WTO CASE REVIEW 2009[#]

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This *WTO Case Review* is the tenth in our annual series on the substantive international trade adjudications issued by the Appellate Body of the World Trade Organization. Each *Review* explains and comments on the Appellate Body reports adopted by the WTO Dispute Settlement Body during the preceding calendar year (January 1 through December 31), excluding decisions on compliance with recommendations contained in previously adopted reports. Our preceding *Reviews* are:

- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1 (2001).

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The WTO reports we discuss are available on the WTO website, http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm. The texts of the WTO agreements we discuss are also available on the WTO website, at http://www.wto.org/english/docs_e/legal_e/legal_e.htm, and are published in a variety of sources, including RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK (3d ed. 2008). We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

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I. INTRODUCTION

Two thousand and nine was a year of great economic uncertainty. The financial crisis that commenced in 2008 gave rise to conditions of pervasive recession in 2009, with a significant contraction of international trade. There was much foreboding that a deep recession would threaten the international institutional order, and, in particular, the underpinnings of the world trading system, as every nation sought to secure its own interests. This has not happened. Rather, the gravity of the crisis has brought with it a widespread recognition that more ambitious collective action is required across a wider range of issues. And much thought has been given to the institutional arrangements that can achieve this, both regionally and globally.

> The [World Trade Organization (WTO)] has remained, amidst the turbulence, at the centre of the world trading system, and the centre has held. The value of a rule-based system has never been greater and in times of great economic peril the system has proved its worth. Significantly, the Members of the WTO have continued to adhere to their commitments to the WTO, and thereby provided much needed stability.[1]

In addition, 2009 was a year of considerable significance for the Appellate Body and for the dispute settlement process at the WTO. Although the Appellate Body circulated only four reports during the year (two initial determinations and two Article 21.5 proceedings), a number of other important milestones were reached in terms of the use of the dispute settlement process, settlement of several long-standing disputes, changes in Appellate Body membership, and proposed changes in the Appellate Body Working Procedures for the first time in several years. At the same time, little or no new progress appears to have been made by periodic special sessions of the Dispute Settlement Body[2] in its more than decade-long effort to review and make "improvements and clarifications" of the Dispute Settlement Understanding under the still-stalled Doha Round.[3]

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1. Appellate Body, *Annual Report for 2009*, at iii, WT/AB/13 (Feb. 17, 2010), *available at* http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm [hereinafter *Annual Report 2009*].

2. The committee of the whole is entrusted with administration of the DSU under Article 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

3. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, ¶ 30 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. The Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing

A. WTO Disputes Reach 400

As of November 2009, the total number of disputes referred to the dispute settlement mechanism reached 400, with an additional five filed through mid-February 2010. According to the WTO, approximately one-half have been settled through the mandatory consultations process.[4] Another 169 have been the subject of panel review and, in about fifty-seven percent of the cases, Appellate Body Review.[5] The United States and the European Union, as might be reasonably expected given their importance in world trade, have overwhelmingly been the major users of the mechanism, with the United States a complainant in ninety-three actions and a respondent in 107 (an even 200 in all), and the EC a complainant in eighty-one and a respondent in sixty-six (147 in all).[6] Thirteen other Members have been complainant and respondent in more than ten actions:

Member	Total	Complainant	Respondent
United States	200	93	103
European Union	147	81	66
Canada	48	33	15
Brazil	38	24	14
India	38	18	20
Mexico	35	21	14
Argentina	31	15	16
Japan	28	13	15
South Korea	27	13	14
Chile	23	10	13
China[7]	23	06	13
Australia	17	07	10
Thailand	16	13	03
Philippines	10	05	05
Turkey	10	02	08

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the World Trade Organization, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1259 (1994), taken at Marrakech in 1994, called for review of the DSU by January 1, 1999, later extended to July 1, 1999. The Doha Declaration at the fourth WTO Ministerial Conference in Qatar in November 2001 effectively represented a re-commitment to these negotiations.

4. Press Release, WTO, WTO Disputes Reach 400 Mark (Nov. 6, 2009), *available at* http://www.wto.org/english/news_e/pres09_e/pr578_e.htm.

5. *Id.*

6. *Id.*

7. China has been a member since December 11, 2001. *See* WTO, China and the WTO, http://www.wto.org/english/theWTO_e/countries_e/china_e.htm (last visited Mar. 20, 2010).

Of these most frequent users of the dispute settlement mechanism, nine are (advanced) developing-country Members (treating South Korea as a developing country). During the nearly fifteen-year period from January 1, 1995 through October 2009, developing countries have been complainants in over forty-five percent of the cases and respondents in more than forty-two percent of the cases, suggesting that the system is not dominated by the rich countries.[8]

B. Workload of the Appellate Body

The year saw only four reports issued by the Appellate Body.[9] This is a relatively low level of activity compared to some earlier years. For example, the Appellate Body heard six new appeals and two Article 21.5 appeals in 2008,[10] and in the peak year, 2000, eleven new appeals and two in Article 21.5 proceedings.[11] Members continued to appeal most panel determinations, seventy-five percent in 2009 and sixty-eight percent during the 1996–2009 period.[12] Of total notices of appeal filed, eighty-three, or eighty-one percent, were in original proceedings and the remaining nineteen in Article 21.5 proceedings.[13]

To reiterate, as shown in the table, above, major developing country participation in the appellate process also was robust. Of the eleven Members that participated in more than twenty appeals each in 2009 as claimants, respondents,

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8. Press Release, WTO Disputes Reach 400 Mark, *supra* note 4.

9. Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (Feb. 4, 2009) (*adopted* Feb. 19, 2009) [hereinafter Appellate Body Report, *United States – Continued Zeroing*]; Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"); Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW (May 14, 2009) (*adopted* June 11, 2009) [hereinafter Appellate Body Report, *United States – Zeroing; Article 21.5*]; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan*, WTO/DS322/AB/RW (Aug. 18, 2009) (*adopted* Aug. 31, 2009) [hereinafter Appellate Body Review, *Untied States – Sunset Reviews; Article 21.5*]; Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution of Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) (*adopted* Jan. 19, 2010). Since in our annual WTO Case Reviews we publish reviews based on date of adoption and we do not review Article 21.5 rulings, in this review we examine only the first case listed above and Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008) (*adopted* Jan. 12, 2009) [hereinafter Appellate Body Report, *China – Auto Parts*].

10. *See* Raj Bhala & David Gantz, *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113, 117 (2009).

11. *Annual Report 2009*, *supra* note 1, Annex 3.

12. *Id.* Annex 4.

13. *Id.* Annex 3.

and third parties, six—Brazil (47), India (38), Mexico (37), China (33), Korea (29) and Argentina (22)—were developing Members.[14] (The other major participants were the United States (132), the EC (113), Japan (59), Canada (48) and Australia (31).[15] Still, only 67 of 153 WTO Members have participated in one or more appeals in the 1996–2009 period.[16]

Also, for the first time in some years, as of February 2010 there were no appeals pending before the Appellate Body. This appears, however, to be an accident of timing rather than a systemic decline in Appellate Body activity. It is highly likely that a number of panel reports will be appealed during the first half of 2010. These include *Australia – Apples*, due for circulation in May 2010;[17] *Thailand – Customs and Fiscal Measures*, due for circulation in June 2010;[18] *European Communities – IT Products*, due for circulation in April 2010;[19] *United States – AD and CVDs*, due for circulation in May 2010;[20] *European Communities – Civil Aircraft*, due for circulation April 2010;[21] and *United States – Civil Aircraft*, due for circulation in June or July 2010.[22] The authors thus expect to be writing a significantly longer WTO Case Review for 2010.

C. Compliance and Non-Compliance: Hormones, Bananas, and Zeroing

Two thousand and nine saw extremely significant steps toward a final settlement of two of the WTO's longest running disputes, *European Communities*

14. *Id.* Annex 6.
15. *Id.*
16. *Id.*
17. Request for the Establishment of a Panel by New Zealand, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/5 (Dec. 7, 2007) (panel established Jan. 21, 2008).
18. Request for the Establishment of a Panel by the Philippines, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/3 (Oct. 6, 2008) (panel established Nov. 17, 2008).
19. Request for the Establishment of a Panel by the United States, Japan, and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/8, WT/DS376/8, WT/DS377/6 (Aug. 19, 2008) (panel established Sep. 23, 2008).
20. Request for the Establishment of a Panel by China, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/2 (Dec. 12, 2008) (panel established Jan. 20, 2009).
21. Request for the Establishment of a Panel by China, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/2 (June 3, 2005) (panel established July 20, 2005).
22. Request for the Establishment of a Panel by the European Communities, *United States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/5 (Jan. 23, 2006) (panel established Feb. 17, 2006).

– *Bananas*[23] and *European Communities – Hormones*.[24] Progress in several other controversial disputes, such as *United States – Upland Cotton*,[25] remained elusive. Perhaps most significantly, the United States continues to refuse to comply with numerous Appellate Body rulings directing the country to cease its practice of "zeroing" in various iterations.

1. Bananas

The Latin American parties and third parties to *European Communities – Bananas* (Brazil, Colombia, Costa Rica, Ecuador, the EC, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, and Venezuela, but not the United States) notified the WTO General Council on December 15, 2009, that they had concluded the Geneva Agreement on Trade in Bananas[26] (Geneva Agreement). The agreement, once fully implemented, promises to end a fifteen-year dispute between the EC the United States, and the Latin American banana producers over their access to the EC banana market.[27] WTO Director Pascal Lamy, who had been involved in the banana dispute while serving as EC Trade Commissioner, commented that it was "one of the most technically complex, politically sensitive and commercially meaningful disputes ever brought to the WTO."[28]

The Geneva Agreement requires the EC to limit its tariffs on bananas, beginning with a rate of €148/metric ton, reduced to a rate of €114/metric ton by January 1, 2017, and thereafter, with the reductions subject to certain delays if Doha Modalities (tariff commitments) are not established by December 31, 2013, but with no delay beyond December 31, 2015.[29] The non-EC parties agree that these reduced tariffs are the EC's "final market access commitments . . . for

23. The principal action is in Appellate Body Report, *European Commission – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (*adopted* Sept. 26, 1997). The other pending disputes are WT/DS27, WT/DS361, WT/DS364, WT/DS16, WT/DS105, and WT/DS158.

24. Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998).

25. Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) (*adopted* Mar. 21, 2005).

26. General Council, *Geneva Agreement on Trade in Bananas*, WT/L/784 (Dec. 15, 2009) [hereinafter *Geneva Agreement*].

27. For further discussion, see generally Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (2000); Hunter R. Clark, *The WTO Banana Dispute Settlement and its Implications for Trade Relations Between the United States and the European Union*, 35 CORNELL INT'L L.J. 291 (2002).

28. *See* Daniel Pruzin, *EU, Latin, U.S. Officials Welcome Beginning of End to WTO Dispute on Banana Imports*, 26 INT'L TRADE REP. 1733, 1733 (Dec. 17, 2009) (quoting Pascal Lamy).

29. *Geneva Agreement*, *supra* note 26, ¶¶ 3(a), 3(b).

inclusion in the final results of the next multilateral market access for agricultural products negotiation successfully concluded in the WTO (including the Doha Round)."[30] In other words, the Latin American banana producers will not seek further concessions from the EC on banana market access and the concessions in the Agreement will form part of the eventual Doha Round provisions on agriculture. The Latin American producers also agreed "not to take any further action with respect to those disputes and claims" relating to the various WTO actions.[31] Once the reduced EC tariffs are certified by the WTO, and thus included in the EC's bound schedule of tariff commitments, the parties are to notify the WTO that the disputes over bananas have ended with a mutually agreed solution.[32]

The United States, presumably because it does not export bananas to the EC, is not a party to the Geneva Agreement, although it has participated fully in the negotiations. U.S. Trade Representative (U.S.T.R.) has indicated that once the EC has obtained WTO certification for the lower tariffs, and the Latin American complainants and third parties have formally settled the dispute, the United States will also make a formal settlement.[33]

The Geneva Agreement seems at best a compromise for the Latin American banana producers. Nothing in the Geneva Agreement appears to prevent the EC from continuing to provide duty-free, quota-free banana market access to their former colonies, the so-called African, Caribbean, and Pacific (ACP) states, even without the trade benefits of the Cotonou Agreement. The Cotonou Agreement was subject to a WTO waiver for certain non-WTO compliant trade provisions that expired December 31, 2007.[34] Various economic partnership agreements that the EC has or is in the process of concluding with the ACP states, many of which entered into force provisionally as of January 1, 2008,[35] replaced portions of the Cotonou Agreement. Whether the refraining from further action undertaking noted above from the Geneva Agreement precludes any and all further challenges to EC discrimination in favor of the ACP states remains to be seen.

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30. *Id.* ¶ 7.

31. *Id.* ¶ 6.

32. *Id.* ¶ 5.

33. *See* Pruzin, *supra* note 28.

34. Partnership Agreement Between the Members of the African, Caribbean, and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part art. 37, June 23, 2000, 2000 O.J. (L 317) 3; *see also* DAVID A. GANTZ, REGIONAL TRADE AGREEMENTS: LAW POLICY AND PRACTICE 348–49 (2009).

35. *See, e.g.*, Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part, Oct. 10, 2008, 2008 O.J. (L 289) 3, *available at* http://www.delbrb.ec.europa.eu/en/epa/epa_signing_docs/EPA_Full_Text_FINAL.pdf.

2. Beef Hormones

The interim settlement of *European Communities – Hormones* also appears to reflect a very pragmatic decision, this time by the United States and the EC, to declare another long-standing and intractable dispute resolved, although the results likely are fully satisfactory to no one and the permanence of the settlement will not be known for several years. The WTO litigation concerning the hormones dispute[36] began with a panel request in April 1996, with the Appellate Body report adopted in 1998. The United States (and Canada) imposed retaliatory trade sanctions in the form of 100 percent tariffs on a variety of imports from EC nations beginning in 1999, when the Dispute Settlement Body (DSB) authorized such sanctions.[37] The continuation of the sanctions was later challenged unsuccessfully by the EC in a separate proceeding after the EC had purportedly complied with the DSB's initial ruling.[38]

On May 13, 2009, the United States and the European Commission announced the signing of a Memorandum of Understanding ("MOU") on the importation of "high quality" beef into the EC and "the level of increased duties applied by the United States to certain EC products in connection with" the WTO proceeding in *European Communities – Hormones*.[39] This was not a full resolution of the case in any sense of the term. The EC agreed to import only "high quality" beef, which under the agreement means beef not fattened through the use of hormones and subject to other restrictions.[40] The imports take place under a tariff-rate quota, which effectively limits duty-free imports to 20,000

36. For commentary on the dispute, see, e.g., Suzanne Bermann, *EC-Hormones and the Case for an Express WTO Postretaliation Procedure*, 107 COLUM. L. REV. 131 (2007); David A. Wirth, *European Communities Restrictions on Imports of Beef Treated with Hormones – Nontariff Trade Barriers – Control of Food Additives – Scientific Basis for Restrictions – WTO Dispute Settlement Mechanisms – Scope of Review*, 92 AM. J. INT'L L. 755 (1998).

37. Dispute Settlement Body, Minutes of Meeting, 17, WT/DSB/65 (Sept. 15, 1999). The sanctions were modified in 2009. *See Implementation of the U.S. – EC Beef Hormones Memorandum of Understanding*, 74 Fed. Reg. 48,808 (Sept. 24, 2009) (discussing the January and subsequent modifications).

38. *See* Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008) (*adopted* Nov. 14, 2008); Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (*adopted* Nov. 14, 2008); *see* Bhala & Gantz, *supra* note 10, at 194–228.

39. Memorandum of Understanding between the United States of America and the European Commission Regarding the Importation of Beef from Animals not Treated with Certain Growth-Promoting Hormones and Increased Duties Applied by the United States to Certain Products of the European Communities 1 (May 13, 2009), *available at* http://www.ustr.gov/sites/default/files/asset_upload_file254_15654.pdf [hereinafter Hormones MOU].

40. *Id.* art. VI.

metric tons the first three years (beginning August 2009) and 45,000 tons in the fourth year.[41] The tariff-rate quota will be administered by the Commission.[42]

During the first three years, the United States is permitted to maintain in force (but not add to the scope or change the subject products) the $37.8 million worth of trade sanctions applicable as of March 23, 2009 (100 percent duties on various products imported from the EC).[43] Should the second phase (45,000 ton quota) be agreed upon and enter into effect, the United States would suspend the increased duties imposed under the WTO ruling.[44] If a third phase contemplated by the MOU is entered into for an agreed additional period, the EC will maintain the 45,000 ton duty-free quota and the United States will terminate the sanctions.[45]

It is apparently understood that for the first eighteen months of the agreement neither party will move forward with the pending WTO litigation,[46] with the status of the dispute to be reviewed when phase three of the understanding is negotiated.[47] Thus, although the MOU offers the possibility of becoming a medium- or long-term settlement of the dispute if phase three is agreed upon for an extended term of years, for the time being the proceedings are not being terminated. However, should either party decide to do so, after eighteen months it could move forward with the WTO litigation and request a new WTO compliance panel, with the possibility of suspension of the panel until the end of the fourth year of the MOU if requested to do so by both parties.[48]

The May MOU was welcomed by such organizations as the National Cattlemen's Beef Association, which recognized the opportunity for increased beef exports to the EC.[49] However, other Members exporting beef to the EC have expressed concern. For example, Australian authorities asked for clarification of the quota system from the Commission, given that if U.S. exports are the only ones who benefit from the quota, they could increase their EC market at the

41. *Id.* arts. I-II(1).

42. *Id.* art. III.

43. *See id.* art. II(3).

44. *Id.* art. II(4)(b).

45. *Id.* art. II(5).

