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Judicial and Similar Proceedings

1. India — Certain Measures Relating to Solar Cells and Solar Modules (World Trade Organization – September 16, 2016)

<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm>

On September 16, 2016, the Appellate Body (AB) of the World Trade Organization (WTO) issued its report in *India — Certain Measures Relating to Solar Cells and Solar Modules*, upholding the panel report handed down in April 2016. The United States requested consultations on February 6, 2013, regarding certain Indian measures that imposed a form of domestic content requirement (DCR) for solar cells and solar modules, claiming that such measures violated Article III:4 of the General Agreement on Trade and Tariffs (GATT) and Article 2.1 of the Agreement on Trade Related Aspects of Investment Measures. India argued that its DCR measures were not in violation of the aforementioned articles based on multiple exceptions, as laid out in Articles III:8, XX(j), and XX(d) of the GATT. The panel report relied on a previous AB report with similar facts, *Canada — Measures Relating to the Feed-in Tariff Program*, to reject the main thrust of India's argument centered around Article III:8's exemption for government procurement. The panel stated that the electricity purchased by the government of India was not in "direct competition" with the solar cells and solar modules subjected to the measures at issue—a key requirement for the exemption. The panel also dismissed the two Article XX claims for exemption as inapplicable to the facts of the dispute. The AB affirmed the panel's assessment of the issues and reinforced the panel's claim that the *Canada* report properly guided the *India* dispute. The AB report also included a separate opinion from an AB member, which stated that "[t]he Appellate Body cannot be expected to offer interpretative guidance regarding provisions of the covered agreements in an abstract manner beyond the scope of what is required in a particular dispute. To do so would go beyond the Appellate Body's adjudicatory function." This AB member concluded by saying, "I hope to be able to shed light on how I view the Appellate Body's function, as well as its limits, both in the context of the present appeal, as well as others on which I have been working with my distinguished colleagues at the Appellate Body."

2. European Federation for Cosmetic Ingredients v. Secretary of State for Business, Innovation and Skills (Court of Justice of the European Union – September 20, 2016)

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=183602&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=527201>

On September 20, 2016, the Court of Justice of the European Union (CJEU) handed down a ruling in *European Federation for Cosmetic Ingredients v. Secretary of State for Business, Innovation and Skills* that addressed restrictions on cosmetic products containing ingredients tested on animals. The Court ruled that introducing products with ingredients that have been tested on animals to "the EU market may be prohibited where that testing has been conducted outside the EU in order to market the product in third countries and where the results of that testing are used to prove the safety of the product." The case arose when three members of the European Federation for Cosmetic Ingredients—a trade association representing the EU manufacturers of cosmetic ingredients—conducted animal testing outside the EU in order to facilitate sales in China and Japan, where such tests were required. These companies requested that the British courts determine whether or not the businesses would face criminal penalties under EU law (which prohibits the marketing of products that utilized animal testing to satisfy EU safety requirements) for placing products on the EU market that utilized animal testing to meet foreign criteria. Citing the EU legislation's goal to promote the use of non-animal alternative testing methods, the Court concluded that animal testing to meet foreign standards might be grounds for prohibition from the EU market "if the data resulting from that testing is used to prove the safety of the products concerned for the purposes of placing them on the EU market."

3. European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft (World Trade Organization – September 22, 2016)
<https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm>

On September 22, 2016, the compliance panel of the World Trade Organization (WTO) circulated a report on the *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft* dispute that assessed the state of compliance by the EU (referred to as the EC or European Communities in the context of the WTO) and certain member states with a previous ruling by the Appellate Body (AB). The AB's report upheld the initial panel report, which found that the EU was providing subsidies to Airbus through certain measures that caused serious prejudice to the interests of the United States within the meaning of Article 5(c) of the Agreement on Subsidies and Countervailing Measures (SCM). After the AB ruling, the EU had an obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy," as laid out in Article 7.8 of the SCM. In reviewing the EU's remedial actions, the compliance panel determined that a "genuine and substantial" cause of serious prejudice to the United States' interests still existed within the meaning of Articles 5(c) and 6.3(a), (b) and (c) of the SCM. The subsidies totaled almost $22 billion in value.

4. McKevitt and Campbell v. the United Kingdom (Court of Justice of the European Union – September 29, 2016)
<http://hudoc.echr.coe.int/eng?i=001-167182>

On September 29, 2016, the European Court of Human Rights dismissed an appeal in *McKevitt and Campbell v. the United Kingdom*, which was based on the infamous 1998 Omagh Bombing that killed 29 people in Omagh, Northern Ireland, in what has been called the single worst atrocity of the Troubles. The defendants argued that the first instance court should have applied a criminal, rather than civil, standard of proof against them due to the severity of the claims. Additionally, they claimed that the admission of testimony by a U.S. FBI agent was unfair as the witness was not available for questioning. There has never been a criminal prosecution for the case, though the civil prosecution brought by the families of the victims at the center of the appeal was successful. The Court dismissed the claim regarding the standard of proof "because the proceedings had been for a civil claim for damages; there had been no criminal charge." As for the fairness of admitting the FBI agent's testimony, the Court ruled that "the defendants had had an adequate opportunity to challenge the agent's evidence with their own" and that the judge had adequately assessed the weight that should have been attached to the evidence. Based on these determinations, the Court ruled that "the national court's findings could not be said to have been unfair arbitrary or unreasonable" and subsequently dismissed the application.

