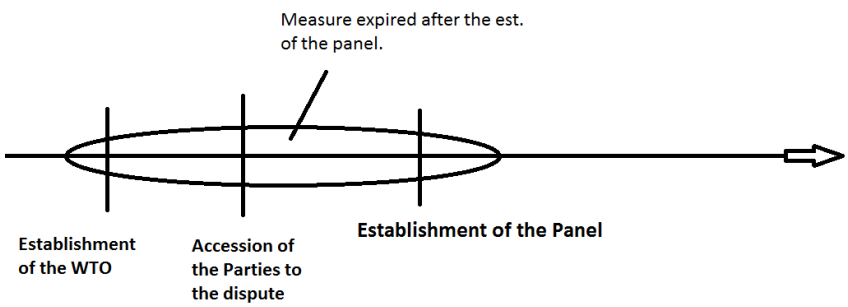


CHART 3-2: Timeline of Expired Measure, not in Force *After* the Establishment of the Panel



The legal problems regarding expired measures all derive from the question of whether the measure exists for the purpose of WTO dispute settlement.

First, the expiration of the measure at issue before or after the establishment of the panel has different implications in the review process. For the former, it does not exist for the purpose of WTO dispute settlement, thus additional reasoning is required to explain why the panel should proceed to review such a measure; for the latter, since the measure does not *in fact* exist after the date of the establishment of the panel, it puts into doubt whether a review will be fruitful.

Second, the question "whether a panel should conduct a review over expired measures" is different from the question "whether a panel should issue recommendation and ruling against an expired measure". The former is dictated by the panel's terms of reference and the Complainant's panel request as regulated under DSU Arts. 7.1 and 6.2, respectively; the latter question, however, involves the consideration of DSU Art. 19.1. Whether an expired measure can be reviewed by the panel is not dispositive of the question of whether a recommendation and ruling can be issued against it.

To address the above issues, WTO practices regarding Expired Measure can be summarized as follows:

1. For an expired measure that ceased to exist before the establishment of the panel, the AB has clarified that the expiry status of such a measure does not exclude it from the scope of a panel's terms of reference, if the Complainant considers that its benefits are still being impaired.[28] Note that this is a deviation from earlier practice which considers a review of such a measure to be "unusual" and thus tends not to conduct review.[29]
2. Regarding an expired measure that ceased to exist after the establishment of the panel, a panel has full discretion to decide on whether to make a finding.[30] This brings us to the next question: what may be the consideration for conducting a review? One ground that has been identified in practice is the need to prevent the re-imposition of the repealed measure.[31] Although such a ground can be rejected by a

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[28] *See* Appellate Body Report, *United States — Subsidies on Upland Cotton*, ¶ 270, WTO Doc. WT/DS267/AB/R (adopted Mar. 21, 2005) [hereinafter US — Upland Cotton Appellate Body Report]. Although the situation in the *US — Upland Cotton* case involves a review of Art. 5 of the SCM Agreement, which is a provision that supports a special ground in the expansion of temporal scope, this line of reasoning has been adopted in later cases to address expired measures. *See, e.g.*, Panel Report, *Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶¶ 7.42-44, WTO Doc. WT/DS371/R (adopted July 15, 2011) [hereinafter Thailand — Cigarettes (Philippines) Panel Report]; Panel Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.30, WTO Doc. WT/DS384/R (adopted Nov. 18, 2011) [hereinafter US — COOL Panel Report].

[29] *See* US — Gasoline Panel Report, *supra* note 24, ¶ 6.19.

[30] The AB stated in the *EC — Banana III* case that:

> [O]nce a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference. We thus consider it to be within the discretion of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue.

Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas: Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶ 270, WTO Doc. WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA (adopted Dec. 11, 2008).

[31] For example, in the *US — Poultry (China)* case, this was cited as a ground for reviewing the measure at issue in this case, Section 727, which expired two days after the deadline for China's first written submission. *See* Panel Report, *United States — Certain Measures Affecting Imports of*

panel,[32] considering the objective of positive resolution of dispute as regulated under Art. 3.7 of the DSU and the due process right of Members,[33] it is likely that modern day panels will tend to conduct a review.

3. In addition to reviewability as explained above, the date of expiration of the measure will have significance in light of its effect on the panel for its recommendation and ruling under DSU Art. 19.1. The AB made clear that a panel should not make recommendations and rulings on an expired measure.[34] This has been followed by later panels.[35]

Poultry from China, ¶ 7.51, WTO Doc. WT/DS392/R (adopted Oct. 25, 2010) [hereinafter US — Poultry (China) Panel Report]). The panel explained that:

> [W]e consider that if we were to refuse to make findings on the expired measure—Section 727—the Panel might be depriving China of any meaningful review of the consistency of the United States' actions with its WTO obligations, while allowing the repetition of the potentially WTO-inconsistent conduct. This would certainly call to mind the "moving target" scenario which the Appellate Body in *Chile — Price Band System* stated that a complainant should not have to face.

Id. ¶ 7.55.

[32] In the *Argentina — Textiles and Apparels* case, the US requested that the panel review a footwear duty that was repealed by Argentina. The US specifically pointed out that there is a threat of reintroducing the repealed duty if the panel did not proceed to review the measure. The panel refused to conduct review on the assumption that Argentina will perform their treaty obligation in good faith. Argentina — Textiles and Apparels Panel Report, *supra* note 25, ¶ 6.14.

[33] The AB stated that: "However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'." Chile — Price Band System Appellate Body Report, *supra* note 16, ¶ 144. Note that the measure at issue in the *Chile — Price Band System* case, being an amended measure, does not seem to block later panels from referring to it in the context of expired measure. Also, in these later cases, no distinction is made between whether the measure expired before or after the establishment of the panel. *See, e.g.*, US — Poultry (China) Panel Report, *supra* note 31, ¶ 7.55 (on measures that ceased to exist after the establishment of the panel); Thailand — Cigarettes (Philippines) Panel Report, *supra* note 28, ¶ 7.47 (on measures that ceased to exist before the establishment of the panel). But in any case, we can understand that the due process right of the Complainant is another support for the review of expired measures that have ceased to exist before and after the establishment of the panel.