46. Statement from USTR on U.S.-EU Beef Hormone Agreement 2 (May 13, 2009), *available at* http://www.america.gov/st/texttrans-english/2009/May/20090514131741eaifas0.5300976.html [hereinafter USTR Hormones Statement].

47. Hormones MOU, *supra* note 39, art. IV(3)(d).

48. USTR Hormones Statement, *supra* note 46, at 2.

49. *U.S., EU Beef Agreement Increases Access, Limits WTO Litigation*, INSIDE U.S. TRADE, May 8, 2009, ¶ 21 (quoting J. Patrick Boyle, President of the American Meat Institute, as calling the deal "an encouraging positive step towards restoration of beef trade between the U.S. and EU").

expense of other WTO Members, raising questions of compliance with GATT Article XIII (which requires non-discriminatory distribution of quota amounts).[50]

3. Zeroing

We note that of the four Appellate Body reports circulated in 2009, as listed above, three relate to U.S. zeroing practices (one new appeal and two Article 21.5 reports). In one sense, perhaps the Appellate Body should be grateful; without U.S. intransigence on zeroing, the Appellate Body would have had little work to do in 2009! Conceivably, there may be some Members who wish that the Appellate Body acted more like a common law court, applying formal principles of res judicata and precedent. In any event, over the past nine years, at least a dozen Appellate Body reports have been devoted to zeroing.[51] Whether the United States reacts in a more forthcoming manner to the most recent WTO decisions against zeroing remains to be seen. It is understandable that U.S. authorities are reluctant to change the methodology used in the calculation of anti-dumping margins in a manner that would reduce such margins in many future investigations, given the continued recession and the general unhappiness with the Congress with any actions that might make it more difficult for U.S. producers to gain protection of the anti-dumping laws. However, when and if the Doha Round is revised, it is certain that the rules negotiations will focus on zeroing. As the chair observed in the most recent negotiating draft in December 2008:

> Delegations remain profoundly divided on this issue. Positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing be specifically authorized in all contexts.[52]

The further rulings against zeroing since December 2008 are only likely to intensify the pressure on the United States to agree to a new methodology.

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50. *See* Daniel Pruzin, *U.S., EU Release Details of Beef Deal; Others Unhappy with Outcome*, 26 INT'L TRADE REP. 706, 706 (May 28, 2009) (discussing the questions of WTO consistency of the quota arrangements).

51. *See infra* Part B.1.b. The first action was directed against the EU. *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) (*adopted* Mar. 12, 2001).

52. WTO, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, 6, TN/RL/W/236 (Dec. 19, 2008), *available at* http://www.wto.org/english/news_e/news08_e/rules_19dec08_e.htm (follow "the new negotiating texts" hyperlink).

D. Possible Changes in the DSU and the Appellate Body's Working Procedures

Two thousand and nine was not a period of progress toward desired modifications of the Dispute Settlement Understanding (DSU). According to WTO records, the public report of the Chairman of the Trade Negotiations Committee of the DSB, Ronald Saborio Soto, was issued on December 5, 2008. In that report, Ambassador Saborio indicated his intent to hold additional consultations and informal meetings of the Special Session of the DSB on a regular basis. However, he cautioned that:

> The negotiations will continue to be member-driven. Reaching convergence will require additional flexibility in Members' positions. We need to make progress in a steady and constructive manner because on most issues much still needs to be done before we can successfully fulfill our mandate.[53]

Insofar as the authors have been able to determine, the negotiations did not progress measurably during 2009.

In December 2009, the Appellate Body was proposing several amendments to the Appellate Body Working Procedures, noting that while "those procedures have operated smoothly and effectively [since last revised in 2004] . . . our experience has revealed some areas where these provisions might be improved."[54] The proposed changes were summarized by the Appellate Body as follows:

> - First, we suggest that an appellant's written submission be filed when an appeal is commenced, namely, on the same day as the filing of a Notice of Appeal, and that all other deadlines for written submissions, the Notice of Other Appeal and third-party notifications be advanced accordingly.
> - Secondly, we propose to explicitly authorize, subject to certain conditions, the electronic filing and service of documents.
> - Thirdly, we propose to introduce a procedure for consolidating appellate proceedings where two or more

53. Report by the Chairman, Special Session of the Dispute Settlement Body to the Trade Negotiations Committee, TN/DS/23 (Dec. 5, 2008).

54. Appellate Body, *Proposed Amendments to the* Working Procedures for Appellate Review, 1, WT/AB/WP/W/10 (Jan. 12, 2010) [hereinafter *Proposed Amendments*].

> disputes share a high degree of commonality and are closely related in time.[55]

The proposed changes are explained in detail by the Appellate Body. The requirement for immediate filing of an appellant's written submission would modify the current practice of not filing the submission until seven days after the notice of appeal.[56] While the communication notes that the submission "provides an important basis for the preparation by the other parties and third parties of their detailed responses,"[57] it seems clear that the main purpose of the change would be to facilitate the Appellate Body's work under a very short period for appellate proceedings:

> Given the [ninety]-day limit for appellate proceedings stipulated under Article 17.5 of DSU, such a "waiting period" [seven days] during an appeal does not appear to be the most efficient allocation of the limited time available. The [seven]-day "waiting period" seems particularly inefficient in the light of the fact that the Appellate Body currently has only around [ten] days after it receives all written submissions to prepare for the oral hearing, which typically takes place [thirty-five] to [forty-five] days after the appeal has been filed. In certain exceptionally large and complex appeals over the past three years, these problems have been further amplified by the increased length of appellants' submissions.[58]

With regard to electronic filing, the Appellate Body is proposing to follow procedures used by many other tribunals both domestic and international.[59] In fact, the Appellate Body has been accepting documents filed with the Appellate Body and served on the other parties and other participants electronically for some time, while also requiring that the documents be filed and served simultaneously in paper form. The Appellate Body does not propose the complete elimination of parallel electronic and paper filing. Rather, the amendments would simply provide that a document electronically filed (by 5 p.m. on the due date) and confirmed by the Appellate Body Secretariat electronically is considered duly filed under the Working Procedures. Parties and other participants who wished to do so could continue to file documents solely in paper form, and in all cases it

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55. *Id.*

56. Appellate Body, *Working Procedures*, Rules 20-21, WT/AB/WP/5 (Jan. 4, 2005).

57. *Proposed Amendments*, *supra* note 54, at 4.

58. *Id.* The Appellate Body further notes that between 2006 and 2009 the average length of an appellant's submission increased from 90 to over 120 pages. *Id*. at 4 n.3.

59. "[A]llowing electronic filing accords with trends in domestic and international tribunals, many of which have successfully implemented filing systems under which submissions of documents by electronic means are authorized or required." *Id.* at 6.

would be required that a paper copy would be served on the Appellate Body by 11 a.m. the day following service. [60] The significant change would be to permit service of the documents on parties and other participants by e-mail alone.[61]

The technical changes proposed to consolidation rules are explained largely as codification of an existing *ad hoc* process, as follows:

> Where two or more disputes share a high degree of commonality, consolidation of appellate proceedings has proven to be a pragmatic way of conducting appeals, as it maximizes the efficient use of resources available to the parties, third parties and the Appellate Body, and fosters consistency in decision-making. To date, decisions to consolidate appellate proceedings have been made on an *ad hoc* basis in consultation with the parties. In the light of the frequent resort to consolidated proceedings in our recent experience, we consider it appropriate to codify this practice by adding a rule on consolidation to the *Working Procedures*. Such a rule would streamline the procedures where consolidation of appellate proceedings is anticipated, and would provide guidance to WTO Members in future disputes, thereby ensuring predictability of the dispute settlement system.[62]

The Appellate Body noted the increase in the need for consolidation of appeals, observing that "[i]n 2008, for example, the Appellate Body conducted three consolidated proceedings in appeals concerning six separate panel reports."[63]

These latest proposed changes to the Working Procedures, like earlier changes, are measured; no one could reasonably accuse them of being radical, and they seem to be based on common sense and on the desire to make the appeals process work more efficiently.

E. Expanding Appellate Body Transparency

The practice began in 2008 when Canada, the United States, and the EC sought and obtained open hearings before the Appellate Body[64] (with the concurrence of Australia, New Zealand, Chinese Taipei, and Norway) continued in 2009. In *United States – Continued Zeroing*,[65] Japan joined those Members who had earlier supported hearings open to the public while Egypt and Thailand

60. *Id.* at 6–7 (proposing a new Rule 18(1)*bis*).
61. *Id.* (proposing amendments to Rules 18(2) and 18(4)).
62. *Proposed Amendments*, *supra* note 54, at 9.
63. *Id.* at 9 n.18.
64. *See* Bhala & Gantz, *supra* note 10, at 118–19.
65. *See infra* Part B.1.

joined Brazil, China, India, and Mexico in the list of Members opposing open hearings.[66] Open hearings were also held in *United States – Zeroing (EC)*, reviewed in Part II, below.[67] A similar approach was followed in two 2009 Article 21.5 proceedings not included in this review: *United States – Zeroing (EC)*[68] and *United States – Zeroing (Japan)*[69] with Hong Kong adding itself to the "opposed" list and Korea, while not objecting to the desires of other Members to make their oral presentations public, requested that its own presentation be treated as confidential.[70] In all instances, the portions of the Appellate Body proceedings relating to those Members opposing public hearings remained confidential, while those requesting and/or acceding to public hearings were also accommodated, as in 2008, although not under ideal circumstances (televised proceedings in a separate room).[71] One can reasonably expect that over time the number of Members requesting or acceding to public hearings will grow, as a result of pressure from civil society and the business community in Korea, Brazil, India, Mexico, and even China (see also the discussion of transparency in Part II(B), *infra*).

F. Changes in Appellate Body Membership

Two new members joined the Appellate Body during 2009. Ricardo Ramirez, whose four-year term began July 1, 2009, is a prominent Mexican attorney, law professor, and former official with Mexico's Ministry of the Economy; he also holds law degrees in both Mexico and the United States.[72] Dr. Peter Van den Bossche, whose term began December 12, 2009, is a Belgian national who serves on the faculties of Maastricht University in the Netherlands, the World Trade Institute in Berne, and the Institute of European Studies of Macau. A former Acting Director of the WTO Appellate Body Secretariat, he holds law degrees from the European University Institute, Belgium, and the United States.[73] Both Ramirez and Van den Bossche have written extensively in the fields of international trade law and economic law.

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66. Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, Annex III, ¶ 2.

67. *See id.* Annex III, ¶ 6; *see infra* Part B.1.h.iii.

68. Appellate Body Report, *United States – Zeroing; Article 21.5*, *supra* note 9.

69. *See* Appellate Body Report, *United States –Sunset Reviews; Article 21.5*, *supra* note 9.

70. *Id.* Annex II, ¶ 3 (relating to Hong Kong and Korea).

71. *See, e.g.*, *id*. Annex II, ¶ 8.

72. *See* WTO, Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#ramirez (last visited Jan. 18, 2010).

73. *See* WTO, Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#vandenbossche (last visited Jan. 18, 2010).

In addition to Ramirez and Van den Bossche, the current members of the Appellate Body are Lilia Bautista (Philippines), Jennifer Hillman (United States), Shotaro Oshima (Japan), David Unterhalter (South Africa), and Yuejiao (China). None of their terms expire during 2010.[74] Including the current seven Members, a total of twenty-one individuals have served or are serving on the Appellate Body, from the United States (3), European Union (3: Belgium, Germany, Italy), Japan (3), Egypt (2), the Philippines (2), and one each from Australia, Brazil, China, India, Mexico, New Zealand, South Africa, and Uruguay.[75]

II. DISCUSSION OF THE 2009 CASE LAW FROM THE APPELLATE BODY

A. GATT Obligations

1. National Treatment

a. Citation

Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS/339/AB/R, WT/DS/340/R, WT/DS/342/AB/R (Dec. 15, 2008) (*adopted* Jan. 12, 2009) (complaints by European Communities, United States, and Canada).[76]

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74. *See* WTO, Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Jan. 18, 2010).

75. *Id.*

76. Argentina, Australia, Brazil, Japan, Mexico, Thailand, and (notably) Chinese Taipei (Taiwan) participated as third parties in all three Panel proceedings, and at the Appellate Body stage. Taiwan attended the oral hearing, and provided no written submission. There is no coverage in the Appellate Body report of what Taiwan thought about the case. Some of the third parties have major auto and auto parts interests in respect of China, as exporters to China, foreign direct investors in China, or both.

At the request of all three complainants, the same Panel heard all three cases, and at the request of the United States, this Panel issued a single Report with slightly different conclusions and recommendations for each complainant. Also at the request of the Americans, the Appellate Body set out its conclusions and recommendations separately for each complainant (in paragraphs 253–54), thus issuing three reports, although the main body (paragraphs 1–252) is presented as a unity. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, x, ¶¶1 nn.1–2, 9, 12; Panel Report, *China – Measures Affecting Imports of Automobile Parts*, ¶ 2.7, WT/DS339/R, WT/DS340/R, WT/DS342/R (July 18, 2008) [hereinafter Panel Report, *China – Auto Parts*]. Canada, the European Communities, and the United States also participated as third parties in the actions brought by the other Members. Given the significant interests of all three in the Chinese auto market, their collaboration is not surprising. For example, car manufacturers from Europe account for

b. Facts[77]

It was a fight over cars and car parts that marked the end of China's honeymoon period in the WTO—that blissful few years when its major trading partners were willing to forgive its trespasses because this largest of the developing countries had joined the club. The United States was not alone in bringing the *Auto Parts* case against China, the first WTO litigation brought against China since it acceded to the WTO on December 11, 2005. (Previous Chinese involvement was limited to a third-party role.) Canada and the European Communities (EC) also filed suit against China. No longer was China a voluntary third-party participant. Now, it was compelled to defend its trade rules and policies before an independent international adjudicator.

More than history was at stake. Commercially, China is the third largest economy in the world (measured by Gross Domestic Product (GDP)), after the United States and Japan, and besting Germany in 2007.[78] After the United States, China boasts the second largest consumer auto market in the world.[79] Likewise,

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twenty to twenty-five percent of all auto production in China. *See* Francis Williams, *China Probed over Car Parts Tariffs*, FIN. TIMES, Oct. 27, 2006, at 2.

Interestingly, the Appellate Body received an unsolicited amicus curiae brief, but (after giving the complainants, respondent, and third parties the chance to express their opinions) did not find it necessary to rely on it to decide the case. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 11.

A modified version of the discussion of the *Auto Parts* case is scheduled to appear in an article entitled *Teaching China GATT*, by Raj Bhala, to be included in a forthcoming edition of *Trade, Law and Development*, an Indian law journal, sponsored by the National Law University of Jodhpur (manuscript on file with author). A different version is scheduled to appear as a chapter in LAW AND DEVELOPMENT PERSPECTIVES ON INTERNATIONAL TRADE LAW (Yong-Shik Lee & Won-Mok Choi eds., forthcoming) (manuscript on file with author). The author is grateful to the *Arizona Journal*, Shashank Kumar of *Trade, Law and Development*, and the book editors for their guidance and flexibility.

77. This discussion is drawn from Appellate Body Report, *China –Auto Parts*, *supra* note 9, ¶¶ 1-13, 109-26; Panel Report, *China – Auto Parts*, *supra* note 76, ¶¶ 1.1-2.7 ; *see generally* WTO, *Update of WTO Dispute Settlement Cases*, 54-56, WT/DS/OV/33 (June 3, 2008).

78. *See* Geoff Dyer, *Chinese Data Put Economy in Third Place*, FIN. TIMES, Jan. 15, 2009, at 1. Of course, some healthy skepticism is appropriate in respect of statistics put out by the Chinese Communist Party. *See* Geoff Dyer, *Economists at Odds over Reliability of Beijing Data*, FIN. TIMES, Jan. 15, 2009, at 3.

79. *See* John Reed & Bernard Simon, *The Thrill is Gone*, FIN. TIMES, Feb. 3, 2009, at 9; Jonathan Lynn, *UPDATE 2 – China Loses WTO Appeal in Car Parts Dispute*, REUTERS, Dec. 15, 2008, *available at* http://www.reuters.com/article/idUSLF46614820081215. *See also* Kathleen E. McLaughlin, *China Poised to be 2nd Largest Car Market by End of 2006, Government Economist Says*, 23 INT'L TRADE REP. 1566, 1566 (Nov. 2, 2006) (quoting Xu Changming, Senior Economist, State Information Center, State Council of China, stating "[t]he era of common household car ownership in China is drawing near").

following the United States, China is the second largest producer of autos and auto parts in the world.[80] Yet, in these two countries, the fortunes of this strategic sector are headed in opposite directions. Car sales of new passenger vehicles in the United States (both total and retail) have trended downwards since 2000 (from just under eighteen million to below twelve million vehicles per year between 2000 and 2009, respectively).[81] Job loss and wage decline in the U.S. auto industry are a decades-long phenomenon. Conversely, the auto industry has been an engine of Chinese economic development. The market share of Chinese-owned vehicle producers (such as Chery) has risen relative to that of joint ventures between Chinese and foreign companies, and imported cars account for less than five percent of all auto sales in China.[82] China aims to win ten percent of the global car market by about 2016.[83] (A worrying sign for China is the effect of the recession on its prized auto industry: in early 2009, the market for used cars was growing faster than for new cars, adding to protectionist pressures within the country.[84]) These commercial facts have their own political ramifications, i.e., the *Auto Parts* case is an historic one set in the broad context of the political economy and development of China.

Underlying all three actions was the same factual predicate: China's imposition of measures that adversely affected exports of automobile parts into the Chinese market.[85] In controversy were three legal instruments issued by the Chinese Communist Party (CCP) government:

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80. *See* Williams, *supra* note 76, at 2.