5. Sanum Investments Limited v. Lao People's Democratic Republic (Court of Appeal of the Republic of Singapore – September 29, 2016)
<http://www.italaw.com/sites/default/files/case-documents/italaw7600.pdf>

On September 29, 2016, the Singapore Court of Appeal ruled in *Sanum Investments Limited v. Lao People's Democratic Republic* that the bilateral investment treaty (BIT) between the People's Republic of China and Laos applied to Macau, finding that Macao-based company Sanum Investments could seek redress through the BIT against the Laos government for its claim of capital investment benefit losses through unfair taxes. The BIT did "not expressly state whether it would or would not in due course apply to Macau" when it was signed in 1993, and Macao became a territory of China in 1999. A main point of contention was whether or not certain *notes verbales* between Laotian and Chinese diplomats that expressed "the view that the PRC-Laos BIT did not apply to Macau' effectively defined the scope of the BIT. The Court was unconvinced, instead reasoning that "because a treaty is binding in respect of the entire territory of a State, the [Moving Treaty Frontier] Rule presumptively provides for the automatic extension of a treaty to a new territory as and when it becomes a part of that State."

6. Marshall Islands Cases (International Court of Justice – October 5, 2016)
<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=160&code=miuk&p3=4>

On October 5, 2016, the International Court of Justice ruled that it did not have jurisdiction over three separate but substantively similar cases between the Marshall Islands and India, Pakistan, and the United Kingdom. The Court found that no dispute existed between the parties and that it subsequently could not proceed to the merits of the cases. The cases were based on the alleged failure of the latter three countries to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race and to their nuclear disarmament. While the Marshall Islands alleged a dispute did exist based on statements it made in multilateral fora, the application of the parties to the Court, the conduct of the respondent countries, and the voting record of the U.K., the Court rejected each line of argumentation. Based on this ruling, the Court determined that there was "no need to consider the other objections raised" by the respondent countries.

RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. San Jose Action Statement (August 4, 2016)
<http://acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2016/10693>

On August 4, 2016, nine Central and North American states released the San Jose Action Statement, wherein they endeavor to take concerted action to strengthen protection for refugees fleeing Central America. Most refugees from the region are forced to flee pervasive violence caused by heavily armed, transnational criminal gangs, particularly in El Salvador, Honduras, and Guatemala. In the statement, the governments of Belize, Canada, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Panama, and the United States asserted: "[W]e are confronted with a growing number of asylum seekers and refugees and *recognize* the need for asylum systems to identify and respond to those in need of international protection." The statement also underscored the need for "timely identification and documentation" of refugees, as well as the need for "unhindered access to fair and efficient procedures for protection." Moreover, participating governments stressed the importance of finding alternatives to detention for asylum seekers and the need to provide access to legal aid. The statement is the culmination of discussions organized by the United Nations Refugee Agency (UNHCR) and the Organization of American States (OAS) in Costa Rica in July 2016. It precedes the UN summit on Addressing Large Movements of Refugees and Migrants, and President Barack Obama's Leaders' Summit on Refugees, both being held during the 71st session of the UN General Assembly in September 2016.

2. Third Report of the Organization for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism (United Nations Secretary-General and the Organization for the Prohibition of Chemical Weapons – August 24, 2016)
<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2016_738.pdf>

On August 24, 2016, United Nations Secretary-General Ban Ki-moon and the Organization for the Prohibition of Chemical Weapons (OPCW) submitted their third joint report to the Security Council on chemical weapons uses in Syria. The Security Council tasked the OPCW-UN Joint Investigative Mechanism (JIM) in August 2015 with identifying "individuals, entities, groups, or governments involved in the use of chemicals as weapons, including chlorine or any other toxic chemicals." The report examined nine cases of previously established chemical weapons uses that occurred in Syria between 2014 and 2015. The investigation found "sufficient evidence" that the Syrian air force had carried out two chlorine gas attacks on civilians. Additionally, the investigation found that ISIS carried out one sulphur-mustard gas attack in the city of Marea. A member of the JIM's three-person Leadership Panel reported plans to provide an update on the cases examined in a follow-up report to the Security Council, due in mid-September.

3. New York Declaration for Refugees and Migrants (United Nations General Assembly – September 13, 2016)
< http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1>

On September 13, 2016, the United Nations General Assembly adopted the New York Declaration for Refugees and Migrants. In it, "Member States agreed to a set of commitments, among them acknowledging a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner." Additionally, "the Assembly underlined the importance of working collectively and, in particular, with origin, transit and destination countries, noting that 'win-win' cooperation in that area would have profound benefits for humanity." While the Assembly stated that it would reach these goals through international cooperation, it noted the differentiated capacities and resources of the responding member states. The two annexes of the Declaration lay out a "global compact for safe, orderly and regular migration" and a "comprehensive refugee response framework," respectively.

4. Policy Paper on Case Selection and Prioritisation (Office of the Prosecutor of the International Criminal Court – September 14, 2016)
<https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>

On September 14, 2016, the Prosecutor of the International Criminal Court, Fatou Bensouda, published a policy paper that lays out the procedure of the Office of the Prosecutor (OTP) for selecting and prioritizing cases. This paper works in conjunction with a previous policy paper that explains the process of opening investigations into situations as a whole. The OTP formulated the new paper based on the applicable legal framework, jurisprudence of the Court, operational experience of the OTP, national and international judicial practice, and extensive internal and external consultations. In speaking on the release of the policy paper, Prosecutor Bensouda stated, "[W]e are equipping our Office with clear and transparent guidelines for the exercise of prosecutorial discretion in the selection and prioritization [of] our cases . . . . In particular, [it] will assist the Office in the often difficult assessment of how to allocate its finite resources to the ever burgeoning demand arising from situations of mass atrocity." The OTP indicated that the document "will serve as a key guiding instrument for the Office of the Prosecutor in its selection and prioritisation of cases for investigation and prosecution."