[34] In the *US — Certain EC Products* case, the measure at issue ceased to exist at the time of the establishment of the panel. The AB considers that "there is an obvious inconsistency between the finding that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations." This indicates a limit in the power of the panel to issue recommendations and rulings against an expired measure. *See* Appellate Body Report, *United States — Import Measures on Certain Products from the European Communities*, ¶¶ 80-81, WTO Doc. WT/DS165/AB/R (adopted Jan. 10, 2001) [hereinafter US — Certain EC Products Appellate Body Report]. Earlier panels may issue recommendation and ruling against an Expired Measure that ceased to exist after the establishment of the panel. *See, e.g.*, Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, ¶¶ 14.9, 15.1(d), WTO Doc. WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (adopted July 23, 1998). The panel in the *India — Autos* case provided further clarification that is useful in understanding the rationale to support this conclusion:

"However, the notion of a measure that no longer 'exists' is not always straightforward."[36] When it is not clear whether the measure exists, an expressed assumption will be declared in the recommendation and ruling.[37]

2. Continuing Measure — This refers to a measure that was enacted before the establishment of the WTO or before the accession of the parties to the dispute, but continues to exist after WTO obligations become binding on the parties. This situation puts into question the applicability of the covered agreement to the measure at issue.[38]

> If only as a matter of logic, there can be no sense in making such a recommendation if a Panel is of the view that the violation at issue has ceased to exist when its recommendation is being made. The Panel does not believe that Articles 11 and 19 of the DSU should be interpreted to demand that a panel must make a formalistic statement that a measure needs to be brought into compliance when it is faced with factual and legal arguments that this is no longer the case and must do so without being entitled to resolve those contentions.

Panel Report, *India — Measures Affecting the Automotive Sectors*, ¶ 8.25, WTO Doc. WT/DS146/R, WT/DS175/R (adopted Apr. 5, 2002) (footnote omitted).

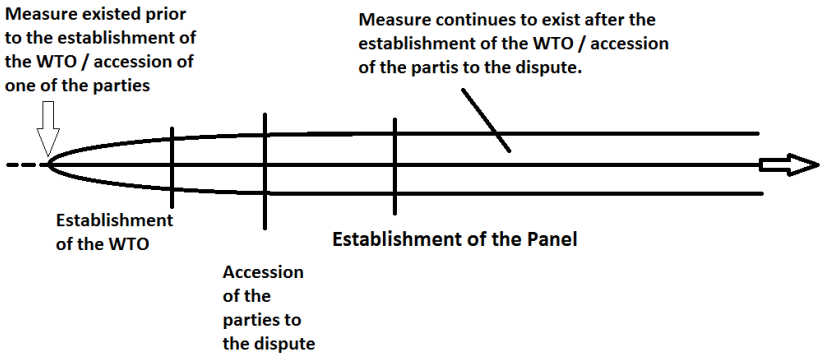
[35] *See, e.g.*, US — Poultry (China) Panel Report, *supra* note 31, ¶¶ 7.56, 8.7 (on measures that ceased to exist after the establishment of the panel); Thailand — Cigarettes (Philippines) Panel Report, *supra* note 28, ¶¶ 6.15, 8.8.

[36] Panel Report, *European Communities — Measures Affecting Trade in Commercial Vessels*, ¶ 8.4, WTO Doc. WT/DS301/R (adopted June 20, 2005).

[37] *See, e.g.*, Thailand — Cigarettes (Philippines) Panel Report, *supra* note 28, ¶ 8.8; Panel Report, *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States, Recourse to Article 21.5 of the DSU by the United States*, ¶¶ 6.20-25, WTO Doc. WT/DS414/RW (adopted Aug. 31, 2015).

[38] This definition does not cover measures that were enacted after the establishment of the WTO as those measures are without question subject to the covered agreements.

CHART 4: Timeline of a Continuing Measure



Under this situation, there is no debate in terms of the reviewing power of the panel. The temporal debate under this context is more unusual in that it focuses on the temporal application of the covered agreements, which is based on Vienna Convention Art. 28[39] as interpreted by the AB.[40]

The AB, through the *EC — Hormones* and the *EC — Sardines* cases, accorded importance to whether the provisions raised in the dispute specifically provided for this limit.[41] The million-dollar question here is whether under WTO Law, there is a general presumption that there is no temporal limit to the review of continuing measures under the WTO Agreement as a whole. The AB seems to imply that this is the case by referring to Art. XVI:4 of the WTO Agreement. Based on this provision, the AB concluded that there are no longer "existing legislation" exceptions

[39] Vienna Convention on the Law of Treaties Art. 28, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT], provides that:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

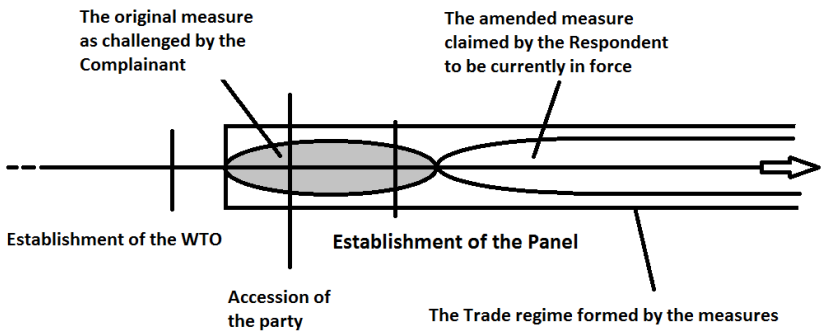
[40] The AB understood VCLT Art. 28 to mean: "Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force." Brazil — Desiccated Coconut Appellate Body Report, *supra* note 15, at 15.

[41] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)*, ¶ 128, WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998) [hereinafter EC — Hormones Appellate Body Report]; Appellate Body Report, *European Communities — Trade Description of Sardines*, ¶¶ 199-212, WTO Doc. WT/DS231/AB/R (adopted Sept. 26, 2002) [hereinafter EC — Sardines Appellate Body Report].

(so-called "grandfather rights") under the WTO.[42]

3. Amended Measure — An amended measure refers to a measure that was amended during the panel review process. While this may entail a specific future aspect, it should not be confused with "future measure", as there are differences in respect of definition and review standard.[43] This covers both the situation in which an amendment is made to certain parts of the measure at issue, and the situation in which the original challenged measure (hereinafter "the original measure") ceased to exist, and was replaced by a new measure, the "amended measure", *after* the establishment of the panel. Since the former situation will not give rise to any temporal dispute because the measure at issue is still the same, the following discussions will focus on the later type.