81. *See* Reed & Simon, *supra* note 79, at 9.

82. *See* Daniel Pruzin, *WTO Panel Upholds U.S., EU, Canada in Final Ruling in China Auto Parts Case*, 25 INT'L TRADE REP. 448, 448–49 (Mar. 28, 2008) (reporting on 2006 data).

83. *See* Williams, *supra* note 76, at 2.

84. *See* Patti Waldmeir & John Reed, *China Used-Car Dealers in Top Gear*, FIN. TIMES, Feb. 5, 2009, at 6.

85. Among the Chinese auto component makers are Weichai Power Co. Ltd. and Changchun FAW – Sihuan Automobile Co. Ltd. Some U.S. component makers, like Delphi Corp. and Visteon Corp., also produce parts in China. Insofar as car manufacturers import some components, rather than purchase from domestic suppliers, these firms are among the ones potentially affected by the Appellate Body decision discussed herein. *See* Lynn, *supra* note 79. Without doubt, exporters of autos and auto parts in the complainant countries are affected, and their representatives at the meeting of the WTO Dispute Settlement Body urged China to implement the Appellate Body decision as quickly as possible, given the "current perilous state of the automobile industry." Daniel Pruzin, *Citing Carmaker's Woes, U.S., EU Urge China to Implement Quickly WTO Auto Parts Ruling*, 26 INT'L TRADE REP. 77, 77 (Jan. 15, 2009).

To be sure, several foreign car manufacturers (e.g., Honda, General Motors, Toyota, and Volkswagen AG) want to rely on components produced in China (and they account for eighty percent or more of the value of the models the foreign firms build in China), because the local parts are cheaper than imports (and the quality of local parts has improved), notwithstanding the added tariff cost associated with imports. In other words,

(1) Policy Order 8 –
Policy on Development of the Automotive Industry, Order Number 8 of the National Development and Reform Commission, effective May 21, 2004.

(2) Decree 125 –
Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles, Decree Number 125 of the People's Republic of China, effective April 1, 2005.

(3) Announcement 4 –
Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles, Public Announcement Number 4 of 2005 of the Customs General Administration of the People's Republic of China, effective April 1, 2005.[86]

Policy Order 8 establishes the legal basis for Decree 125 and Announcement 4. Under that Order, the Customs General Administration (CGA) works with other relevant Chinese governmental departments (such as the Ministries of Commerce and Finance, the National Development and Reform Commission (NDRC), and the Verification Centre) to promulgate specific rules about the imports of autos and auto parts. Decree 125 implemented those rules. Essentially, the rules deal with the supervision and administration of parts that are imported and subsequently assembled into certain models of cars. The rules also set the criteria to characterize whether imported auto parts should be treated as a complete vehicle. Announcement 4 gives further details on the procedures and criteria.

Taken together, the measures may be referred to as "China's 2004 Automobile Policy."[87] Briefly stated, the Policy imposes a twenty-five percent charge on imported auto parts used in the manufacture or assembly of certain models of motor vehicles in China, and sold in the Chinese domestic market. But, the imposition occurs only if those imported parts are characterized as—or, stated differently, if they have the essential character of—a completed vehicle based on

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these companies do not all complain about high Chinese tariffs, which leads to the inference that the *Auto Parts* dispute is perhaps more political than economic in nature. *See* Lucy Hornby & Fang Yan, *UPDATE 1 – China Commerce Ministry Regrets WTO Car Parts Ruling*, REUTERS, Dec. 16, 2008, *available at* http://www.reuters.com/article/idUSSHA19631520081216.

86. Appellate Body Report, *China – Auto Parts*, *supra* note 9, at ¶ 2.

87. *See* Amy Tsui, *WTO Affirms Chinese Measures, Treatment of Imports of Auto Parts Violate Obligations*, 25 INT'L TRADE REP. 1779, 1779 (Dec. 18, 2008).

criteria prescribed in the Policy.[88] Further, the charge is levied only after the parts are imported and assembled in China into a finished vehicle. The criteria are a set of thresholds concerning the type or value of imported auto parts used to produce specific models of vehicles. More precisely, as the Appellate Body explained:

> The measures set out . . . the criteria that determine when imported parts used in a particular vehicle model must be deemed to have the "essential character" of complete vehicles and are thus subject to the [twenty-five] per cent charge. These criteria are expressed in terms of particular combinations or configurations of imported auto parts or the value of imported parts used in the production of a particular vehicle model. The use in the production of a vehicle model of specified combinations of "major parts" or "assemblies" that are imported requires characterization of *all* parts imported for use in that vehicle model as complete vehicles. [Authors' note: The noun "assembly" as a synonym for "major part" should not be confused with the verb "assemble" in the sense of putting together parts to make a finished car.] Various combinations of assemblies will meet the criteria, for example: a vehicle body (including cabin) assembly and an engine assembly; or five or more assemblies other than the vehicle body (including cabin) and engine assemblies. The use, in a specific vehicle model, of imported parts with a total price that accounts for at least [sixty] per cent of the total price of the complete vehicle also requires characterization of *all* imported parts for use in that vehicle model as complete vehicles. Imports of CKD and SKD kits [completely knocked down vehicle kits and semi-knocked down vehicle kits, respectively, discussed below] are also characterized as complete vehicles.[89]

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88. Both the Panel and Appellate Body intentionally used the term "charge," rather than "duty" or "tariff." China's 2004 Automobile Policy employs the latter two terms, but the Panel and Appellate Body preferred the word "charge" because it was neutral as to whether the "charge" fell under Article II or Article III of the General Agreement on Tariffs and Trade (GATT). *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 109 & n.127.

89. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 114 (citations omitted) (emphasis in original). In a footnote, the Appellate Body explained that the term "assembly" under Decree 125 included "the vehicle body (including cabin) assembly, the engine assembly, the transmission assembly, the driving axle assembly, the driven axle assembly, the frame assembly, the steering system, and the braking system." As indicated, the term corresponds loosely to the major parts of a vehicle. In a separate footnote, the Appellate Body summarized Decree 125 as containing

Broadly speaking, this passage reveals two thresholds that will lead to characterization of imported auto parts as a completed vehicle:

> (1) Volume threshold –
>
> Employing certain key imported major parts (i.e., assemblies), or a designated combination of imported major parts, to make a vehicle, which effectively summed to sixty percent or more of the content of the vehicle.[90]
>
> (2) Value threshold –
>
> Employing imported parts in a vehicle that account for sixty percent or more of the total price of that vehicle.[91]

If the imported parts used in a particular vehicle meet or exceed the relevant threshold, then all of the imported parts used to assemble that model of vehicle are characterized as complete vehicles. As the Appellate Body explained:

> When the imported parts used in the production of a specific vehicle model meet the criteria under the measures at issue, then the [twenty-five] per cent charge and the requirements under the

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> [t]he following combinations of "assemblies" . . . (i) imports of a vehicle body (including cabin) assembly and an engine assembly for the purpose of assembling vehicles; (ii) imports of a vehicle body (including cabin) assembly or an engine assembly, plus at least three other assemblies, for the purpose of assembling vehicles; and (iii) imports of at least five assemblies other than the body (including cabin) and engine assemblies for the purpose of assembling vehicles. . . . In turn, the determination of whether auto parts used to produce an assembly will be deemed an "imported assembly" and therefore count towards the thresholds . . . is made based on criteria specified in . . . Decree 125. These criteria include: (i) a complete set of parts imported to assemble the assembly; (ii) "key parts" or "sub-assemblies" that reach or exceed specified quantities referred to in Annexes 1 and 2 to Decree 125; and (iii) the total price of the imported parts accounts for at least [sixty] per cent of the total price of that assembly.

Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 114 n.147.

90. *See* Daniel Pruzin & Christopher S. Rugaber, *U.S., EU Initiate WTO Dispute Complaints Against Chinese Restrictions on Auto Parts*, 23 INT'L TRADE REP. 530, 530–531 (Apr. 6, 2006). This account states the volume threshold as in excess of sixty percent.

91. The value threshold, originally scheduled to take effect on July 1, 2006, entered into force on July 1, 2008, "because of the administrative complexity in implementing it." Appellate Body Report, *China – Auto Parts* , *supra* note 9, ¶ 195 n.275.

> measures apply in respect of *all* imported parts assembled into the relevant vehicle model. [That is, the charge affects every imported part assembled into a completed vehicle, even a part that was not considered when determining whether the vehicle model in question met the volume or value threshold.] It is immaterial whether the auto parts that are "characterized as complete vehicles" were imported in multiple shipments—that is at various times, in various shipments, from various suppliers and/or from various countries—or in a single shipment. It is also immaterial whether the automobile manufacturer imported the parts itself or obtained the imported parts in the domestic market through a third party supplier such as an auto part manufacturer or other auto part supplier. However, if the automobile manufacturer purchases imported parts from such an independent third party supplier, the automobile manufacturer may deduct from the [twenty-five] per cent charge that is due the value of any customs duties that the third party supplier paid on the importation of those parts, provided that the automobile manufacturer can furnish proof of the payment of such import duties. If optional parts that are imported are installed on a relevant vehicle model, the manufacturer must report those optional parts to the Verification Centre, make declarations at the time of the actual installation of the optional parts and pay the [twenty-five] percent charge on such optional parts.[92]

In effect, China rolls all imported parts together and presumes irrebutably that the imported parts impart the essential character of a completed vehicle. In turn, all imported parts used for the vehicle model are subject to the twenty-five percent charge. China imposes the charge following the assembly of the vehicles.

The twenty-five percent figure is no accident. It equals the average applied and bound tariff rate China lists as in its Schedule of Concessions as applicable to complete motor vehicles.[93] The twenty-five percent most-favored nation (MFN) duty rate is higher than the average rate China applies to auto parts, and has bound, which is ten percent. As for imported auto parts that China does not characterize as complete vehicles, they are subject to the duty rate in China's Schedule for parts, i.e., an average of ten percent. Manifestly, China's 2004 Automobile Policy was an effort (inter alia) "to discourage foreign car makers from importing vehicles in large parts to circumvent the higher tariff."[94]

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92. *Id.* ¶ 121 (citations omitted) (emphasis in original).

93. *See China – Accession Protocol: Schedule CLII*, Annex 8, WT/ACC/CHN/49/Add.1.

94. Hornby & Yan, *supra* note 85. *See also* Daniel Pruzin, *China Outlines Defense in WTO Dispute over Auto Parts Tariffs*, 24 INT'L TRADE REP. 621, 621 (May 3, 2007)

In sum, under the 2004 Automobile Policy, imported automobile parts used in the production in China of a vehicle for sale in China are subject to a charge. That charge equals the tariff for a completed imported vehicle, namely, twenty-five percent, and the automobile manufacture (not the importer) is legally liable for paying the charge.[95] The charge is levied only if those parts are imported and used in the production and assembly of a vehicle in excess of certain thresholds. The thresholds—which are based on volume and value criteria that the Policy lays out—define whether imported parts used in a particular vehicle model have the essential character of, and thus qualify as, a completed vehicle. If the imported parts have the essential character of a completed vehicle, then China slaps a twenty-five percent tariff on those parts, and indeed all imported parts used to make that model of vehicle.

China also applies the twenty-five percent charge—i.e., the tariff for a complete vehicle—on an CKD and SKD kit.[96] These kits are a sub-set of all the products covered by China's 2004 Automobile Policy.[97] Yet, its Policy does not provide any definition of a "CKD" or "SKD" kit. Filling this definitional void, the Panel considers these kits to refer to all, or nearly all, of the auto parts necessary to assemble a complete vehicle, which must be packaged and shipped in a single shipment, and following importation, which must go through a process of assembly to become a completed vehicle.[98] The distinction between the two kits

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(summarizing China's argument about the prevention of circumvention by treating dissembled auto parts that have the essential character of a car as a complete vehicle, and thereby subjecting the shipment to the twenty-five percent vehicle tariff, not the ten percent parts tariff).

95. If the automobile manufacturer purchases imported parts from an independent supplier, the automobile manufacturer may deduct from the twenty-five percent charge the value of any customs duties that the third-party supplier paid on those parts, provided that the automobile manufacturer can furnish proof of the payment of such import duties. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 174 n.235.

96. *See id.* ¶ 4 n.19.

97. *See id.* ¶ 210.

98. The Appellate Body explained in further detail the procedural steps an automobile manufacturer must follow. In summary, before beginning production of a new vehicle model that will incorporate imported parts and be sold in the Chinese market, the manufacturer performs a self-evaluation as to whether the imported parts to be used in that model have the essential character of a complete vehicle, and thus qualify as such and trigger the twenty-five percent charge. It submits the results to the NDRC and Ministry of Commerce. If the self-evaluation yields an affirmative result, then the manufacturer arranges for the Chinese government to list the vehicle model in question in a Public Bulletin. If the result is negative, then the Chinese government—specifically, the Verification Centre—conducts a verification examination to ensure the proposed vehicle model meets the thresholds established by the criteria in the 2004 Automobile Policy. If the Centre verifies the self-evaluation results, then the manufacturer is not subject to the twenty-five percent charge.

concerns assembly. A CKD kit contains auto parts imported together in an unassembled state. Subsequently, the parts are assembled to make a complete vehicle. An SKD kit also has auto parts imported together, but some of the components in such a kit have been assembled prior to importation.

The auto parts subject to the twenty-five percent charge fall into four categories of the Harmonized Commodity Description and Coding System (Harmonized System, or HS):

(1) Complete motor vehicles (headings 87.02–.04).[99]

(2) Certain intermediate categories of auto parts, specifically chassis fitted with engines (heading 87.06), and bodies for motor vehicles (heading 87.07).

Once listed in the Public Bulletin, the manufacturer applies to the CGA to register the vehicle model. Assuming approval of the registration application, CGA requires the manufacturer to post a duty bond (a financial guarantee that final duties ultimately assessed will be paid) that corresponds to the ten percent tariff rate on auto parts multiplied by the projected monthly importations of auto parts. At this point, the manufacturer may start importing parts for use in its new vehicle model. When the manufacturer imports the parts that are characterized as complete vehicles, it must specify on the relevant customs documentation that the parts are "characterized as complete vehicles." Thereafter, the manufacturer is free to use the parts, though it must submit information (according to prescribed deadlines) to the CGA about all completed vehicles it made so that a "Verification Report" can be issued (by the Verification Centre).

Once that Report is issued, the relevant district customs office classifies the auto parts as complete vehicles, and assesses the twenty-five percent charge. The manufacturer makes a duty declaration on the tenth working day of each month for all complete vehicles of the relevant model that it assembled during the preceding month. The office collects the charge.

There are four principal qualifications to these procedures. First, an automobile manufacturer may apply for a re-verification of a vehicle model, if it changes the configuration or combination of imported parts it uses to manufacture that model, and it believes the change will affect the determination that the vehicle meets the essential character criteria. The Verification Centre is responsible for Re-Verification Reports. Second, if an automobile manufacturer does not use imported auto parts that it had declared as a complete vehicle, then it is eligible for the ten percent auto parts duty rate. Third, if a Chinese auto or auto parts manufacturer substantially processes imported auto parts (other than an entire imported assembly or sub-assembly, i.e., it incorporates imported parts into an assembly or sub-assembly), then the imported parts are treated as a domestic parts, and not subject to the twenty-five percent charge. Fourth, an automobile manufacturer importing a CKD or SKD may declare and pay duties on the kits at the time of importation, and thereby obtain an exemption from certain aspects of the 2004 Automobile Policy that establish the twenty-five percent charge. *See id.* ¶¶ 114–26.

99. *See id.* ¶ 112. This category is the one to which the average applied Chinese tariff is twenty-five percent. There are variations at the HS 8 digit level, but the twenty-five percent figure is the average.

(3) Other intermediate categories of auto parts, specifically parts and components of motor vehicles that fall under a particular HS heading (heading 87.08).[100]

(4) Parts and accessories of motor vehicles that fall under a variety of HS Chapters other than Chapter 87, such as engines (Chapter 84) (specifically, parts under headings 84.07–.09, 84.83, 85.01, 85.03, 85.06, 85.11–.12, and 85.39).

Thus, for example, suppose imported parts exceed the applicable volume or value threshold. Then, the Chinese government imposes on all imported parts used in the relevant vehicle model a charge amounting to twenty-five percent ad valorem, which is in addition to the normal MFN rate applicable to the parts. The Chinese government does not impose the same charge on domestically produced parts. Thus, the 2004 Automobile Policy imposes different charges on vehicles made in China depending on the domestic content of the parts used in the production process. The Policy penalizes a manufacturer of vehicles in China for using imported auto parts in a vehicle destined for sale in China. Conversely, it gives producers an advantage if they use domestically made parts.

c. Some GATT Basics

As just explained, China bound its tariff on auto parts at most-favored nation (MFN) rates considerably lower than its tariff bindings for complete vehicles—ten versus twenty-five percent. Yet, if an imported part is incorporated into a vehicle made and sold in China, and that vehicle contains imported parts in excess of a government-defined threshold, then the tariff imposed on the part is at the higher level, i.e., that of a finished vehicle. In effect, China bumped up the tariff on the imported part to the level of a finished good. Note, then, China's Schedule displays tariff escalation—the bound tariff rates are higher for complete motor vehicles than for components. The typical purpose of tariff escalation is to encourage the location of high value-added economic activity within the territory of the importing country.

Contrary to the tariff binding principles in Article II:1 of the General Agreement on Tariffs and Trade (GATT), the bump up means China assesses on the disfavored imported auto parts a charge that is in excess of the charges set

100. *See id.* This and the fourth category are the ones for which China has an average applied tariff rate of ten percent.

forth and bound in its Schedule of Tariff Concessions for these imports. Article II:1 states:[101]

> (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favo[]rable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from *ordinary customs duties* in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.[102]

The extra charge also raises a problem under national treatment principles.

Those principles are set out in GATT Article III. The national treatment problems arise because the charge applies only to imports, not like domestic products. Article III:1–2 and 4 state:

> 1. The contracting parties recognize that internal taxes and other *internal charges*, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other *internal charges* of any kind in excess of those

101. Unless otherwise noted, all GATT and WTO rules are quoted from RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT (3rd ed. 2008).

102. *Id.* at 116 (emphasis added).

> applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other *internal charges* to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*****
>
> . . .
>
> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favo[]rable* than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.[103]

Indicated by the asterisk (*****) in Articles III:1–2, the Interpretative Note, Ad Article III (sometimes referred to as the Ad Note) provides:

> Any internal tax or other *internal charge*, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other *internal charge*, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.
>
> *Paragraph 1*
>
> The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would

103. *Id.* at 119 (emphasis added).

> result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.
>
> *Paragraph 2*
>
> A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.[104]

Further, the bump up is a way China discourages vehicle producers located in that country from using too many imported parts, and encourages them to source their inputs from suppliers in China. That is because China's 2004 Automobile Policy specifies domestic content thresholds (using value or volume metrics).

This kind of encouragement is a prohibited subsidy, a Red Light import substitution subsidy, under Article 3:1(b) of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). That is, the "subsidy" (under Article 1) is government revenue China foregoes by imposing a lesser tariff on imported auto parts if a final, assembled vehicle contains the requisite amounts of local content. The subsidy is "specific" (under Article 2) to the auto industry. This specific subsidy is for import substitution under Article 3:1(b), which states:

> 3.1. Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact,[105] whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

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104. *Id.* at 121 (emphasis added).

105. A footnote to this phrase explains that de jure or de facto contingency exists:

> [W]hen the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not

> (b) subsidies contingent, whether solely or as one of several other conditions, *upon the use of domestic over imported goods*.[106]

Avoidance of the extra charges is contingent on the use of domestic over imported goods. That, in turn, helps keep Chinese factories in business and workers employed—all at the expense of Canadian, European, and American car parts companies and their work forces.

The 2004 Automobile Policy also biases the pattern of foreign direct investment (FDI) into China, raising concerns among the complainants that officials ran afoul of the WTO Agreement on Trade-Related Investment Measures (TRIMs). The Policy confers an advantage on enterprises that use in the production of vehicles domestic rather than imported parts. This advantage may induce firms to establish parts manufacturing operations in China. By locating their plants in China, rather than exporting auto parts from outside China, they avoid imposition on the parts of the full vehicle duty rate.

d. The Panel's Strong Verdict Against China[107]

In their separate actions before the Panel, the European Communities, Canada, and the United States made a large number of claims. Each complainant averred China's 2004 Automobile Policy violated all or some of the following multilateral trade obligations:

- GATT Articles II:1(a)–(b) (concerning tariff bindings), III:1–2 and III:4 (concerning national treatment for fiscal and non-fiscal measures, respectively), III:5 (concerning domestic content requirements), and XI:1 (concerning quantitative restrictions).[108]

> for that reason alone be considered to be an export subsidy within the meaning of this provision.

Id. at 433.

106. *Id.* (emphasis added).

107. This discussion is drawn from Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶¶ 1–13, 108–26; *see Update of WTO Dispute Settlement Cases*, *supra* note 77, at 54–56.

108. *See* BHALA, *supra* note 101, at 116, 118–19, 131; RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 95–172, 280–316 (2005); RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 280–316 (3d ed. 2008).

- Articles 2:1–2:2 of the WTO TRIMs Agreement (concerning national treatment and quantitative restrictions, and referring to GATT Articles III and XI), along with the related Illustrative List (in Annex 1 thereto, particularly Paragraphs 1(a) and 2(a), concerning domestic sourcing and import substitution, and referencing GATT Articles III:4 and XI:1).[109]

- Articles 3:1(b) and 3:2 of the WTO SCM Agreement (concerning prohibited or "Red Light," specifically import-substitution, subsidies).[110]

- Certain provisions in the WTO accession documents agreed to by China that lay out commitments China made to join the WTO, particularly Part I, Paragraphs 7.2–3 of the Protocol of Accession, and Paragraphs 93, 203 and 342 of the Working Party Report on the Accession of China (in conjunction with Part I, Paragraph 1.2 of the Accession Protocol).[111]

The complaining WTO Members also asserted that the Automobile Policy nullified or impaired benefits accruing to them under the aforementioned agreements.

In the first decision by any WTO adjudicatory body against China, the *Auto Parts* Panel rendered a strong verdict against China's Automobile Policy on the most potent arguments of the complainants. In particular:[112]

- National Treatment (Fiscal Measures) Violation –

  The complainants alleged the twenty-five percent levy imposed under China's 2004 Automobile Policy was an "internal charge" incongruous with GATT Article III:2 (first

109. For a discussion of the TRIMs Agreement, see BHALA, *supra* note 101, at 333–34, 336–37 *See also* BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 396.

110. For a discussion of the SCM Agreement, see BHALA, *supra* note 101, at 431. *See also* BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 1067.

111. Canada pled an additional violation, namely, Article 2(b)–(d) of the WTO *Agreement on Rules of Origin*. *See generally* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (2000) (assessing China's accession commitments based on the November 15, 1999, bilateral agreement between the United States and China).

112. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶¶ 3–5, 7, 128–33, 183–84, 187.

sentence). China applied the internal charge to imported auto parts, but not to like domestic auto parts. That is, the internal charge China imposed on imported parts was in excess of that imposed on domestic parts. China's response was that the twenty-five percent levy was an ordinary customs duty ("OCD") within the meaning of Article II:1(b) (first sentence), not an "internal charge" subject to Article III:2 (first sentence). The Panel agreed with the complainants.

- National Treatment (Non-Fiscal Measures) Violation –

The complainants argued that by imposing the twenty-five percent levy, China violated GATT Article III:4, because it treated imported auto parts less favorably than like domestic auto parts. The less favorable treatment arose because China imposed additional administrative requirements, and additional charges, on automobile manufacturers that used imported auto parts in excess of thresholds specified in the 2004 Automobile Policy. The result was a disincentive for producers to use imported parts. China's response, again, was that the twenty-five percent levy was an OCD under Article II:1(b) (first sentence), not an internal measure governed by Article III:4. The Panel agreed with the complainants.

- Alternative Tariff Bindings Violation –

As an alternative contention, the complainants said China breached GATT Article II:1(a)–(b). The charge on imported auto parts imposed under China's 2004 Automobile Policy—if considered an OCD—exceeded the bound tariff rates set out in China's Schedule of Concessions. That Schedule is annexed to its Protocol of Accession; hence, there was a violation of it and the Accession Working Party Report. China countered that the Policy did not run afoul of Article II, but rather gave effect to the proper interpretation of the term "motor vehicles" in its Schedule. As an alternative to its findings under Article III:1–2, the Panel held the Policy established an OCD within the scope of Article II:1(b) (first sentence). Under its Policy, China imposed duties in excess of the relevant tariff bindings in China's Schedule, which were incongruous with Article II:1(a)–(b).

- Special Finding on Auto Kits –

On the assumption the twenty-five percent charge is characterized as an OCD, the complainants claimed China violated GATT Article II:1(b) (first sentence) in its treatment of the CKD and SKD kits. The Panel disagreed, handing China its only substantive victory in the case. That is, the Panel said China could legitimately classify a CKD and SKD kit as a completed "motor vehicle" under its Schedule of Concessions, impose a twenty-five percent charge, and not breach its Article II:1(b) (first sentence) tariff binding for finished cars.[113] But, the Panel held Chinese treatment of these kits was inconsistent with Paragraph 93 of China's Accession Working Party Report. In that Paragraph, China pledged not to apply a tariff rate above ten percent to imports of CKD and SKD kits. This Paragraph states:

> Certain members of the Working Party expressed particular concerns about tariff treatment in the auto sector. In response to questions about the tariff treatment for kits for motor vehicles, the representative of China confirmed that China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. If China created such tariff lines, the tariff rates would be no more than [ten] per cent. The Working Party took note of this commitment.[114]

To reach its conclusion, the Panel held that by implementing the 2004 Automobile Policy, China had created new tariff lines for CKD and SKD kits at the HS-10 digit level.

- Failure of the Administrative Necessity Defense –

The complainants urged that the violation of Article III:4, or in the alternative Article II:1(a)–(b), could not be excused under the administrative necessity exception of Article XX(d), which China had invoked. China invoked this exception because it said its 2004 Automobile Policy ensures "substance over form" in its administration of customs law. That is because the Policy allows Chinese customs officials to classify as a

113. This specific conclusion was not appealed. The application of GRI 2(a), discussed *infra*, to the term "motor vehicles" in China's Schedule of Concessions, provided China with the legal basis for its classification of the kits.

114. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 212 (emphasis added).

complete motor vehicle a group of auto parts that have the essential character of a complete vehicle, regardless of how an importer structures importation of the parts. In other words, the Policy prevents the circumvention of China's tariff headings for complete motor vehicles. (This argument, of course, is about substantial completeness, a problem dealt with in U.S. customs law by the five-factor Daisy Heddon Test and under World Customs Organization (WCO) standards by the General Rule of Interpretation (GRI) 2(a), known as the "Doctrine of the Entireties."[115] China's point was that it properly applied GRI 2(a) by treating a dissembled set of parts that has the essential character of a car—i.e., is a substantially complete car—as a complete vehicle. Indeed, if it did not do so, said China, then importers would be able to circumvent its twenty-five percent MFN tariff on cars.) However, the Panel rejected China's argument about tariff circumvention, partially because of the increasing standardization of auto parts. The standardization means that many parts can be used interchangeably among different car models, allowing manufacturers to realize economies of scale by making families of vehicle models that

115. *See* BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 534. The *Daisy-Heddon* test was developed in Daisy-Heddon, Div. Victor Comptometer Corp. v. United States, 600 F.2d 799 (C.C.P.A. 1979), and is summarized and applied in Simod America Corp. v. United States, 872 F.2d 1572 (Fed. Cir. 1989). *See also* BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 538–44. In respect of the *Daisy-Heddon* test, and the broader Doctrine of the Entireties that the test articulates, the test remains good law in the United States. Many cases refer to it or the Doctrine in other contexts. For example, in Border Brokerage Co. Inv. v. United States, 349 F. Supp. 1011 (1972), the U.S. Customs Court applied the Doctrine in the context of "American Goods Returned."

However, the *Daisy-Heddon* Test arose under the former Tariff Schedule of the United States (TSUS), which the Harmonized Tariff Schedule of the United States (HTSUS) replaced on January 1, 1989. Relying on pre-1989 judicial decisions (or administrative rulings) from the TSUS era for classification purposes is dicey. That is because the HTSUS numbering scheme is different from that of the TSUS, and the General Rules of Interpretation (GRI)—which were introduced along with the HTS—changed many criteria for classification. When pre-1989 rulings or cases are used, the reasons typically are either that the issue is one of settled law or there is no more recent decision on point.

Further, in the case of Zomax Optical Media, Inc. v. United States, 366 F. Supp. 2d 1326, 1334 (2005), the U.S. Court of International Trade (successor to the Customs Court) observed that CBP acknowledged the Doctrine was "defunct," at least for purposes of that case. That narrow interpretation is based on the facts of the case, which involve split shipments. It is also based on the legal reality that the way in which CBP handled classification of merchandise is no longer covered by the Doctrine, but rather by a statute on split shipments, namely, 19 U.S.C. § 1484(j) (2006).

> share platforms and components, and for which sixty to seventy percent of parts are common to the models. The Panel agreed China failed to prove its violations of its GATT obligations satisfied the two-step test under the Article XX(d) exception.

Still other major claims against China arose under GATT Articles III:5 and XI:1, Article 2 of the TRIMs Agreement (including Paragraph 1(a) of Annex 1 thereto), and Article 3:1(b) and 3:2 of the SCM Agreement, Part I, Paragraphs 7:2–3 of China's Accession Protocol and Paragraph 203 of its Accession Working Party Report. On all these claims, the Panel exercised judicial economy.

e. Appellate Issues and Overview of Appellate Body Holdings

Not surprisingly, but perhaps not wisely, China appealed the verdicts of the Panel. For the Appellate Body, the key issues were as follows:[116]

- Internal Charge or OCD?

  Is the twenty-five percent charge an internal charge under GATT Article III:2 (first sentence), rather than an OCD under Article II:1(b) (first sentence)?[117] China argued the Panel erred in ruling this charge is properly characterized as an "internal charge" subject to the national treatment rule, rather than an OCD governed by the tariff binding rule. Briefly, the Appellate Body upheld the Panel finding, i.e., the Appellate Body agreed the charge is an "internal charge" under Article III:2 (first sentence), not an OCD under Article II:1(b) (first sentence).[118]

- National Treatment (Fiscal Measures) Violation?

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116. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 108. Also at issue on appeal was whether the Panel violated Article 11 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, or DSU) concerning its ruling about the United States and Canada mounting a prima facie case. The Appellate Body exercised judicial economy on this issue. *See id.* ¶¶ 108(d)(ii), 246.

At the Panel Stage, China unsuccessfully argued its 2004 Automobile Policy does not itself impose a duty or fee, but rather defines the circumstances under which China classifies imported parts under a different tariff provision. The Panel held the Policy does establish a charge, and China did not appeal the finding.

117. *See id.* ¶ 108(a).

118. *See id.* ¶ 253(a) (findings and conclusions of all three reports: WT/DS339/AB/R (European Communities), WT/DS340/AB/R (United States), and WT/DS342/AB/R (Canada)).

Is the twenty-five percent charge illegal under GATT Article III:2 (first sentence)?[119] China urged the Panel was wrong in holding the charge exceeded impositions levied on like domestic products. Briefly, the Appellate Body upheld the Panel. In respect of imported auto parts in general, China's 2004 Automobile Policy violates Article III:2 (first sentence) because it subjects imported parts to an internal charge not applied to like domestic auto parts.[120]

- National Treatment (Non-Fiscal Measures) Violation?

Is the 2004 Automobile Policy through which China imposes the twenty-five percent charge illegal under GATT Article III:4?[121] China claimed the Panel was mistaken in finding its Policy treated imported auto parts less favorably than like domestic merchandise. The Appellate Body thought China was mistaken, ruling with respect to auto parts in general, the Policy accords less favorable treatment to imported parts than to like domestic parts, and thus violate Article III:4.[122]

- Tariff Bindings Violation?

Is the 2004 Automobile Policy, through which China imposes the twenty-five percent charge, illegal under GATT Article II:1(a)–(b)?[123] That is, assuming arguendo the Appellate Body reverses the finding of the Panel that the charge is an "internal charge" under Article III:2 (first sentence), and classifies it as an OCD under Article II:1(b) (first sentence), then was the Panel wrong in its alternative ruling that the Policy violates the Article II:1(a)–(b) tariff binding provisions? China faulted this alternative ruling. The Appellate Body exercised

119. *See, e.g.*, *id.* ¶ 108(b)(i).

120. *See id.*¶ 253(b) (findings and conclusions of all three reports: WT/DS339/AB/R (European Communities), WT/DS340/AB/R (United States), and WT/DS342/AB/R (Canada)).

121. *See, e.g.*, Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 108(b)(ii).

122. *See id.* ¶ 253(c) (findings and conclusions of all three reports: WT/DS339/AB/R (European Communities), WT/DS340/AB/R (United States), and WT/DS342/AB/R (Canada)).

123. *See id.* ¶ 108(c).

judicial economy, finding it unnecessary to issue a ruling on the question.[124]

- Accession Commitment Violation?

  Is the 2004 Automobile Policy inconsistent with the conditional commitment China made in Paragraph 93 of its Accession Working Party Report not to apply a tariff rate above ten percent to imports of CKD and SKD kits?[125] Specifically, did the Panel err in construing the Policy as imposing a charge on CKD and SKD kits, and was it mistaken to rule that China did not meet its Paragraph 93 commitment? This holding rested on two other findings, namely, the Policy (1) was deemed to have created tariff lines for CKD and SKD kits, and (2) established separate tariff lines at the HS-10 digit level for these kits. Accordingly, these findings were at issue on appeal. Briefly, the Appellate Body sided with China, holding that the Policy did not impose a charge on CKD and SKD kits, and China did meet its accession commitments with respect to the kits.[126]

On all but the final issue, which itself was at the periphery of the case, China lost its appeal. Given the meticulous work of the Panel, premised on a considerable amount of GATT Panel and Appellate Body jurisprudence, the loss was predictable. It was all the more predictable because of China's appellate arguments and overwhelming reliance, not well grounded in facts, on the claim the twenty-five percent charge was governed by GATT Article II, not Article III. Put differently, China gambled with the same argument it made and lost at the Panel stage, hoping it would somehow persuade the Appellate Body.

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124. *See id.* ¶ 253(d) (findings and conclusions of all three reports: WT/DS339/AB/R (European Communities), WT/DS340/AB/R (United States), and WT/DS342/AB/R (Canada)).

125. The complainants did not appeal the finding of the Panel that China acted consistently with GATT Article II:1(b) in classifying the kits as a complete motor vehicle and imposing a twenty-five percent charge on them. *See id.* ¶ 211.

126. *See id.* ¶ 253(e) (findings and conclusions of all three reports: WT/DS339/AB/R (European Communities), WT/DS340/AB/R (United States), and WT/DS342/AB/R (Canada)).