CHART 5: Timeline for Amended Measure as a Measure that Was Enacted After the Establishment of the Panel



The main legal question here is whether the amended measure falls within the scope of a panel's terms of reference, despite the fact that the measure came into force after the critical date of the establishment of the panel.

There are three key cases on Amended Measure:[44]

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[42] EC — Hormones Appellate Body Report, *supra* note 41, ¶ 128.

[43] In this respect I would consider the panel ruling in the *US — Large Civil Aircraft II* case to be misleading, and urge readers of this Paper to not follow such a usage. Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 7.688, WTO Doc. WT/DS353/R (adopted Mar. 23, 2012) [hereinafter US — Large Civil Aircraft II Panel Report].

[44] In my view, the panel in the *EC — IT Products* case provides us with a good summary of the standard established by the *Chile — Price Band System* and *EC — Chicken Cuts* cases:

1. *Chile — Price Band System* case as reference to what will be considered as an amended measure: the AB ruled that to the extent that the terms of reference covers amendments, and that the amended measure does not render the original measure into a different measure, the amended measure should also be reviewed for the purpose of positive resolution of the dispute.[45] This has been consistently referred to as the basis for reviewing amended measure in a dispute.[46]
2. *EC — Chicken Cuts* case as reference to what measures will *not* be considered as an amended measure: in this case, the AB does not consider the two subsequent measures at issue to be amendments to the original measure because the subsequent measures are, *in essence*, different from the original measures.[47] This establishes a standard that

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> In light of the Appellate Body's earlier enunciations in its reports on *Chile — Price Band System* and *EC — Chicken Cuts*, we understand that a panel's terms of reference may be considered to include "amendments" to measures that are listed in the panel request as long as the terms of reference are broad enough, and second, the new measure does not "change the essence" of the original measures included in the request or have legal implications overly different from those of the original measures. Moreover, it may be relevant to consider whether the inclusion of any amendments within a panel's terms of reference is necessary to secure a positive solution to the dispute.

Panel Report, *European Communities and Its Member States — Tariff Treatment of Certain Information Technology Products*, ¶ 7.139, WTO Doc. WT/DS375/R, WT/DS376/R, WT/DS377/R (adopted Sept. 21, 2010) [hereinafter EC — IT Products Panel Report].

[45] *See* Chile — Price Band System Appellate Body Report, *supra* note 16, ¶¶ 136-44. In addition to the above standard, the AB also explained the need to expand the temporal scope of review in light of due process: "the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'." *Id.* ¶ 144.

[46] *See, e.g.*, Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.52, WTO Doc. WT/DS366/R (adopted May 20, 2009); Panel Report, *United States — Measures Relating to Shrimp from Thailand*, ¶ 7.46, WTO Doc. WT/DS343/R (adopted Aug. 1, 2008); Panel Report, *Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.20, WTO Doc. WT/DS302/R (adopted May 19, 2005). One additional consideration in the *Chile — Price Band System* case that supports the conclusion of the AB is that the parties did not object to the AB's power to rule on the price band system that is currently in force. *See* Chile — Price Band System Appellate Body Report, *supra* note 16, ¶ 143. This was referred in the *India — Additional Import Duties* Panel Report as a ground to support its conclusion that it should not rule on the amended measures, because the parties did not agree that the panel is entitled to rule on the amended measure. Panel Report, *India — Additional and Extra-additional Duties on Imports from the United States*, ¶ 7.64, WTO Doc. WT/DS360/R (adopted Nov. 17, 2008). However, I do not think that this consideration provides any practical guidance to the review of amended measure, because the actions of the parties on whether to challenge a panel's power of review cannot replace the standard as established in the *Chile — Price Band System* case.

[47] EC — Chicken Cuts Appellate Body Report, *supra* note 12, ¶¶ 157, 159. Beside the fact that the original measures are still in effect despite the presence of the subsequent measures, more importantly, the legal implications of the two subsequent measures are different from the original

takes into account the relationship between the original measure and the later measure subject in this context.

3. "Substantive change" standard under the *Argentina — Financial Services* case: in this case, the panel ruled that the amended measure that was installed after the establishment of the panel "did not involve any substantive change in the formulation of [the measures at issue]" and thus does not raise a new dispute different from the one that was subject to consultation. Thus it can proceed to review the amended measure.[48]

In sum, whether an amended measure is covered in the dispute requires a review of the scope of the terms of reference based on an analysis of the relationship between the original measure and the amended measure.

4. Future Measure — A future measure is a measure that exists after the establishment of the panel.[49] Though debates surrounding futures measures are reviewed in practice, there is no general recognition that a Member can make pre-emptive challenges against another Member based on its own imagination. In principle, if a panel determines that a measure did not exist, have never existed and might not subsequently come into existence, there is no basis to claim any impairment of benefit that warrants prompt settlement of dispute in accordance with DSU Art. 3.3.[50] This can be understood as a threshold requirement for bringing a challenge against future measures.

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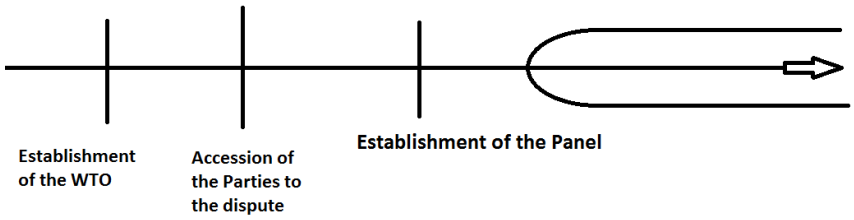
measures: the two subsequent measures amended the EC combined nomenclature in general, while the original measures are focused on frozen boneless salted chicken cuts. *Id.* ¶ 158.

[48] Panel Report, *Argentina — Measures Relating to Trade in Goods and Services*, ¶ 7.14, WTO Doc. WT/DS453/R (adopted May 9, 2016).

[49] US — Large Civil Aircraft II Panel Report, *supra* note 43, ¶ 7.674, which followed the definition as agreed upon by the parties in the dispute in *id.* ¶¶ 7.665, 7.669.

[50] *See* Panel Report, *United States — Subsidies on Upland Cotton*, ¶¶ 7.158-60, WTO Doc. WT/DS267/R (adopted Mar. 21, 2005).

CHART 6: Timeline of Future Measure that Comes into Force After the Establishment of the Panel



In practice, a review of future measures as defined in WTO practice is allowed only under very limited circumstances. First of all, as recognized in the *US – Large Civil Aircraft II* case, a future measure can be reviewed if its existence can be verified through existing measures that provide clear indication of what would occur in the future.[51] Secondly, it is established that challenges against mandatory legislations of a Member can be presented even if it is not yet in force.[52] To the extent that the future measure at issue is a mandatory legislation, WTO practice has established them to be reviewable. Finally, a special type of future measure arises under the context of DSU Art. 21.5 compliance proceedings: after the date of the establishment of the compliance panel and during the review process, the complying Member may enact measures that replace the inconsistent measure as identified in the original panel or AB report. WTO practice has recognized the need to entertain such claims, considering that there is often an ongoing or continuous character in matters of implementation.[53]

[51] US — Large Civil Aircraft II Panel Report, *supra* note 43, ¶¶ 7.689-91. Also, as I will later explain in Part IV.C.1, the review of temporal issues arising from the "effect" of subsidies under Art. 5 of the SCM Agreement follows a different set of approach despite its possible overlap with the review of future measure.

[52] *See* Panel Report, *Turkey — Restrictions on Import of Textiles and Clothing Products*, ¶ 9.37, WTO Doc. WT/DS34/R (adopted Nov. 19, 1999); *see also* Panel Report, *China — Measures Affecting Imports of Automobile Parts*, at 154 n.202, WTO Doc. WT/DS339/R, WT/DS340/R, WT/DS342/R (adopted Jan. 12, 2009).

[53] Panel Report, *Australia — Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada*, ¶ 7.10(27), WTO Doc. WT/DS18/RW (adopted Nov. 6, 1998) [hereinafter Australia — Salmon Panel Report]. Similar reasoning was made in the *US — Zeroing (Japan)* case: an anti-dumping review which does not exist at the time of the establishment of the panel falls within its terms of reference because these reviews form part of a continuum, thus making a claim against this measure entirely predictable. *See* Panel Report, *United States — Measures Relating to Zeroing and*

Compared to other situations, there is a more compelling reason to review measures introduced during compliance proceedings.[54]

The common standard that can be distilled from these cases is that the Complainant must present a strong factual support (such as prior legislation or conduct) where the future measure at issue can be perceived to manifest in its complete form at the time of the establishment of the panel. There is a strong reason for allowing such a challenge: the design of the obligations not only protects current trade but also creates the predictability needed to plan future trade.[55] If a verifiable future measure that goes against the covered agreements cannot be challenged until it is in force, it will defeat the above purpose.[56] This notion, even though derived from old GATT practice, strengthens the legitimacy of such a review. However, it is equally important to note that the threshold for bringing a claim against a future measure is also quite high: from the previous examples, it is essential to ask the Complainant to show a physical presence of the measure at issue at the time of the dispute.

5. Replacement and Renewal Measure — A replacement and renewal measure refers to a measure that is subject to review on a regular basis. The "review on a regular basis" is a key characteristic, since a new measure will always be enacted to replace the original measure after the review process. Thus the original measure will cease to be in effect after the new measure comes into force.[57] It is possible that the Respondent may decide not to change the content of the original measure after the review process, yet there will still be an amendment in which the title of the measure is changed to reflect its updated status.

This type of measure can be understood as a hybrid of "amended measure" and "future measure". It is an "amended measure" because after the annual review, the original measure will cease to exist and be replaced by a new measure; but considering that the Respondent can be reasonably expected to make an amendment, the amended measure can also be qualified as a "future measure" if it did not exist at the time of the

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Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, ¶ 7.116, WTO Doc. WT/DS322/RW (adopted Jan. 23, 2007).

[54] Australia — Salmon Panel Report, *supra* note 53, ¶ 7.10(28).

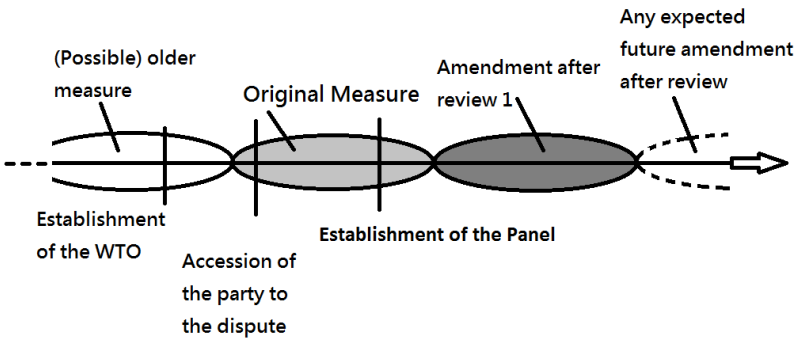
[55] Report of the Panel, *United States — Taxes on Petroleum and Certain Imported Substances*, ¶ 5.2.2, L/6175 (June 17, 1987), GATT BISD (32d Supp.), at 136 (1988).

[56] This rationale is reflecting in the *US — Superfund* ruling. *See id*.

[57] The most apparent example of such a measure is a measure that incorporates an annual review mechanism, such as the measure seen in the *China — Raw Materials* case: each year, regarding certain measures relating to the exportation of rare earth materials, the Chinese government will conduct a review on certain key measures enacted by the central government each year, and make amendments after the review process; during the panel process, many measures enacted in the year 2009 were replaced by new measures in the year 2010. *See* China — Raw Materials Panel Report, *supra* note 8, ¶ 7.5.

establishment of the panel.

CHART 7: Timeline of Replacement and Renewal Measure



WTO practices have established that any future amendment of a replacement and renewal measure falls within the scope of the panel's terms of reference if its scope is broad enough to cover these future amendments. The rationale for the covering of these measures follows mainly the rationale of amended measure[58]—to the extent that the request for establishment of the panel has prescribed the measure at issue in a way that is broad enough to cover subsequent measures, which are of the same essence as the cited measure at issue, then a panel is free to review the measure at issue and the subsequent new measures enacted after review.

However, when it comes to recommendations and rulings, WTO practice recognizes the need to issue one against a replacement and renewal measure. This was first verified in the *China — Raw Materials* case: the panel considered that for measures that have expired but are "alleged to be ongoing, with prospective application and a life potentially stretching into the future",[59] it can issue recommendation and ruling despite the fact that the original measure may have been replaced by a new measure.[60] The prospective effect of a reviewable measure is what supports the active position of panels to issue rulings.