China did not appeal the finding of the Panel that its 2004 Automobile Policy failed to qualify for administrative necessity under GATT Article XX(d).[127] That decision is mildly puzzling. With the gamble China took on its argument-in-chief, it raised the stakes on itself when it removed its only viable fallback position, namely, the administrative necessity defense.

f. A Tutorial on the Difference Between an "Internal Charge" under GATT Article III:2 and an "OCD" under Article II:1(b)[128]

A trade measure cannot simultaneously qualify as an "internal charge" under GATT Article III and an "OCD" under Article II. The measure either is imposed after the border (i.e., post-entry), in which case it is in the first category and governed by the national treatment rules, or it is imposed at the border (i.e., pre-entry), in which case it is in the second category and governed by the tariff binding rules. Put simply, a measure is either an internal tax, or a tariff, but not both. China conceded this point during oral arguments in the appeal.[129]

Thus, logically, the Appellate Body started with the question of what the twenty-five percent charge is, and thereby what rules of GATT govern it. Indeed, it spent considerable time and effort doing so. Why did the Appellate Body agree with the Panel, and hold that the twenty-five percent charge is best characterized as a "internal charge" under GATT Article III:2 (first sentence)?[130]

The answer, in brief, is that the Panel performed its task of defining and delineating carefully. Following the dictates on treaty interpretation in Articles 31–32 of the *Vienna Convention on the Law of Treaties*, the Panel looked to the ordinary meaning of the terms "internal charge" and "OCD." It also looked to the context in which each term is situated. For "internal charge," that context is the phrase "imported into the territory" in Article III:2 (first sentence), and the Interpretative Note, Ad Article III, Paragraph 2 (also called the "Ad Note"). For "OCD," the context was the phrase "on their importation" in the first sentence of Article II:1(b), and the phrase "on or in connection with the importation" in the second sentence of Article II:1(b). Also informing the meaning of the two terms was the accretion of GATT and WTO jurisprudence, starting as far back as 1952 with the GATT Panel Report, *Belgium – Family Allowances*,[131] and the 1990

127. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 198 n.282.

128. This discussion is drawn from *id.* ¶¶ 127–82.

129. *See id.* ¶ 184.

130. *See id.* ¶¶ 181–82.

131. *See* Report of the Panel, *Belgium – Family Allowances (Allocations Familiales)*, (Nov. 7, 1952), GATT II B.I.S.D. (1st Supp.) at 59 (1953). *See also* BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 323.

GATT Panel Report in *European Economic Community – Parts and Components*.[132]

On these bases, in respect of "OCD," the Panel concluded logically as follows:

> [T]he ordinary meaning of "on their importation" in Article II:1(b), first sentence, of the GATT 1994, considered in its context and in light of the object and purpose of the GATT 1994, contains a *strict and precise temporal element* which cannot be ignored. This means that the obligation to pay ordinary customs duties is linked to the product at the moment it enters the territory of another Member . . . . It is at this moment, and this moment only, that the obligation to pay such charge accrues. . . . And it is based on the condition of the good at this moment that any contemporaneous or subsequent act by the importing country to enforce, assess or reassess, impose or collect ordinary customs duties should be carried out. . . .
>
> In contrast to ordinary customs duties, the obligation to pay internal charges does not accrue because of the importation of the product at the very moment it enters the territory of another Member but because of the internal factors (e.g., because the product was re-sold internally or because the product was used internally), which occurs once the product has been *imported* into the territory of another member. The status of the *imported* good, which does not necessarily correspond to its status at the moment of *importation*, seems to be the relevant basis to assess this internal charge.[133]

Succinctly put, said the Panel:

> [I]f the obligation to pay a charge does not accrue based on the product at the moment of its importation, it cannot be an "ordinary customs duty" within the meaning of Article II:1(b), first sentence of the GATT 1994: it is, instead, an "internal

132. *See* Report of the Panel, *European Economic Community – Regulation on Imports of Parts and Components*, (May 16, 1990), GATT B.I.S.D. (37th Supp.) at 132 (1990) [hereinafter Report of the Panel, *European Economic Community – Parts and Components*].

133. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 129 *(*quoting Panel Report, *China – Auto Parts*, *supra* note 76, ¶¶ 7.184–185) (footnotes omitted) (emphases in original).

> charge" under Article III:2 of the GATT 1994, which obligation to pay accrues based on internal factors.[134]

In contrast, in respect of "internal charge," the Appellate Body summarized the Panel understanding as follows:

> 161. Like the Panel, we consider that the adjectives "internal" and "imported" suggest that the charges falling within the scope of Article III are charges that are imposed on goods that have already been "imported," and that the obligation to pay them is triggered by an "internal" factor, something that takes place *within* the customs territory. Further, the second sentence of Article III:2 expressly refers to the principles set forth in Article III:1. The Appellate Body has stated that Article III:1 articulates a general principle, that informs all of Article III, that internal measures should not be applied so as to afford protection to domestic production. . . . [The Appellate Body cited its Report in *Japan – Taxes on Alcoholic Beverages*, 18, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (*adopted* Nov. 1, 1996).].[135]
>
> 162. . . . [I]n examining the scope of application of Article III:2, in relation to Article II:1(b), first sentence, the time at which a charge is collected or paid is not decisive. In the case of Article III:2, this is explicitly stated in the GATT 1994 itself, where the *Ad* Note to Article III specifies that when an internal charge is "collected or enforced in the case of the imported product at the time or point of importation," such a charge "is nevertheless to be regarded" as an internal charge. What is important, however, is that the *obligation* to pay a charge must accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product.
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> 163. This leads us, like the Panel, to the view that a key indicator of whether a charge constitutes an "internal charge" within the meaning of Article III:2 of the GATT 1994 is "whether the obligation to pay such charge accrues because of an *internal* factor (e.g., because the product was *re-sold* internally or because the product was *used* internally), in the sense that such 'internal factor' occurs *after the importation* of

134. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 131 (quoting Panel Report, *China – Auto Parts*, *supra* note 76, ¶ 7.204).

135. This case is excerpted and discussed in BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 375.

> the product of one Member into the territory of another Member."[136]

The work of the Panel serves as an excellent tutorial—for China and indeed all WTO Members—on the different scope of application between the tariff binding and national treatment obligations in GATT. It is no surprise the Appellate Body admired its analytical approach.

The boundaries between these obligations must be respected, if their distinct objects and purposes are to be served.[137] Binding tariffs under Article II preserve the value of negotiated reductions in duties. Non-discriminatory treatment, with respect to both internal taxes and regulatory measures, under Article III is essential to avoid the devilish protectionist temptation to favor like domestic products over imported merchandise. Together, the distinct disciplines promote the objective of the Agreement Establishing the World Trade Organization (WTO Agreement), namely, to promote the security and predictability of reciprocal, mutually advantageous trade-liberalizing arrangements.

In lawyer-like fashion, the Panel then turned to the task of applying these GATT principles to the facts of the case. Briefly, the Panel was struck by four key facts about the operation of China's 2004 Automobile Policy:

- The obligation to pay the charge becomes ripe internally, that is, after the auto parts have entered the customs territory of China, and have been assembled into motor vehicles in China.

- The twenty-five percent charge is imposed on automobile manufacturers, not on importers.

- The charge is not levied on specific imported parts at the moment of importation. Rather, it is levied on specific imports based on what other imported or domestic parts are used together with those specific imports in assembling a vehicle model.

- Identical imported parts, which are imported simultaneously in the same container and vessel, can be subject to a different charge rate, depending on whether the vehicle model into which these parts are subsequently assembled satisfies the thresholds in the criteria set out in the Policy.

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136. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶¶ 161–63 (citations omitted) (emphases in original).

137. *See id.* ¶ 130 & n.190.

These four facts (supplemented by others, as explained below) led the Panel inexorably to the conclusion that the twenty-five percent charge is an internal one under GATT Article III:2 (first sentence).

Notably, China misunderstood or obscured what the Panel did and did not infer from these facts, particularly the first one. China suggested the Panel held that "the mere fact that the assembly of parts into a completed vehicle will necessarily occur *after* the parts have entered the customs territory means that a charge assessed on this basis is an internal charge."[138] Not so, said the Appellate Body.[139] The Panel simply looked at when and where the obligation to pay the charge accrues, and weighed it with other facts. The small comfort for China was that the Panel excluded from this finding the charge on CKS and SKD kits, and found the charge on the kits was an OCD under the first sentence of Article II:1(b).

g. China's Contention that the Panel Erred, Number One

China's appellate argument was that the Panel failed to take into account *GRI* 2(a)—the Doctrine of the Entireties, as it is known in United States customs law—which states:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.[140]

China asserted that this Rule enables customs authorities to classify unassembled auto parts as a complete motor vehicle, even in the situation in which the parts arrive in multiple shipments and the parts are assembled after importation.[141] As for the text of Article II:1(b) (first sentence), China said it requires customs authorities to determine what the "product" in question is, and then—following HS Rules—classify the product and apply the correct OCD.

Specifically, China accused the Panel of three mistakes. First, the Panel ought not to have separated (1) the threshold question of whether the twenty-five percent charge is an OCD from (2) the question of whether China is authorized to apply GRI 2(a) to multiple entries of auto parts. The twenty-five percent charge is

138. *Id.* ¶ 179 (emphasis in original).
139. *See id*.
140. *Id.* ¶ 134 n.197 (quoting GRI 2(a)).
141. *See id.* ¶¶ 134–35.

inextricably linked to valid classification procedures under HS Rules. The Panel should have examined the two questions simultaneously, not sequentially.

Second, the Panel wrongly refused to characterize the twenty-five percent charge as an "OCD" under Article II:1(b) (first sentence). China argued that it is impossible to decide whether its charge is an OCD without taking proper account of the term "product" in that Article, in light of the classification rules of the HS, like GRI 2(a). China conceded Article II:1(b) (first sentence) emphasizes the moment of importation as pertinent to ascertaining whether a charge is an "OCD." But, no less relevant is the "condition," or "status," of the product at the moment it enters the importing country. GRI 2(a) is needed to determine whether the condition of status of a completely unassembled motor vehicle at that moment permits, or not, the parts to be classified as a complete vehicle. In essence, the Panel erred by neglecting to use the HS Rule to interpret the significant GATT terms.

Third, said China, the Panel erroneously dubbed the twenty-five percent charge an "internal charge" under GATT Article III:2 (first sentence). China insisted that the fact that auto parts are assembled into a completed vehicle after importation does not mean the twenty-five percent charge is governed by that provision. In other words, China faulted the Panel for making too much of the time and place of assembly—after importation, post-border. All three claims of Panel error were related, and to some degree China's style of argumentation—as recounted by the Appellate Body—lacked the clarity and precision expected of a sophisticated presentation.

China's argument, about the first error it contended the Panel made, was a post hoc rationalization for the twenty-five percent charge, as well as an argument with no factual basis. Conceptually, its argument made no sense. As the United States, Canada, and the EU all rightly pointed out, to accept China's position would be to "blur" or "confuse" the threshold issue of what provision of GATT governs the controversial twenty-five percent charge with the distinct question of whether the charge is consistent with that provision.[142] China puts the "cart before the horse" by presuming the charge is an OCD, when that is the first question in need of analysis.[143] Again unsurprisingly, the Appellate Body sided with the Panel and complainants:

> In its appeal, China challenges the Panel's decision to analyze the threshold issue separately from the issue of the consistency of the measures with Article II:1(b) of the GATT 1994. Yet, as the Appellate Body has previously observed, the "fundamental structure and logic" of a covered agreement may require panels to determine *whether* a measure falls within the scope of a particular provision or covered agreement *before* proceeding to

142. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 136.
143. *Id.*

> assess the consistency of the measure with the substantive obligations imposed under that provision or covered agreement. [The Appellate Body cited its Reports in *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 151, WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2001) (*adopted* June 19, 2000) (quoting Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 119, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998)), and *United States – Standards for Reformulated and Conventional Gasoline*, I, 3, 20, WT/DS2/AB/R (Apr. 29, 1996) (*adopted* 20 May 20, 1996).[144]] We consider this to be just such a case, particularly in the light of the Panel's observation—with which China expressly agrees—that "a charge cannot be at the same time an 'ordinary customs duty' under Article II:1(b) of the GATT 1994 and an 'internal tax or other internal charge' under Article III:2 of the GATT." If, as the Panel considered, the charge imposed on automobile manufacturers could fall within the scope of either the first sentence of Article II:1(b) *or* Article III:2, then the Panel had to begin its analysis by ascertaining *which* of these provisions applied in the circumstances of this dispute.[145]

In sum, the Appellate Body approved of the sequential methodology of the Panel to treat the threshold issue of "what GATT rule applies?" before considering "did the twenty-five percent charge violate the rule?"[146]

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144. The *Auto* case is excerpted and discussed in BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 329. The *Shrimp* and *Gasoline* cases are excerpted and discussed in *id.* at 1391 & 1399, respectively.

145. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 139 (emphasis in original).

146. Neither side in the case, at either the Panel or Appellate stage, argued the twenty-five percent charge qualified for the phrase of GATT Article II:1(b) (second sentence) as all other duties and charges [ODC] of any kind imposed on or in connection with the importation" of the product in question. In other words, the dispute was whether the twenty-five percent charge fell within the first sentence of Article II:1(b) as an OCD, not whether it was an ODC under the second sentence. Likewise, there was no dispute as to the delineation between an OCD and ODC. The Appellate Body said that in deciding whether a particular charge falls under Article III:2 as an "internal charge," or under Article II:1(b) (first sentence) as an "OCD," it would be helpful to examine the meaning of "ODC." That would produce a complete understanding of the architecture of Articles II and III. But, the Panel's choice not to study ODC neither affected the outcome of the case (because China said no products at issue in the case were affected by an ODC), nor was it reversible error. *See id.* ¶ 140.

h. China's Contention that the Panel Erred, Number Two

As to the second error China contended the Panel made, here, too, the Appellate Body looked approvingly at the work of the Panel, and quoted generously from it. There is a strict, precise temporal element to Article II:1(b) (first sentence). The panel held, from the terms surrounding "OCD," that an "OCD" is "imposed on products, on their importation."[147] If a charge does not accrue at the moment of importation, it is not an OCD. China cited an Appellate Body precedent, *European Communities – Chicken Cuts*, in which the Appellate Body agreed it is permissible to examine the HS as context for interpretation of a GATT–WTO text, even though the HS is not technically part of the accords annexed to the WTO Agreement (i.e., it is not a covered agreement):[148]

> In *EC – Chicken Cuts*, the Appellate Body considered the issue of whether the Harmonized System could constitute context for the interpretation of a term in the European Communities' Schedule of Concessions. The Appellate Body pointed out that, although the Harmonized System is not formally part of the *WTO Agreement*, there is nonetheless a close link between that System and the covered agreements. The Appellate Body explained that:
>
> > [P]rior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an "agreement" between WTO Members "relating to" the *WTO Agreement* that was "made in connection with the conclusion of" that *Agreement*, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is "context" under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for

147. *See id.* ¶ 153 (*quoting* GATT Article II:1(b)).

148. *See* Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005) (*adopted* Sept. 27, 2005). This case is discussed in Raj Bhala & David Gantz, *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107, 130–52 (2006).

> purposes of interpreting tariff commitments in the WTO Members' Schedules.[149]

However, the complainants astutely observed that China made too much of this precedent. It relates to the use of the HS only to interpret a term in a Schedule of Concessions, not a term in a GATT–WTO rule.

The Appellate Body agreed with the view of the complainants in *European Communities – Chicken Cuts*:

> The negotiators of the *WTO Agreement* used the Harmonized System as the basis for negotiating Members' Schedules of Concessions, and included express references to the Harmonized System in certain covered agreements for purposes of defining product coverage of those agreements or specific provisions thereof. It follows that the Harmonized System is context for purposes of interpreting the covered agreements, in particular for the classification of products under Schedules of Concessions and for defining the product coverage of certain covered agreements. This is what the Appellate Body found in *EC – Chicken Cuts*. Yet this does not answer the question of whether the Harmonized System is context that is relevant to the determination of whether a charge is an ordinary customs duty or an internal charge.[150]

As to the latter question, the Appellate Body looked to the direction of Article 31(2) of the Vienna Convention, which states:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[151]

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149. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 146 (emphasis in original).

150. *Id.* ¶ 148 (citation omitted).

151. *Id.* ¶ 150 (quoting Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S 331).

The Appellate Body explained that the context must be relevant to the interpretative question at issue.

Because the Schedule of Concessions of every WTO Member is constructed using the HS, the rules of the HS are a relevant context for discerning the meaning of a term in the Schedule. Thus, if the question in the case at bar were whether China could classify auto parts as complete motor vehicles, then it would be necessary to interpret China's Schedule. Yet, that is not the question. The key matter—to which the HS rules are not pertinent—is defining "OCD" and "internal charge" under GATT Articles II:(1)(b) and III:2 (first sentence), respectively.

> 155. . . . The Harmonized System categorizes products, and the characteristics of particular products are relevant to how they are categorized. We recognize, as China argues, that classification, and hence the tariff rate applied, might, in some circumstances, vary depending on the condition of goods at the moment of importation. Since different categories of products are subject to different bound and applied tariff rates, the classification of a given product may affect the amount of the duty imposed. Accordingly, classification issues have some bearing on the question of whether a Member applying such a duty is in conformity with its obligation, under Article II:1(b), not to impose duties in excess of the bound rate set out in the Member's Schedule for the product concerned. Yet this issue (whether a duty applied to a *product* by virtue of its classification is consistent with Article II:1(b)) is separate from the issue of whether a *charge* falls under the first sentence of Article II:1(b) at all (as opposed to under Article III:2). It is not evident to us how classification rules are relevant to the latter issue. While it is true, as China argues, that the "classification of the product necessarily precedes the determination of which 'ordinary customs duty' applies," it is not the case that classification of the product (even if properly done) necessarily precedes a determination of *whether* the charge that applies is an ordinary customs duty.
>
> . . .
>
> 158. Yet we fail to see how the Panel erred in not relying on GIR 2(a) in resolving the threshold issue of whether the charge imposed under the measures at issue is an ordinary customs duty or an internal charge. The *right* of a WTO Member to impose a customs duty, and the *obligation* of an importer to pay such a duty, accrue at the very moment the product enters the customs

territory of that Member and by virtue of the event of importation. In contrast, the classification rules according to which customs authorities determine under which tariff heading the "product" concerned falls, depending on its "status" or "condition," are not relevant to the nature of the "duty" itself because they do not determine the *moment* at which the *obligation* to pay accrues, but only the *amount* of that duty. Similarly, as all of the participants agree, the moment at which a charge is *collected* or *paid* is not determinative of whether it is an ordinary customs duty or an internal charge. Ordinary customs duties may be collected *after* the moment of importation, and internal charges may be collected at the moment of importation. For a charge to constitute an ordinary customs duty, however, the *obligation* to pay it must accrue at the moment and by virtue of or, in the words of Article II:1(b), "on," importation.

. . .

163. . . . We also observe that the Harmonized System does not serve as relevant context for the interpretation of the term "internal charges" in Article III:2.

164. In sum, we see the Harmonized System as context that is most relevant to issues of classification of products. The Harmonized System complements Members' Schedules and confirms the general principle that [as the Appellate Body stated in *EC – Chicken Cuts*] it is "the 'objective characteristics' of the product in question when presented for classification at the border" that determine their classification and, consequently, the applicable customs duty. The Harmonized System, and the product categories that it contains, cannot trump the criteria contained in Article II:1(b) and Article III:2, which distinguish a border measure from an internal charge under the GATT 1994. Among WTO Members, it is these GATT provisions that prevail, and that define the relevant characteristics of ordinary customs duties for WTO purposes. Thus, even if the Harmonized System and GIR 2(a) would allow auto parts imported in multiple shipments to be classified as complete vehicles based on subsequent common assembly, as China suggests, this would not *per se* affect the criteria that define an ordinary customs duty under Article II:1(b).

. . .

> 166. . . . [A] determination of whether a particular charge falls under Article II:1(b) or Article III:2 of the GATT 1994 must be based on a proper interpretation of these two provisions. The Harmonized System does not provide context that is relevant to the threshold question or to the assessment of the respective scope of application of "ordinary customs duties" in the first sentence of Article II:1(b) and "internal charges" in Article III:2 of the GATT 1994 that must be undertaken in answering that question. It follows that the Panel did not err in interpreting the term "ordinary customs duties" in the first sentence of Article II:1(b) of the GATT 1994 without relying on the rules of the Harmonized System, in general, or GIR 2(a), in particular.[152]

The above-quoted paragraphs may be distilled as follows: The essence of China's appellate argument was that China correctly classified the "product"—a completed vehicle—under GRI 2(a), thus its twenty-five percent charge must be an "OCD" under Article II:1(b) (first sentence). But, "must be" and "is" are not the same. It is specious to conflate tariff classification under HS Rules, and the related matter of respect for tariff bindings under Article II:1(b) (first sentence), with the characterization of a charge as an "OCD" under that Article. Just because classification is done properly (a completed vehicle despite dissembled parts), and a charge imposed (twenty-five percent), does not make that charge an OCD. As for the HS Rules, they are context most relevant to product classification, but they are not context that supersedes the language of GATT.

To this finding and rationale, the Appellate Body added a consequential justification, one suggested by the Panel.[153] Suppose China's argument were accepted: a twenty-five percent charge imposed on auto parts following, and as a result of, their assembly into a completed vehicle, constitutes an OCD. The consequence would be that whether any charge is an OCD would depend on circumstances that transpire after the border, rather than solely on the moment of (and by virtue of) importation. The distinction between border and post-border would collapse, because what happens after importation would affect characterization of a charge at the border. Stated differently, the scope of "OCD" and Article II:1(b) (first sentence) would expand, but the scope of "internal charges" and Article III:2 (first sentence) would contract. The latter consequence would enervate the highly important national treatment discipline, and upset the balanced structure so carefully arranged by the GATT drafters and elaborated on through GATT and WTO adjudication.

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152. *Id.* ¶¶ 155, 158, 163–64, 166 (citations omitted) (emphases in original).
153. *See id.* ¶¶ 165–67.

i. China's Contention that the Panel Erred, Number Three

Obviously, with the Appellate Body upholding the decision of the Panel that China's twenty-five percent levy was not an "OCD" under GATT Article II:1(b) (first sentence), the proper categorization was an "internal charge" under Article III:2 (first sentence). That categorization, said China, was the third error made by the Panel. The Appellate Body did not agree, and found no fault with the work of the Panel.

The Panel rightly scrutinized all relevant characteristics of the twenty-five percent charge, particularly its design and operation. That scrutiny enabled the Panel to identify the "center of gravity" of the charge based on its "core" or "leading" features, an essential task because some aspects may point to a conclusion that this charge is an "OCD," while others suggest it is an "internal charge." The Panel also correctly examined the circumstances under which China imposed the twenty-five percent charge. In brief, the Panel correctly followed the teaching of the Appellate Body in *India – Additional Import Duties*, a case concerning whether a measure was governed by Article II:2(a) or the Ad Note to Article III.[154]

As summarized by the Appellate Body, the characteristics of the twenty-five percent charge that impressed the Panel, and persuaded it the charge was not an "OCD" governed by Article II:1(b) (first sentence), were:

> 172. . . . (i) the obligation to pay the charge accrues internally after auto parts have entered the customs territory of China and have been assembled/produced into motor vehicles; (ii) the charge is imposed on automobile manufacturers rather than on importers in general; (iii) the charge is imposed based on how the imported auto parts are *used*, that is, *not* based on the auto parts as they enter, but instead based on what other parts from other countries and/or other importers and/or domestic parts are subsequently used, together with those imported parts, in assembling a vehicle model; and (iv) the fact that identical auto parts imported at the same time in the same container or vessel can be subject to different charge rates depending on which vehicle model they are assembled into.
>
> 173. We agree with the Panel as to the legal significance of these features of the measures at issue. Furthermore, there are additional characteristics of the charge imposed under the measures that the Panel recognized, and that support its

154. *See* Appellate Body Report, *India – Additional Import and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R (Oct. 30, 2008) (*adopted* Nov. 17, 2008). This case is reviewed in Bhala & Gantz, *supra* note 10, at 119–35.

characterization of that charge as an internal charge falling within the scope of Article III:2 of the GATT 1994. Foremost among these is the fact that it is not the declaration made at the time of importation, but rather the declaration of duty payment made subsequent to the assembly/production of complete motor vehicles, that determines whether the charge will be applied.

174. That the declaration made at the time of importation does not control or necessarily affect whether the charge under the measures will ultimately be applied to specific imported parts is illustrated most prominently in the scenario where an automobile manufacturer does not import parts directly, but instead purchases them from an independent third party supplier within China. In such circumstances, the third party supplier imports and declares those auto parts at the border and pays a [ten] per cent duty. Yet those same parts may subsequently be subject to the [twenty-five] per cent charge—imposed after assembly—if they are sold to an automobile manufacturer and assembled into a vehicle model that meets the thresholds set out in the measures at issue.

175. In addition, there are at least two circumstances in which imported auto parts that are not characterized as complete vehicles or declared as such at the moment of importation will nonetheless be subject to the charge under the measures at issue following vehicle assembly: (i) when imported auto parts are installed on a vehicle as *options* (that is, such parts were not mentioned in the self-evaluation or Verification Report because they are not installed on the baseline models of the particular vehicle model in question), the manufacturer must report the options to the Verification Centre and make declarations for purposes of paying the charge at the time of the actual installation of the optional parts; and (ii) when, following re-verification due to an increase in the combinations or value of imported parts vis-à-vis domestic parts, a vehicle model that previously did not meet the criteria under the measures at issue is determined to meet those criteria, the imported parts used in the production/assembly of that model must be declared after assembly, and will then be subject to the charge.

176. There are also at least two circumstances in which auto parts that are characterized as complete vehicles and declared as such at the time of importation will *not* attract the [twenty-five] per cent charge under the measures at issue, namely: (i)

> when imported parts that are characterized as complete vehicles in the declaration made at the time of importation are not assembled/produced into complete vehicles within [twelve] months, they must be declared within [thirty] days of the expiration of the [twelve]-month period and will be subject to a [ten] per cent charge, rather than the [twenty-five] percent charge that would otherwise apply under the measures at issue; and (ii) when, following re-verification due to a decrease in the combinations or value of imported parts vis-à-vis domestic parts, a vehicle model that previously met the criteria under the measures at issue is determined no longer to meet those criteria, the imported parts used in the assembly/production of that model will not be subject to the charge under the measures at issue.[155]

Even a quick read of these characteristics indicates that the facts weighed heavily against China's argument of Panel error. Were there any countervailing facts supporting the proposition that the twenty-five percent charge was an "OCD"? Indeed, there were four characteristics China stressed:

> (i) [T]he measures at issue use language typically reserved for references to "ordinary customs duties"; (ii) China's explanation of the policy purpose of the measures, and that the charge imposed thereunder "objectively relate[s] to the administration and enforcement of China's tariff provisions for motor vehicles"; (iii) China's view that parts imported directly by an automobile manufacturer remain subject to customs control until after assembly/production of the relevant vehicle model; and (iv) the measures at issue and the charge imposed thereunder are administered primarily by China's customs authorities.[156]

Here, again, even a glance at these characteristics reveals the weakness of the Chinese argument. None of them individually, or taken in the aggregate, are persuasive enough to offset the features pointing toward classifying the twenty-five percent charge under Article III:2 (first sentence).

The first feature is a matter of labeling by China. A WTO Member can manipulate rubrics to suit its ends, but the job of a panel or the Appellate Body is to see through formalistic labels and look to underlying substantive reality. That is clear from Appellate Body precedent in *Softwood Lumber IV*.[157] The second

155. Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶¶ 172–76.

156. *Id.* ¶ 177.

157. *See* Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 56, WT/DS257/AB/R (Jan. 19, 2004) (*adopted* 17 Feb. 17, 2004) [hereinafter Appellate Body

feature is China's perspective. Legislative intent is difficult to discern, especially by external adjudicators, and is not conclusive. That is apparent from the Appellate Body decision in the *Byrd Amendment* case.[158] The third feature actually cuts against China's argument. Imported auto parts are not physically confined or otherwise restricted by customs authorities, and can be used freely in China's internal market. That is, importation of these parts under the financial guarantee of a bond hardly amounts to "ongoing customs control." The fourth feature is a matter of China's internal administrative edifice. Decisive weight about interpreting a provision of GATT cannot be given to a point, like governmental structure, which is wholly under the control of a WTO Member. That is manifest in the 1990 *European Economic Community – Parts and Components* GATT Panel Report.[159] The fourth feature cited by China also is not the whole truth. Other organs of the CCP—the Ministries of Commerce and Finance, and the NDRC, and the Verification Centre—have official roles in the administration of the twenty-five percent charge.

j. National Treatment Violations

With the twenty-five percent charge clearly characterized as an "internal charge," the next question concerned its consistency with the governing provision, GATT Article III:2 (first sentence). China made the job of the Appellate Body easy.[160] At no point in the case did China contend the imported and domestic auto parts were not like products. Further, China admitted that if the charge was an internal one, then it violated Article III:2 (first sentence). Indubitably, the twenty-five percent charge was in excess of levies imposed on like domestic products. In other words, once China lost the debate to slot the charge as an "OCD" under Article II:1(b) (first sentence), it lost the debate about compliance with national treatment and fiscal measures.[161]

Report, *United States – Softwood Lumber IV*]. This decision is reviewed in Raj Bhala & David Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99, 200–17 (2005).

158. *See* Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, ¶ 259, WT/DS217/AB/R, WT/DS/234/AB/R (Jan. 16, 2003) (*adopted* Jan. 27, 2003). This decision is reviewed in BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 108, at 853, and in Raj Bhala & David Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317, 332–47 (2004).

159. *See* Report of the Panel, *European Economic Community – Parts and Components*, *supra* note 132, ¶¶ 5.6–5.7.

160. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶¶ 183–86.

161. As explained below, the Article III:2 finding of the Appellate Body, like that of the Panel, excluded the imposition of the twenty-five percent charge on CKD and SKD kits. *See id.* ¶ 186 n.259.

There is, of course, a second national treatment obligation. GATT Article III:4 covers all non-fiscal measures. The United States, Canada, and EU all successfully persuaded the Panel that the China's 2004 Automobile Policy was an internal one within the ambit of this obligation, and was incongruous with it. That success carried through to the Appellate Body. The focus of this debate was on the regulatory requirements in the Policy that require all vehicle manufacturers in China to register and to provide a listing and detailed records to Chinese customs authorities if they use imported auto parts.

China's losing argument on Article III:4 was essentially the same as on Article III:2 (first sentence): the 2004 Auto Policy imposes an "OCD," so the correct rule to apply is Article II:1(b) (first sentence). Additionally, the administrative procedures for implementing the Policy are associated with the imposition of an OCD, and should be viewed as customs measures to implement the classification rules of the HS, not internal rules governed by Article III:4. The Appellate Body rejected the Chinese's Article III:4 argument, using similar logic to what it used in rejecting Article III:2 (first sentence) context.[162] Manifestly, China had too much confidence in its characterization that the twenty-five percent charge, and the measures by which China administered the charge, were governed by Article II:1(b) (first sentence). Once China lost that debate, most of its case crumbled.

To be sure, China put up one argument on which the Appellate Body paused.[163] China said the Panel was wrong to find that the 2004 Automobile Policy influences the choice by an automobile manufacturer between domestic and imported auto parts, and thus affects the internal use of imported parts. China said the influence is created by the differential tariff structure, namely, a ten percent bound duty on parts, and a twenty-five percent bound rate for completed vehicles. The Panel wrongly premised an Article III:4 violation on an inherent feature of China's Schedule of Concessions. There is nothing illegal about discriminating against imported auto parts merely through the imposition of a customs duty validly imposed under GATT rules, i.e., those rules countenance one kind of discrimination—tariffs.

Unfortunately for China, it again misunderstood or obfuscated what the Panel had ruled.[164] The difference in bound rates for auto parts and completed vehicles in China's Schedule was not the discrimination concerning internal use of imported auto parts on which the Panel relied to find a violation of GATT Article III:4. Rather, the Panel looked to the measures at issue, especially the incentives created for car manufacturers by the volume thresholds (i.e., the use of designated assemblies or combinations of assemblies) and value thresholds (i.e., the sixty-percent test). Those thresholds determine whether China characterizes imported auto parts as complete vehicles. For an automobile manufacturer to avoid the

162. *See id.* ¶ 189.
163. *See id.* ¶¶ 190–97.
164. *See id.* ¶ 192.

twenty-five percent charge for a completed vehicle (and instead qualify for a ten percent duty on parts), it must ensure that the imported parts it uses to assemble a vehicle model are below the thresholds. Moreover, if a manufacturer exceeds the thresholds, then the twenty-five percent charge applies to all imported parts it uses in the vehicle model in question. Further, if a manufacturer exceeds the thresholds, then it is subject to tracking and reporting requirements and attendant delays, concerning auto parts imported in multiple shipments.

Quite obviously, these realities are incentives for a manufacturer to limit its use of imported relative to domestic parts, and they "'affect' the *conditions of competition* for imported auto parts on the Chinese internal market."[165] The Panel was on solid ground, citing the *United States – FSC (Article 21:5 – European Communities)* decision of the Appellate Body, which explained that an incentive for a manufacturer not to use imported inputs affects the internal use of imported products, and thus violates Article III:4. That decision, plus long-standing jurisprudence under this Article, emphasizes the importance of not tilting the competitive playing field against foreign vis-à-vis like domestic products. That lesson may be especially important for a Communist country like China claiming it no longer is a non-market economy (NME).

k. The Alternative: Tariff Binding Violations

The United States, Canada, and the EC convinced the Panel to reach an alternative finding, namely, if the twenty-five percent charge was an "OCD," then China violated GATT Article II:1(a)–(b) by exceeding "the bound tariff rates for auto parts in China's Schedule of Concessions."[166] Why did the Panel agree to embark on the alternative analysis in the first place? It looked out to the demands of the parties, and up to the Appellate Body. The complainants and China disagreed on whether the charge violated this Article, so an issue was joined. There was the specter (perhaps remote) that the Appellate Body might overturn its finding under Article III:2 (first sentence), as the line between and "OCD" and an "internal charge" is not always bright.[167] The Panel sided with the complainants, stating:

> [T]he tariff provisions for motor vehicles (87.02–87.05) of China's Schedule of Concessions do not include in their scope auto parts imported in multiple shipments based on their assembly into a motor vehicle. Accordingly, to the extent the measures could be considered as falling within the scope of Article II of the GATT 1994, China's measures have the effect

165. *Id.* ¶ 195 (emphasis added).
166. *See* Appellate Body Report, *China – Auto Parts*, *supra* note 9, ¶ 198.
167. *See id.* ¶ 198 n.283.

> of imposing ordinary customs duties on imported auto parts in excess of the concessions contained in the tariff headings for auto parts under its Schedule, inconsistently with its obligations under Article II:1(a) and (b) of the GATT 1994.[168]

The Panel premised this alternative finding on more than just the interpretation of "motor vehicles" in China's Schedule of Concessions. The criteria China applied to determine whether import parts have the essential character of a completed vehicle also indicate that China accords less favorable treatment to imported auto parts than it promised in its Schedule.