[58] *See id.* ¶¶ 7.15-16, 7.19; EC — IT Products Panel Report, *supra* note 44, ¶¶ 7.140, 7.142.
[59] Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, ¶ 171, WTO Doc. WT/DS350/AB/R (adopted Feb. 19, 2009) [hereinafter US — Continued Zeroing Appellate Body Report].
[60] China — Raw Materials Panel Report, *supra* note 8, ¶¶ 7.30-33.

C. Third Factor: Special Considerations Arising from the Applicable Law

The effect of the applicable law is another factor that may affect the outcome of a temporal scope claim. Under this type of situation, the applicable law raised in the dispute may provide grounds for expanding or limiting the temporal scope. Existing practice has identified three situations for such expansion: (1) when challenging the "effect" of an SCM measure under Article 5 of the SCM Agreement; (2) when challenging an anti-dumping measure, which may trigger the temporal limit set down by Art. 18.3 of the AD Agreement; and (3) when challenging a general practice of a Member regarding how it conducts an anti-dumping investigation.

In situations where this factor may overlap with the previous factor, my view is that this factor should take precedent, as the special considerations reflected in these provisions can be considered to be more specific compared to the general nature of the qualifications identified in the previous factor.

1. SCM Agreement Art. 5: The "Effect" of a Measure as a Subject of Review — This is a special temporal issue arising from a subsidy measure that falls within the scope of the SCM Agreement. In essence, the adverse effect of subsidy to international trade may show up at a time that is different from the issuance of a subsidy. Thus under SCM Agreement Art. 5, it refers to "adverse effect" as a subject that warrants remedy.[61] The AB specifically rejected the claim by the European Communities in the *EC and certain Member States — Large Civil Aircraft* case that "no obligation arising out of Article 5 SCM Agreement is to be imposed on a Member in respect of subsidies granted or brought into existence prior to the entry into force of the *SCM Agreement*"[62] (emphasis original) and recognized the possibility that a subsidy granted prior to 1 January 1995 falls within the scope of Article 5 of the SCM Agreement.[63] In this sense, Article 5 of the SCM Agreement can be considered a special regulation in comparison with

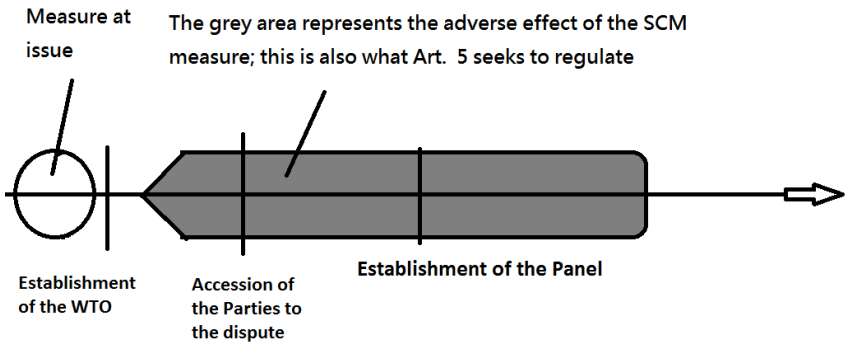
[61] In the *EC and certain Member States — Large Civil Aircraft* case, the AB clarified that Art. 5 addresses a "situation" that consists of causing, through the use of any subsidy, adverse effects to the interests of another Member. *See* EC and certain Member States — Large Civil Aircraft Appellate Body Report, *supra* note 4, ¶ 686. Also, based on the interpretation of SCM Agreement Art. 7.8, the AB in the *US — Upland Cotton* case pointed out that there may be a time-lag between the payment of subsidy and the consequential adverse effects. If a Member cannot challenge an expired SCM measure, then it will be difficult for the Complainant to seek remedy against the adverse effect of a subsidy—such a result will weaken the obligation enshrined under Art. 5. *See* US — Upland Cotton Appellate Body Report, *supra* note 28, ¶ 273.

[62] EC and certain Member States — Large Civil Aircraft Appellate Body Report, *supra* note 4, ¶ 686.

[63] *Id.*

the general approach mentioned in Factors 1 and 2, as the temporal nature of the SCM Measure itself will not affect the jurisdiction of the panel.

CHART 8: Timeline of an SCM Measure and Its Adverse Effect



The similarities and differences between temporal scope review under SCM Agreement Art. 5 and under the review of a continuing measure are interesting. They are similar in the sense that under both situations, a Member bears the obligation to ensure that its conduct complies with its "current" obligation due to the continuing aspect of the measure, yet there is one crucial difference that separates it from the notion of continuing measure: for an SCM measure, when addressing "adverse effect", the measure at issue need not be present;[64] while for a continuing measure, the measure itself still exists, therefore it is subject to the covered agreements. In sum, SCM Agreement Art. 5 can be considered as having a special regulatory effect that does not follow the same reasoning as in the review of a continuing measure.

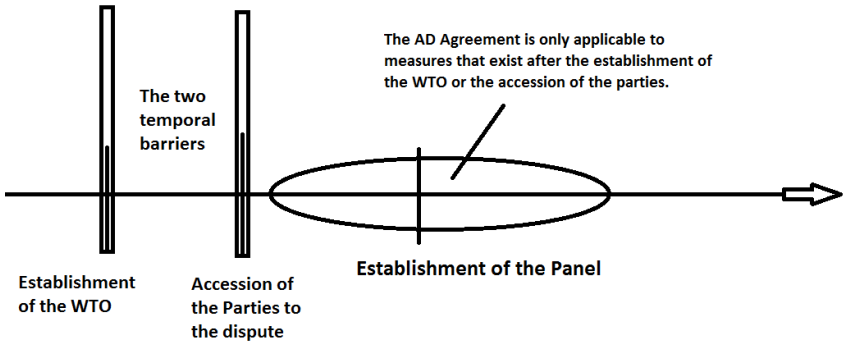
2. AD Agreement Art. 18.3 & SCM Agreement Art. 32.3: Intended Limitation on Temporal Application — AD Agreement Art. 18.3 and SCM Agreement Art. 32.3 sets out the temporal limit of the application of these agreements.[65] This is a good example of an intended limitation of temporal