China's appeal raised serious systemic concerns, and the United States and the EC expressly stated as much.[169] These two complainants sought a complete examination by the Appellate Body of the alternative finding of the Panel, so as to leave no doubt about the inconsistency of China's twenty-five percent charge under GATT Article II. China posited two different scenarios. First, trotting out its old argument, China urged the Appellate Body to reverse the Panel, and to hold the twenty-five percent charge is an "OCD" under GATT Article II:1(b) (first sentence). If the Appellate Body does so, then it will see the charge is based on a valid classification of imported auto parts under *GRI* 2(a) as a completed vehicle—hence, the charge is not a duty in excess of China's tariff binding. This scenario, of course, did not materialize. Second, on the assumption that the Appellate Body upheld the conclusion of the Panel that the twenty-five percent charge was an internal one governed by Article III:2 (first sentence), China called upon the Appellate Body to declare the alternative finding of the Panel to be moot and of no legal effect. Seeing no reason to do so, the Appellate Body rejected that call.[170] In sum, leaving the Panel's alternative finding alone, the Appellate Body did the bidding of neither the complainants nor China.

l. China's Small Victory: The Accession Commitment

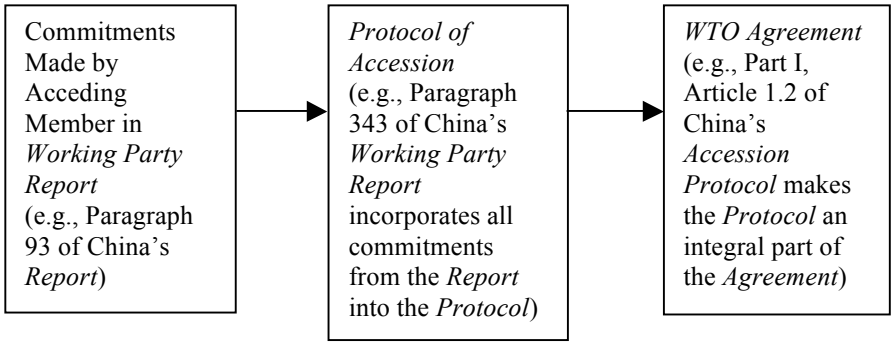
Promises made by a country to get into the WTO are not political campaign promises. Rather, they have legal consequences. They create an obligation enforceable under GATT–WTO law, specifically through the DSU.[171] That is true for a pledge set out in the Working Party Report on the accession of that Member and for one set out in the Protocol of Accession. As the Diagram below indicates, the Accession Protocol itself states it is an integral part of the WTO Agreement. For example, this link is made in Part I, Article 1.2, of China's Accession Protocol. In turn, a Working Party Report incorporates into the

168. *Id.* ¶ 199 (quoting Panel Report, *China – Auto Parts*, *supra* note 76, ¶ 7.523).
169. *See id.* ¶¶ 204–08.
170. *See id.* ¶¶ 203, 209.
171. *See id.* ¶¶ 213–14.

Accession Protocol any commitment an acceding country makes in that Report. In China's case, Paragraph 342 of the Working Party Report incorporates China's promises in that Report, including Paragraph 93 concerning the ten percent tariff on CKS and SKD kits.

Consequently, when faced with the issue of whether a Member has broken a promise it made to join the WTO, a WTO adjudicator can—indeed, must—apply the Article 31–32 Vienna Convention rules on treaty interpretation to Working Party Reports and Accession Protocols. That is exactly what the Panel and Appellate Body did in the *Auto Parts* case. The Panel held that China broke its promise not to apply a tariff rate in excess of ten percent on CKD and SKD units.[172] China appealed on three grounds.

Diagram:
Legal Linkages among WTO Accession Commitments and *WTO Agreement*



First, China said the Panel was wrong to characterize its 2004 Automobile Policy as imposing a "charge" or "duty" on an automobile manufacturer importing a CKS or SKD unit that declares the kit, and pays duties, at the border.[173] In fact, the Policy excludes the kits from both administrative procedures (e.g., declarations, bonding requirements, tracking, reporting, and verifications) and the twenty-five percent charge. True, the kits attract a twenty-five percent duty—but that is the MFN rate in China's Schedule of Concessions for completed vehicles, not the twenty-five percent charge under the Policy. In brief, the Policy entirely excludes the kits, and the basis for imposing the duty is Chinese customs law. So, it was illogical for the Panel to say China's Policy as applied to the kits violated its accession commitments.

The Panel ruled that China misread or misunderstood its own Policy. The Panel examined carefully the relevant language in it (especially Articles 2(1)–

172. *See* Appellate Body Report, *China – Auto Parts supra* note 9, ¶ 215.
173. *Id.* ¶ 216.

(2) and 21 of Decree 125). An auto manufacturer importing a CKD or SKD kit has the option to exclude them from the administrative procedures attendant with the Policy by declaring the kit at the border and paying a twenty-five percent charge on the kit as a completed vehicle. A manufacturer exercising this option is not relieved from the obligation to pay the charge, but rather the red-tape associated with paying the charge later, after it assembles the vehicle at a post-border location. This option is why the Panel excluded CKD and SKD kits from its ruling under GATT Article III:2 (first sentence). If an importer chooses to declare and pay duties on a kit at the border, then the twenty-five percent charge it pays is a result of the operation of the Policy, not an internal charge subject to the national treatment rule. Additionally, held the Panel, the Chinese Policy created new tariff lines, at the HS 10-digit level, for CKD and SKD kits. The twenty-five percent charge on the kits is associated with those new lines.

The logical consequence of this reasoning was China violated its Paragraph 93 accession commitment. Under its 2004 Automobile Policy, China imposed a tariff on CKD and SKD units higher than ten percent. Existing WTO Members negotiating with China for its accession specifically anticipated China, once it joined the WTO, might try to treat the kits as completed vehicles. Doing so, they feared, would impede access to China's internal market—the fifteen-percentage-point differential is a hefty cost for automobile manufacturers importing the kits. Thus, China was asked—and agreed—to hold the line at ten percent.

The Appellate Body did not accept the finding and rationale of the Panel.[174] Reviewing the same language in the 2004 Automobile Policy, the Appellate Body said China had established (especially in Decree 125) a special, seamless regime of administrative procedures and the twenty-five percent charge covering imported auto parts characterized as a complete vehicle. The procedures and the charge were inseparable. A CKD and SKD kit that is declared for and paid at the border is exempt from that regime. The twenty-five percent tariff China levies on the kit is—as China argued—a consequence not of the special

174. *See id.* ¶¶ 235–45. Interestingly, the Appellate Body rejected an American argument that construction by a WTO panel of municipal law is a factual determination that is not subject to review under *DSU* Article 17:6. Citing its reports in *United States – Section 211 Omnibus Appropriations Act of 1998*, ¶ 105, WT/DS176/AB/R (Jan. 2, 2002) (*adopted* Feb. 1, 2002) and *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶¶ 65–66, 68, WT/DS50/AB/R (Dec. 19, 1997) (*adopted* Jan. 16, 1998), the Appellate Body pointed out municipal law is not only evidence of facts, but also of compliance (or the lack thereof) with international legal obligations. Thus, if a panel interprets municipal law to determine whether a Member has complied with its WTO obligations, then the finding of the panel is a legal one, subject to Appellate Body review. *See id*. ¶¶ 224–26. The *Section 211* case is discussed in Raj Bhala & David Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143, 198-221 (2003). The *India Patent* case is excerpted and discussed in BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE, *supra* note 108, at 1625

regime, but rather arises under normal customs law. That is the MFN tariff on a finished car under China's Schedule governed by GATT Article II:1(b). The Appellate Body also faulted the Panel for not properly scrutinizing the key characteristics of the twenty-five percent charge in the context of CKD and SKD imports.[175] That failure was an asymmetry in the Panel Report. The Panel did study these characteristics in its threshold analysis under GATT Articles II:1(b) (first sentence) and III:2(b) (first sentence).

The "bottom line" was that China did not violate its Paragraph 93 accession commitment about a ten percent cap on tariffs applied to SKD and CKD kits. The finding of the Panel that China broke its promise rested on an erroneous reading by the Panel that the twenty-five percent charge on imported kits arises under China's 2004 Automobile Policy. It does not. China's Policy is a seamless web. A declaration of a kit as a complete vehicle at the border exempts the declarer from both the administrative procedures and twenty-five percent charge arising under the Policy. The declaration subjects the kits to payment of a twenty-five percent duty under China's Schedule. In effect, Paragraph 93 is irrelevant to such kits. The charge on the kits is nothing more than an OCD—the MFN duty—governed by Article II:1(b) (first sentence). Here, China kept its promise.[176]

m. Commentary

i. The Middle Kingdom Learns the Golden Rule

The drafters of GATT showed considerable foresight in making the national treatment principle a pillar of their document. They knew well that if a government is prone to discriminate, then it is highly likely to prefer its domestic producers over foreign competitors. GATT Article III is nothing less than the international trade law equivalent of the Golden Rule. The Judeo-Christian version of the Golden Rule is found in the Old Testament:

> *Do to no one what you yourself dislike*. Give to the *hungry* some of your bread, and to the *naked* some of your clothing. *Seek counsel* from *every wise* man. At all times bless the Lord God, and ask him to make all your paths *straight* and to grant success to all your *endeavors and plans*.[177]

The New Testament expression is in *The Gospel According to Matthew*:

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175. *See* Appellate Body Report *China – Auto Parts* ¶ 243.

176. The Appellate Body exercised judicial economy as to whether China's 2004 Automobile Policy created new tariff lines, at the HS ten-digit level, for those kits, or could be deemed as having done so. *See id.* ¶ 252.

177. *Tobit* 4:15a-19 (emphasis added).

> When the Pharisees heard that [Jesus] had silenced the Sadducees, they gathered together, and one of them [a scholar of the law] tested him by asking, "Teacher, which commandment in the law is the greatest?" He said to him, "You shall have the Lord, your God, with all your heart, with all your soul, and with all your mind. This is the greatest and the first commandment. The second is like it: *You shall love your neighbour as yourself*. The whole law and the prophets depend on these two commandments."[178]

By no means, of course, is the Golden Rule uniquely Christian. It is expressed (directly or indirectly) in the sacred texts of other religions and philosophies.

The advocates for inclusion of China in the WTO urged that by becoming a Member, the international rule of law would circumscribe China's trade behavior. The GATT Golden Rule would be an international legal obligation incumbent on China to eschew viewing its domestically produced merchandise better than foreign competitors. That shift might help China emerge from a Middle Kingdom mentality, a Maoist-era semi-isolationist sense, into a responsible stakeholder on the world stage.[179]

The *Auto Parts* case was China's first lesson via adverse litigation as to what the Golden Rule of trade means in practice as well as in theory. No doubt an elite cadre of CCP trade professionals in Beijing knew the logic and details of GATT Article III even before China acceded to the WTO on December 11, 2001. No doubt, too, this cadre is slowly increasing as China develops, spreading beyond the roughly 63 million CCP members and Beijing to non-Party members and other major cities. But, even in a small country, let alone in the most populous nation, appreciation for why national treatment matters is not (and probably never will be) universal. Moreover, even advanced, developed countries

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178. *Matthew*, 23:34–40 (emphasis added). *See also* CATECHISM OF THE CATHOLIC CHURCH 499 ¶ 2055 (United States Catholic Conference, Inc. – Libreria Editrice Vaticana 2d ed. 1997) (quoting the two Great Commandments from *Matthew* 22:37–40, and discussing them in relation to the Ten Commandments).

179. While U.S. Deputy Secretary of State, Robert Zoellick coined this appellation in a speech he delivered in New York on September 21, 2005. His remark was that the U.S. should "step up efforts to make China a 'responsible stakeholder' in the international system." *Zoellick: 'Stakeholder' Concepts Offers New Direction*, CHINA DAILY, Jan. 25, 2006, *available at* http://www.chinadaily.com.cn/china/09usofficials/2009-05/22/content_7932826.htm.

Thus, in the context of Doha Round talks, Chinese Foreign Ministry spokesman Liu Jianchao declared in December 2008 that "China will continue to play a constructive and active role as a responsible country, and work with all sides to promote the negotiations to achieve a comprehensive and balanced result on the basis of existing achievements." *Foreign Ministry: China to "Actively" Join Doha Round*, SINA ENGLISH, Dec. 4, 2008, *available at* http://english.sina.com/china/2008/1204/202606.html.

make mistakes on national treatment. The loss the United States suffered in the *Section 337* case is just one example.

That said, was China smart to fight the *Auto Parts* case? The facts and the law were against it from the outset. Then U.S. Trade Representative (U.S.T.R.) Rob Portman said exactly that when the case was launched:

> It's a classic example of discrimination. . . . China maintains regulatory policies that impose discriminatory tariffs and encourage its automakers to use Chinese parts, at the expense of auto parts from the United States and other countries. These regulations discourage U.S. exports and create an incentive for auto parts makers to relocate to China.[180]

Hence, it was a case China was nearly destined to lose. China was only smart to fight this case if it secretly hoped to lose, and then use the Appellate Body Report to bludgeon recalcitrant hard-liners to change their ways and begin treating foreign auto imports fairly. This response—while privately admitted by trade officials occasionally representing other countries—is sheer conjecture in the Chinese context. The point, then, may be that China ought to review carefully the cases it chooses to defend rather than settle, if it hopes to avoid running up a string of losses. After all, there is no shortage of potential cases China may find itself defending in the years to come.[181]

ii. Legal Capacity and Development

Development is the underlying narrative in the story of China's first defeat in the WTO. A common feature of developing countries (and, a fortiori, least developed countries) is their lack of legal capacity to participate fully and effectively in the international trade arena. As the world's largest developing country, China is a land of pockets of garish wealth and stunning skylines amidst a desert of mild to extreme poverty and life-threatening pollution. Its legal capacity in international trade is a microcosm of this macrocosm.

There exists a small, growing cadre of brilliant trade lawyers, typically educated outside China and now working in Beijing and Shanghai. The vast majority of lawyers, and worryingly, judges, have precious little appreciation for the policies, much less for the intricacies, of the GATT–WTO regime. Thus, the *Auto Parts* dispute provides the first case study in the development of China's legal capacity to bring and defend claims on the world stage. Why did China not settle the case, after it failed to give a convincing justification for its controversial

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180. Pruzin & Rugaber, *supra* note 90, at 530–31 (quoting Portman).

181. *See, e.g.*, U.S. TRADE REPRESENTATIVE, 2008 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 11–14 (2008) (chronicling many areas of apparent non-compliance).

measures?[182] Why did it press on with an appeal, after the widely reported preliminary and final panel rulings clearly condemned its controversial trade measures?[183] How did China argue the case, given that it was aware of the strong claims against it since 2004?[184] Why were China's arguments largely unpersuasive? What legal lessons are there for China as it develops in the area of international trade adjudication?

These and related topics will be asked and debated for generations to come, and rightly so, assuming China aspires to develop its trade law capacity. Assuming China indeed has this aspiration, it might also be queried why (despite the requests of the complainants) China refused to allow public access to the WTO proceedings.[185]

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182. *See* Daniel Pruzin, *WTO Talks with China on Auto Parts Dispute Ends with No Sign of Resolution*, 23 INT'L TRADE REP. 762, 762 (May 18, 2006). The first WTO action brought against China was by the United States, which contended China taxed imported semi-conductors in a discriminatory fashion. China settled that action by agreeing to end the discriminatory treatment. *See id*. In the *Auto Parts* case, China's cut on auto tariffs to 10% (from a range with a high point of 16.4%), and its cut on autos to 25% (from 28%) effective July 1, 2006, seemed a clumsy effort to solve the case that failed to address the underlying claims of discriminatory treatment, and in any event were necessary for China to fulfill its WTO accession commitments. *See* Kathleen E. McLaughlin & Christopher S. Rugaber, *China to Reduce Import Tariffs on Autos, Some Parts Effective July 1*, 23 INT'L TRADE REP. 947, 947 (June 22, 2006); *China to Cut Car Import Duties*, FIN. TIMES, June 16, 2006, at 5; Pruzin & Rugaber, *supra* note 90, at 530–31.

China also blocked the first request for the establishment of a panel in the *Auto Parts* case, did not accept the slate of panelists (requiring WTO Director-General Pascal Lamy to appoint them), and reacted angrily to the eventual formation of a panel, all signs, perhaps, which adduce a pugnacious approach, in contrast to the semi-conductor case. *See* Daniel Pruzin, *U.S., EU, Canada Ask Lamy to Appoint Panel Members in China Auto Parts Case*, 24 INT'L TRADE REP. 134, 134 (Jan. 25, 2007); Kathleen E. McLaughlin, *China Ministry Complains About WTO Case on Auto Part Tariffs, Cites Shrinking Duties*, 23 INT'L TRADE REP. 1566, 1567 (Nov. 2, 2006); Daniel Pruzin, *U.S., EU, Canada to Renew Requests at WTO for Panels to Rule on China Car Parts Tariffs*, 23 INT'L TRADE REP. 1507, 1507 (Oct. 19, 2006); Daniel Pruzin, *China Blocks U.S., EU, Canadian Requests for WTO Panel Review of Auto Parts Tariffs*, 23 INT'L TRADE REP. 1436, 1436–37 (Oct. 5, 2006).

183. *See* Frances Williams, *WTO Panel Finds Against China in Import Tariff Dispute*, FIN. TIMES, July 19, 2008, at 2; Rossella Brevetti, *WTO Panel Issues Ruling Upholding U.S. Complaint on China Auto Part Import Duties*, 25 INT'L TRADE REP. 1100, 1100 (July 24, 2008); Pruzin, *supra* note 81, at 448–49; Daniel Pruzin, *WTO Issues Preliminary Ruling Condemning China on Auto Parts Tariffs in U.S., EU Case*, 25 INT'L TRADE REP. 270, 270 (Feb. 21, 2008).