[64] The Appellate Body clarified that "we are *not* saying that the causing of adverse effects, through the use of pre-1995 subsidies, can necessarily be characterized as a 'continuing' situation in this case. Rather, we simply find that a challenge to pre-1995 subsidies is not *precluded* under the terms of the *SCM Agreement*." (Emphases original.) *Id.*

[65] *See also* RÜDIGER WOLFRUM ET AL., WTO—TRADE REMEDIES 249 (2008) (stated that Art. 18.3 lays down a number of rules on the application of the AD Agreement *rationae temporis*).

scope under a covered agreement.[66] Since the two regulations are considered to be "identical",[67] the rulings made in respect of one provision can be informative of the other. Thus the date of the establishment of the WTO, 1 January 1995,[68] or the date of the accession of one of the parties to the dispute,[69] serves as a crucial date in identifying whether a measure is subject to the AD Agreement or the SCM Agreement. This leads to a "great wall" effect in temporal scope review.[70]

CHART 9: Timeline on the Temporal Limit, with the AD Agreement as Example



3. "Continuing Practice" Claim Against AD Measures — Another special practice in the context of the Anti-Dumping Agreement is the reference to the continuing use of "certain practice". In most cases this refers to the practice of zeroing by Members when calculating dumping margins,[71] though other practices may be referred to.[72] Because it is

[66] Brazil — Desiccated Coconut Appellate Body Report, *supra* note 15, 18-19 ("[T]he Uruguay Round negotiators expressed an explicit intention to draw the line of application of the new WTO Agreement to countervailing duty investigations and reviews at a different point in time from that for other general measures.").
[67] *Id.* at 18 n.23; US — DRAMS Panel Report, *supra* note 7, at 133 n.477.
[68] *See* US — DRAMS Panel Report, *supra* note 7, ¶ 6.12.
[69] *See* US — Shrimp (Viet Nam) Panel Report, *supra* note 20, ¶ 7.220.
[70] For relevant rulings, see for example *id.* ¶¶ 7.218, 7.220-22; US — DRAMS Panel Report, *supra* note 7, ¶¶ 6.14, 6.16-17.
[71] *See, e.g.*, Request for Establishment of the Panel by the European Communities, *United States — Continued Existence and Application of Zeroing Methodology*, at 3, WTO Doc. WT/DS350/6 (May 11, 2007).
[72] *See, e.g.*, US — Shrimp (Viet Nam) Panel Report, *supra* note 20, ¶ 7.38 (in which Viet Nam referred to practices such as Vietnam-wide rate and the limitation of the number of respondents individually examined).

usually left to the discretion of the Respondent's relevant authorities on how to carry out its Anti-Dumping investigation, for the Complainant, to reduce uncertainty, it will be more efficient to seek a prospective ban on certain Anti-Dumping practices than to chase every individual Anti-Dumping investigation or review. The temporal scope debate in this instance is focused on whether such a claim is acceptable—can the Complainant seek a remedy that may affect future investigations or reviews that are not present at the time of the establishment of the panel?

The AB's answer to the above question was in the affirmative when it reversed the panel's ruling in the *US — Continued Zeroing* case.[73] However, a valid submission of a continuing practice claim must be clear in respect of the Complainant's intention to include a measure in the form of an ongoing conduct, or to target a future determination that will be completed by the Respondent.[74] Thus despite the possible difficulty, a continuing practice claim is possible.

D. Fourth Factor: Other Temporal Elements that May Have a Bearing to the Review of the Dispute

Finally, beside the temporal classifications mentioned in the previous parts, the analysis of WTO practice will not be complete without mentioning two additional factors: (1) the notion of evidence, and (2) the need to review multiple measures as an inseparable whole. These two factors are not like the factors mentioned in previous parts, in that they do not establish a basis for the expansion of temporal scope. Nevertheless, it may have a bearing on the review of temporal claims, thus warrants special elaboration.

1. Evidence: Breaking the Temporal Limit in WTO Dispute Settlement — The first factor is in regards to "evidence" in WTO dispute settlement. The AB has made clear that the difference between a measure and an evidence is that there is no temporal limit to the review of evidence.[75] Panels and the AB are free to take into consideration any

[73] In the *US — Continued Zeroing* case, the panel ruled that Art. 6.2 of the DSU does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment. Panel Report, *United States — Continued Existence and Application of Zeroing Methodology*, ¶ 7.59, WTO Doc. WT/DS350/R (adopted Feb. 19, 2009). The rationale of the AB's reversal is that in its view, an ongoing conduct is prospective in nature, which has prospective application and a life potentially stretching to the future. This prospective effect is not uncommon in WTO practice, thus it does not find a problem for allowing a Complainant to raise a continuing practice claim. US — Continued Zeroing Appellate Body Report, *supra* note 59, ¶ 171.

[74] For an example in which the formation of a request for establishment of the panel is problematic which lead to the rejecting of such a submission, see US — Shrimp (Viet Nam) Panel Report, *supra* note 20, ¶¶ 7.57-63, 7.66-67.

[75] The AB clarified the difference in the following:

evidence as submitted by the parties, free from any temporal limitation. The importance of this approach is specifically recognized in the review of a *de facto* discrimination claim, where a determination must be based on the totality of facts and circumstances before it.[76] The only exception to this general rule is found in the context of a safeguard dispute: the panel should not consider evidence that did not exist at the point of time when the Respondent made its safeguard determination.[77]

But what is important about this practice is not in terms of the general approach on evidence, but the potential to break temporal limits in respect of the measure at issue. A measure excluded from review due to temporal considerations can nevertheless be re-introduced into a dispute as evidence, thus having a bearing on the dispute.[78] Such an approach may inform the panel about certain factual aspects of the case, affecting the outcome of the review. Thus while a measure excluded due to temporal scope will not itself be adjudicated, we should not overlook its possible effect on the outcome of the dispute.

2. The Need to Review Multiple Measures as an Inseparable Whole: Possible Effect on Temporal Scope Review — Another factor that may affect the temporal scope review is the situation in which a number of measures must be reviewed as an inseparable whole. It is not uncommon for panels to review a number of measures as if they are an inseparable whole.[79] Each individual measure does not itself establish the regulatory

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> While there are temporal limitations on the measures that may be within a panel's terms of reference, such limitations do not apply in the same way as evidence. Evidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment.

EC — Selected Customs Matters Appellate Body Report, *supra* note 6, ¶ 188 (footnote omitted). For a recent ruling that followed this general standard, see Panel Report, *Russia Federation — Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, ¶¶ 7.174-78, WTO Doc. WT/DS475/R (adopted Mar. 21, 2017).

[76] Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 206, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012).

[77] *See* Appellate Body Report, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, ¶¶ 77-78, WTO Doc. WT/DS192/AB/R (adopted Nov. 5, 2001). This conclusion is based on the consideration that the urgent nature of a safeguard may not permit the Member to wait for evidence that will appear in a future investigation because it cannot be expected that the Respondent has taken such evidence into consideration when making its determination. *Id.* ¶ 77.

[78] For examples of such a review, see US — COOL Panel Report, *supra* note 28, ¶¶ 7.30-32; China — Raw Materials Panel Report, *supra* note 8, ¶¶ 7.24-25.

[79] For example, in the *US — Section 301 Trade Act* case, the panel has recognized that due to the multi-layered character of the measure, it should conduct review of all elements of the measure, including the statutory language and relevant institutional and administrative elements, and should not read these elements independently. *See* Panel Report, *United States — Section 301-310 of the*

regime subject to challenge, but contributes to certain aspects of the regime's operation. The key element that binds the measures is that they should work in concert, operating together as if these measures were one.

The main problem for such a claim is the complexity it brings to a temporal scope review, as amongst the inseparable measures subject to review, each may have a different temporal background, or may involve a development process that consists of the enactment and removal of many measures.[80] But if a certain part of the series of measures is excluded because of a successful temporal claim, it may risk defeating the whole purpose of the dispute, as a review of part of the series of measures may not be satisfactory for the party making the claim. This shows a tension between the need to review a series of measures as a whole and the need to exclude certain measures from review on temporal grounds.

In my view the *US — COOL* case panel provided a good solution to the above tension by making use of evidence as mentioned in the previous part. Even if a certain measure is excluded from the scope of review because of temporal grounds, the excluded measure may nevertheless be reviewed as evidence, thus providing full information to the review process in respect of measures that are subject to adjudication.

V. PROBLEMATIC ASPECTS OF WTO PRACTICE ON TEMPORAL SCOPE REVIEW: AN OVERVIEW

Through the above summary, we can see that WTO panels and the AB generally follow a specific legal standard and approach when addressing claims on temporal scope. To the extent that these practices are followed in future cases, it is unlikely that Members will suffer from arbitrary rulings despite the lack of a unified classification. However, this does not mean that current practice is not without its flaws. In what follows, I would like to point out two issues that I consider to be problematic and left without a solution in relevant WTO practice: (1) the problematic approach of referring to Art. XVI:4 of the WTO Agreement as support for the review of

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Trade Act 1974, ¶¶ 7.26-28, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000) [hereinafter US — Section 301 Trade Act Panel Report]. Another example is the *Japan — Apples* case, in which the panel, taking into account the claims of the parties and the nature of "measure" under the DSU and the SPS Agreement, determined that it would review the 9 individual requirements identified by the Complainant as "one measure". *See* Panel Report, *Japan — Measures Affecting the Importation of Apples*, ¶¶ 8.10-20, WTO Doc. WT/DS245/R (adopted Dec. 10, 2003). Finally, in the *China — Raw Materials* case, the panel found that a series of measures, made up of the *Customs Law*, *Regulations on Import and Export Duties*, and *2009 Tariff Implementation Program* in that case, when operating "in concert" in regulating the export of various forms of bauxite, constitutes a violation of China's Accession Protocol. China — Raw Materials Panel Report, *supra* note 8, ¶ 7.76.

[80] For an example on such a scenario, see US — COOL Panel Report, *supra* note 28, ¶¶ 7.9-14.

continuing measures; and (2) the curious practice of not issuing recommendations and rulings on expired measures under Art. 19.1 of the DSU.

A. Questionable Reasoning of Relying on Art. XVI:4 of the WTO Agreement as a Basis of Reviewing Continuing Measure

One problem in relevant WTO practice is the reference to Art. XVI:4 of the WTO to support a review of continuing measures. This provision affirms the general obligation of Members to ensure compliance with the covered agreements. However, it refers only to "laws, regulations and administrative procedures". In comparison, the AB's definition of a "measure" is broader in scope: "[A]ny act or omission attributable to a WTO Member can be a measure for the purpose of WTO dispute settlement."[81] Thus there is a "regulatory gap" between the scope of Art. XVI:4 and the definition of "measure" in WTO dispute settlement.

The interesting question is whether there are cases that have interpreted Art. XVI:4 in an expansive way so as to cover this gap. The answer is negative: panels and the AB did not include measures other than what was written under Art. XVI:4.[82] In the *US — Zeroing (Japan) (Article 21.5 —Japan)* case, the AB did cite Art. XVI:4 as supportive of the statement that governments are responsible for the "acts and omissions" of its judicial body,[83] but by not providing further reasoning, it is uncertain what the reasoning is to support such a conclusion. In sum, the regulatory gap in Art. XVI:4 of the WTO Agreement has yet to be clarified.

The regulatory gap in Art. XVI:4 of the WTO Agreement will lead to problems when serving as reference to establish a legal statement or to present a claim of inconsistency. This is because the limited scope of Art. XVI:4 means that this provision does not support a legal statement or a claim involving a measure that is not a law, regulation or administrative procedure. In the context of temporal scope review, The AB referred to Art.

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[81] *See* Appellate Body Report, *United States — Sunset Review of Anti-Dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan*, ¶ 81, WTO Doc. WT/DS244/AB/R (adopted Jan. 9, 2004).

[82] *See, e.g.*, US — Section 301 Trade Act Panel Report, *supra* note 79, ¶ 7.41 (states that Art. XVI:4 expands the scope of a measure to cover "laws, regulations and administrative procedures" to cover measures as such, but did not further interpret the provision to cover other measures); Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan*, ¶ 129, WTO Doc. WT/DS184/AB/R (adopted Aug. 23, 2001) (affirms the consequential finding of the panel without further clarification of the scope).

[83] *See* Appellate Body Report, *United States — Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, at 81 n.463, ¶ 182, WTO Doc. WT/DS322/AB/RW (adopted Jan. 23, 2007).

XVI:4 as one of the supportive grounds of its review capacity.[84] But what if the continuing measure at issue is one that falls outside the scope of Art. XVI:4? Apparently, Art. XVI:4 does not provide any guidance in this respect. Note that the AB, when citing Art. XVI:4 in a general context for the purpose of reviewing continuing measures, did not claim that Art. XVI:4 establishes an obligation over "any acts or omissions" of a Member. In light of the above, other references must be cited to serve as the source of review capacity—in the aforementioned example, the AB cited Art. 28 of the VCLT, pointing out that the continuing measure cited is subject to the agreement at issue unless an intention of exclusion is identified.[85] Besides, as previously cited, Art. 18.3 of the Anti-Dumping Agreement is a good example that under the WTO, there may be temporal limits to the application of a covered agreement—it cannot be generally said that all covered agreements is applicable to continuing measures.

From the above analysis, Art. XVI:4 of the WTO Agreement does not establish a general obligation over "any act or omission" of a Member. Only when the measure at issue can be qualified as a law, regulation or administrative procedure can it be subject to this provision. Thus it is questionable to refer to Art. XVI:4 as a basis for supporting the review of continuing measures in general.

In my view, the more appropriate approach is to follow a provision-by-provision interpretation, in which a panel should identify whether there is any limit in applying the provision at issue in the review of continuing measures. When a Complainant seeks to present a claim against the Respondent's continuing measure, it will be advised to show to the panel that the cited agreement does intend to regulate continuing measures, not just rely on the general obligation enshrined under Art. XVI:4 of the WTO Agreement.

B. Having the Power to Review, but Cannot Provide Recommendation and Ruling?—the Curious Practice Under DSU Art. 19.1 Regarding Expired Measure.

Although the WTO may be consistent in its practice regarding the review of temporal scope in accordance with its mandate as regulated under the DSU, the practice for restricting panels to issue recommendations and rulings against an expired measure, even though it is confirmed to be subject to review, is intriguing.

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[84] *See* EC — Hormones Appellate Body Report, *supra* note 41, ¶ 128 (on the SPS Agreement); EC — Sardines Appellate Body Report, *supra* note 41, ¶¶ 212-13 (on the TBT Agreement).
[85] *See* EC — Hormones Appellate Body Report, *supra* note 41, ¶ 128.

Art. 19.1 of the DSU provides that when a panel or the AB finds that a measure is inconsistent with the covered agreements, it shall recommend that the Member concerned bring its measure into conformity with the covered agreements. This can be seen as the "result" of the review conducted by the panel or the AB. This result is closely connected to Art. 21.1 of the DSU, which provides that "[p]rompt compliance with *recommendations or rulings* of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members."[86] Thus we can see that the recommendation and ruling is what guides the Respondent to secure compliance with its obligations under the covered agreement. However, in the situation of a review of expired measure, after the AB established, in the *US — Certain EC Products* case, a bar to the issuing of recommendations and rulings,[87] it also means that there is no need for implementation in regards to the expired measure at issue.

While the AB ruling in the *US — Certain EC Products* case might be a logical result, nonetheless it makes one wonder what the merit is in reviewing an expired measure when a panel cannot issue recommendations and rulings against it. Note that in the *US — Upland Cotton* case, the AB recognized that a claim can be brought against an expired measure if the Complainant considers that benefits accruing to it under the covered agreements are still being impaired by those measures[88] —if the Complainant deems that there is a harm, would it not want to ensure that it can acquire remedy through the recommendation and ruling issued by the panel? Furthermore, if the panel cannot issue recommendations and rulings against the expired measure, then why should the panel proceed to review the measure in the first place?[89]

The problem with this result is more apparent when we look into the practice of other international *fora*. For example, in the practice of the International Court of Justice (hereinafter "ICJ"), the court can rule that a claim lacks admissibility on grounds such as the disappearance of the object of the claim[90] or the lack of effect on the rights or obligations of the parties,[91] which would then result in the ICJ declining to hear the case, despite the fact that it has jurisdiction.[92] However, in comparison, under

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[86] DSU, *supra* note 3, Art. 21.1.
[87] US — Certain EC Products Appellate Body Report, *supra* note 34, ¶¶ 80-81.
[88] US — Upland Cotton Appellate Body Report, *supra* note 28, ¶ 270.
[89] This was exactly the position of certain Respondents in past cases, such as Thailand in the *Thailand — Cigarettes (Philippines)* case. Thailand — Cigarettes (Philippines) Panel Report, *supra* note 28, ¶¶ 7.32-33.
[90] *See* Nuclear Test (N.Z. v. Fr.), Judgement, 1974 I.C.J. 457, ¶ 59 (Dec. 20).
[91] *See* Northern Cameroons (Cameroon v. U.K.), Judgement, 1963 I.C.J. 15, at 34 (Dec. 2).
[92] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgement, 2008 I.C.J. 412, ¶ 120 (Nov. 18).

the WTO, the AB has made clear that the refusal to make recommendation to an expired measure under Art. 19.1 does not affect that measure being a "measure at issue" for the purpose of Art. 6.2.[93] Therefore a panel can review a measure despite the fact that it may not lead to any consequence.

The only possible explanation for this practice is that panels and the AB perceive that there is merit in the review process alone. The notion of ensuring security and predictability of the WTO legal system[94] means that every word in the finding part of a panel or AB report may provide guidance to future cases. Thus it can be understood that the findings have their own influential power independent of the legal effect arising from recommendations and rulings.

VI. CONCLUSION

From the above analysis, we can see that through an extensive reading of the numerous panel and AB rulings on the temporal scope debate, the different temporal issues can be categorized in a systematic manner. A review of these rulings shows that panels and the AB are aware of the need to build up consistent approaches for the review of the different types of temporal claims. However, by not pushing for the construction of a unified system of common terms and qualifications, it may be difficult to understand and appreciate the delicate differences that panels and the AB have painstakingly labored over until now. In addition, these practices are not without their problems. I hope that through this Paper, I may provide an accessible summary to those interested in this issue, as well as contributing to the intellectual analysis of the ever-evolving procedure issues in WTO dispute settlement.

[93] US — Upland Cotton Appellate Body Report, *supra* note 28, ¶ 271.

[94] *See* Panel Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the European Communities and Their Member States*, ¶¶ 7.25-30, WTO Doc. WT/DS79/R (adopted Sept. 22, 1998).

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