184. Pruzin & Rugaber, *supra* note 90, at 530–31.

185. *See* Daniel Pruzin, *WTO Panel Chairman Sets Dates for Decision on China Auto Tariffs*, 24 INT'L TRADE REP. 308, 308 (Mar. 1, 2007) (noting the contrast between the policy of the complainants to make WTO adjudication more transparent, hence their

Not surprisingly, *The Economist* summarized the wide context and repercussions of China's first loss, not only for China, but also for foreign countries and their industries:

> [O]n a symbolic and practical level, the case could be a turning-point for many industries in China: the start of a new era in which they are attacked by litigation.
>
> . . .
>
> The WTO decision also draws attention to China's increasingly fractious trade relationships, which are the source of a growing number of anti-dumping actions . . . . Most importantly, it shows China's potential vulnerability before the WTO.
>
> . . . [T]he Chinese government has not just intervened on behalf of partsmakers. It has erected barriers to protect many other industries, for example by imposing elaborate registration and certification requirements for imported food, cosmetics, chemicals, and pharmaceuticals. These do not apply to local firms, which is just the kind of preferential treatment that could fall foul of WTO rules.
>
> China was eager to join the WTO on the basis that membership of a large, multilateral organisation would enhance its ability to compete with other big countries. But its odd, state-dominated economy makes it particularly sensitive to verdicts of this kind.[186]

A related matter is the role exports play in Chinese economic growth, which, in two words, is "huge" and "unsustainable." As even China's Premier, Wen Jiabao, has admitted, it is "unstable, unbalanced, uncoordinated, and unsustainable" for China to continue to rely on exports, rather than domestic

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request to open the panel proceedings in the *Auto Parts* case, and the political sensitivity of China about its first case).

The transparency of China's international trade law regime—like that of many developing countries—has been a long-standing concern of the United States and other developed countries. The ostensibly straightforward task of obtaining accurate information about Chinese laws—what they are and how they are applied—often proves not to be so simple. *See, e.g.*, Daniel Pruzin, *U.S. to Press China for Answers on Alleged Barriers to Goods Trade*, 23 INT'L TRADE REP. 1636, 1636–37 (Nov. 16, 2006) (reporting on the difficulty in obtaining data from China on barriers to trading rights of foreign firms, export quotas, and export duties on coking coal (used to make steel), value added tax (VAT) rebates for steel, investment incentives for the purchase of domestic industrial machinery, and policies on SOEs).

186. *Inevitable Collision*, ECONOMIST, Feb. 23, 2008, at 82–83 (commenting on the impact of the Panel decision).

consumption, as the dominant component of its growth in Gross Domestic Product (GDP).[187] In the United States, personal consumption was 67% of GDP for the last quarter of the twentieth century, and 72% between 2000 and 2008. In China, domestic consumption has fallen from 45% of GDP in the mid-1990s to 35% of GDP in 2009. China must increase its wage levels, so that its citizens have more disposable income to spend. (Wages in China account for 40% of GDP, whereas in the Group of Seven (G-7) industrialized nations, the comparable figure is 52%.) But, how can China boost wage levels without damaging its international competitive advantage by driving up its own labor costs? Even if wage levels rise, why would average Chinese citizens spend on consumer items when they must save for their and their children's education and health care, and for their pensions, as the state no longer provides a comprehensive safety net? Amidst these challenges, how can China continue to privatize state owned enterprises (SOEs), end export subsidies, allow its currency to float freely in foreign exchange markets, and open major sectors—like autos and auto parts—to free trade?

At the risk of melodramatic enhancement, the historic *Auto Parts* case is a multi-layered story in an environment of colossal challenges for China and the world. The case is about the development of legal capacity in the one developing country about which every other country cares. It is about a sector on which the fortunes of tens of millions of Chinese and foreigners ride. It is about the structure of the Chinese economy and the role the CCP plays in directing domestic and foreign factors of production. The *Auto Parts* case may even be about—in a tiny way—the beginning of the end of the six decades of political dominance by the CCP.

iii. China's Charter '08

As suggested above, the *China Auto Parts* case is a minor part in a far larger drama at play inside China. The context in which China's 2004 Automobile Policy is set, which is obviously not a WTO matter, is the grip—dare it be dubbed "iron" or "tenacious"—on political power certain elements within the CCP insist on keeping.[188] A sagging economy amidst global recession, significant wage declines and job losses, and consequent industrial unrest would undermine the claim (again, made by some, not all, CCP members) that the CCP alone can

187. David Pilling, *China Should Raise Wages to Stimulate Demand*, FIN. TIMES, Feb. 5, 2009, at 9. The statistics in this paragraph are taken from this source.

188. Lest this comment be wrongly misread as premised on a disposition hostile toward China or the CCP, rather than as being offered in the spirit of friendly, constructive suggestions, see generally Raj Bhala, *Virtues, the Chinese Yuan, and the American Trade Empire*, 38 HONG KONG L.J. 183 (2008). As the late Professor Edward Said rightly remarked, it is the job of the scholar to speak the truth to power. *See* EDWARD W. SAID, REPRESENTATIONS OF THE INTELLECTUAL xvi (1994).

guide China to higher heights of economic prosperity and social peace. Thus, the *Financial Times* wrote:

> Beijing is feeling defensive: concerned above all else to ensure that a sharp slump in growth does not trigger regime-threatening unrest. *All Chinese policies can almost always be traced back to this primal fear*.[189]

The CCP is scared in part because it is well aware of what most average Chinese understand intuitively: despite the large absolute size of China's GDP, in per capita purchasing power parity terms, China ranks a pathetic 122nd in the world, behind Egypt, El Salvador, and Armenia.[190]

Yet, in the long run, what the CCP is not mindful of—through willful blindness or intentional suppression—is what will doom its monopoly on power. Thousands of Chinese intellectuals, and distinguished leaders like the Dalai Lama, have signed Charter '08 which, *inter alia*, calls for non-violent change toward modern democratic institutions and practices that safeguard basic human dignity and fundamental freedoms, including the freedom of conscience and speech.[191] To some elements within the CCP, the drafters and signatories of the Charter are enemies of the state to be ignored or, better yet quashed, rather than Chinese patriots seeking peaceful change toward an economic, political, and social climate enjoyed in every other major country except China.

Do the signatories of Charter '08 speak for the people, including the twenty million rural migrant Chinese laborers (15% of the total of that cohort) who have lost their jobs in the coastal manufacturing centers and returned to the interior?[192] The short answer is "yes." Are they simply elites enraptured by western liberal values? The short answer is "no."

Based on its erroneous Marxist premise about human nature—that man is fundamentally an economic creature—the official ideology of the CCP holds that as long as the CCP can provide the conditions for rapid growth in per capita GDP, reduce poverty, and rectify rural-urban imbalances, no rational Chinese citizen would want anything more out of life. Yet, throughout history, poor people have shown themselves to be more than *homo economicus*. China need look no further than its giant southern neighbor, India, and no further back than sixty years, to the history of the British Partition. Mahatma Gandhi led a movement that, at its root,

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189. *Chinese Leadership Besieged by Caution*, FIN. TIMES, Feb. 3, 2009, at 10 (emphasis added).

190. *See* Dyer, *Chinese Data Put Economy in Third Place*, *supra* note 77, at 1.

191. *China's Charter '08* is published in a variety of sources. *E.g.*, 56 N.Y. REV. BOOKS 1 (Jan. 15, 2008), *available at* www.nybooks.com/articles/22210 (Perry Link trans.).

192. *See* David Pilling, *China Should Raise Wages to Stimulate Demand*, FIN. TIMES, Feb. 5, 2009, at 9; Jamil Anderlini & Geoff Dyer, *Downturn Has Sent 20M Rural Chinese Home*, FIN. TIMES, Feb. 3, 2009, at 1.

was about the dignity of every person—no matter how destitute or socially outcast. Thus, without a doubt, on the points raised in Charter '08, this ideology is on the wrong side of history. That was a point made by President Barack H. Obama, in his Inaugural Address, when he stated:

> To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect. To those leaders around the globe who seek to sow conflict, or blame their society's ills on the West—know that your people will judge you on what you can build, not what you destroy. *To those who cling to power through corruption and deceit and the silencing of dissent, know that you are on the wrong side of history; but that we will extend a hand if you are willing to unclench your fist*.[193]

Regrettably, the CCP actually censored parts of the new President's speech, particularly in Chinese-language translations.[194] No less regrettably, on Christmas Day in 2009, after a two-hour trial, the Number 1 Intermediate Court in Beijing sentenced a leading co-author of Charter '08, Liu Xiaobo, a former professor at Beijing Normal University, to eleven years imprisonment (out of a possible fifteen years) on charges of subversion.[195]

Trade protectionism through measures in key sectors like autos might extend the rule of the CCP—but not forever. Likewise, no amount of fiscal stimulation will extend in perpetuity the monopoly on power of the CCP. In 2008, China's auto sector posted the lowest rate of growth—6.7 percent—in a decade. Thus, in November 2008, the CCP announced a $586 billion economic stimulus package, which contained three components to assist China's auto industry:

> (1) A cut in the sales tax on small cars (vehicles with engines of 1.6 liters or less) from ten to five percent.
>
> (2) Investment of $1.5 billion to upgrade technology.

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193. President Barack H. Obama, Inaugural Address (Jan. 20, 2009), *available at* http://news.bbc.co.uk/2/hi/americas/obama_inauguration/7840646.stm (emphasis added).

194. *See* Michael Bristow, *Obama Speech Censored in China*, BBC NEWS, Jan. 21, 2009, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/7841580.stm. *See also It Never Stays Long*, ECONOMIST, Jan. 17, 2009, at 60 (remarking "the failure of the Beijing Olympics to bring any of the promised (or more accurately, hoped-for) changes in China's policy . . . was probably the biggest disappointment of 2008").

195. *See China Sentences Charter '08 Founder Liu Xiaobo to 11 Years; Free Speech Activist Jailed for Inciting Subversion Despite International Calls for Leniency*, GUARDIAN [UK], Dec. 25, 2009, http://www.guardian.co.uk/world/2009/dec/25/china-court-sentences-liu-xiaobo/print.

(3) Expenditures of $750,000 to help farmers shift away from three-wheeled, gas-powered vehicles that pollute heavily.[196]

All three initiatives are laudable, and all three are environmentally friendly, as they will help boost fuel efficiency and reduce pollution. To give the benefit of the doubt, they are the result of dedicated CCP officials sincerely concerned about the present and future livelihoods of their people. But, neither of these kinds of initiatives, nor the legal record of the CCP in WTO adjudication, really matters in proportion to the ideals of Charter '08—and, in all probability, the CCP knows that.

B. Trade Remedies

1. Antidumping and Zeroing

a. Citation[197]

Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS/350/AB/R (Feb. 4, 2009) (*adopted* Feb. 19, 2009) (complaint by European Communities (EC)).

b. Facts and Panel Holdings[198]

Another zeroing case and another defeat on the issue for the United States—indeed, the twelfth such case.[199] This case was brought by the European Communities (EC) as an "as applied" and "ongoing conduct" challenge to the

196. *See* Kathleen E. McLaughlin, *Chinese Government Announces Auto Industry Aid Under Stimulus*, 26 INT'L TRADE REP. 99, 99 (Jan. 22, 2009).

197. The third parties at the Panel and Appellate Body stages were Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, Taiwan, and Thailand. Only Brazil, Japan, and Korea filed appellate briefs; the other third parties limited their participation to the oral hearing.

198. This discussion is drawn from Appellate Body Report, *United States – Zeroing*, *supra* note 9, at ¶¶ 1–10; Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶¶ 1.1–3.3, 8.1–8.7, WT/DS/350/R (Oct. 1, 2008) (*adopted as modified by the Appellate Body* Feb. 19, 2009) [hereinafter Panel Report, *United States – Continued Zeroing*].

199. *See* Daniel Pruzin, *WTO Panel Publishes Final Decision Confirming EU Win Against U.S. Zeroing*, 25 INT'L TRADE REP. 1462, 1462–63 (Oct. 9, 2008).

zeroing methodology of the United States.[200] At issue was the application by the United States of zeroing in eighteen different antidumping (AD) cases.[201] The EC alleged zeroing resulted in the calculation of a dumping margin to support an AD order, or maintenance of a margin in place of a review of an existing AD order, far in excess of the margin that would have resulted without zeroing. The eighteen cases generated fifty-two different proceedings in which the United States applied zeroing: four initial AD investigations, thirty-seven Periodic (i.e. Administrative) Reviews, and eleven Sunset Reviews.[202] The EC did not challenge the American zeroing methodology "as such." In all of the eighteen cases, the United States applied and maintained an AD measure.

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200. The "as such"/"as applied" distinction is defined in RAJ BHALA, DICTIONARY OF INTERNATIONAL TRADE LAW 30–31 (2008) (entries for those terms). The "ongoing conduct" concept is discussed in the Commentary below.

201. For an explanation and analysis of AD law, see BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 108, at 683–869.

202. Periodic Reviews are more commonly known in the United States as "Administrative Reviews." *See* Tariff Act of 1930, 19 U.S.C. § 751(a) *amended by* 19 U.S.C. § 1675(a)(2) (1999).

Under an Administrative Review, as the Appellate Body explained, the relevant administering authority (here, the U.S. Department of Commerce) must:

> [R]eview and determine the amount of any anti-dumping duty, at least once during each [twelve]-month period beginning on the anniversary of the date of publication of an anti-dumping duty order, if a request for such a review has been received. In the case of the first assessment proceeding following the issuance of the Notice of Antidumping Duty Order, [under the United States *Tariff Act of 1930*, as amended, 19 U.S.C. § 1675(c)] the period of time may extend to a period of up to [eighteen] months in order to cover all entries that may have been subject to provisional measures. [Note that the eighteen-month extension applies to transition orders, i.e., ones in effect on the date of the establishment of the WTO, which was January, 1 1995. *See* 19 U.S.C. § 1675(c)(6)(A)(ii), (C). The normal maximum period for extension is ninety days, and only if the case is "extraordinarily complicated." *See* 19 U.S.C. § 1675(5)(B).]

Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 2(c) n.9. In a "Sunset Review," the administrative agency must:

> [C]onduct a review to determine whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and of material injury five years after the date of publication of an anti-dumping duty order.

Id. ¶ 2(d) n.11. The relevant U.S. statutory provision is the *Tariff Act of 1930*, as amended by 19 U.S.C. § 751(c)(1).

The subject merchandise included anti-friction bearings, ball bearings, chemicals, (specifically, chlorinated isocyanurates and purified carboxymethylcellulose), pasta, and steel products (specifically, hot-rolled steel, stainless steel sheet, and steel bar).[203] The targeted producers-exporters were located in Belgium, Finland, France, Germany, Italy, Latvia, Netherlands, Spain, Sweden, and the United Kingdom. Considerable sums were at stake in respect of some of the orders. For example, on one AD order covering hot-rolled steel from the Netherlands, the deposits for estimated duty liabilities exceeded $30 million.[204]

The EC explained that zeroing fails to take into consideration the totality of export transactions when calculating a dumping margin for a product under consideration as a whole. The types of zeroing against which the EC complained are known as "Model Zeroing" or "WA-WA Zeroing" and "Simple Zeroing" or "WA-T Zeroing."[205] Model Zeroing entails the use of zeroing in investigations in which the weighted average Normal Value is compared to the weighted average Export Price, hence the acronym "WA-WA Zeroing." Simple Zeroing involves the comparison of weighted average Normal Value with Export Prices from

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203. *See* Daniel Pruzin, *EU Preparing New WTO Proceedings Challenging U.S. Compliance on Zeroing*, 27 INT'L TRADE REP. 38, 38 (Jan. 14, 2010); Daniel Pruzin, *U.S., EU Agree on Implementation Deadline for U.S. in WTO Zeroing Ruling*, 26 INT'L TRADE REP. 793 (June 11, 2009).

204. *See* Daniel Pruzin, *WTO Fixes October for Ruling on U.S. Compliance in EU Zeroing Case*, 25 INT'L TRADE REP. 849, 849 (June 5, 2008).

205. For a brief treatment of zeroing, see BHALA, *supra* note 200, at 529–35 (entry for "zeroing"). For a full discussion, see BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE, *supra* note 108, at 1023–46. Briefly, as the Appellate Body explained:

> [T]he European Communities used the term "model zeroing" to describe a methodology whereby an investigating authority compares the weighted average normal value and the weighted average export price for each model of the product under investigation and treats as zero the results of model-specific comparisons where the weighted average export price exceeds the weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product under investigation.

Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 2(b) n.6. The Appellate Body continued: [T]he European Communities used the term "simple zeroing" to describe a methodology whereby an investigating authority compares the prices of individual export transactions against monthly weighted average normal values and treats as zero the results of comparisons where the export price exceeds the monthly weighted average normal value when aggregating comparison results.

Id. ¶ 2(c) n.8. Note that Model Zeroing requires the division of subject merchandise into product groups, whereas Simple Zeroing does not.

individual transactions, hence the acronym "WA-T Zeroing." The United States employed Model Zeroing in the four original investigations, and Simple Zeroing in the thirty-seven Administrative Reviews. In the eleven Sunset Reviews, the American AD authority—the Department of Commerce—relied on dumping margins that they had previously calculated on the basis of either Model or Simple Zeroing.

At the Panel Stage, the EC claims arose under the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping or AD Agreement) and the General Agreement on Tariffs and Trade (GATT).[206] The EC made four claims:

> (1) Continued application of AD duties in the eighteen cases based on dumping margin calculations that used zeroing was illegal under Articles 2:4, 2:4:2, 9:3, 11:1, and 11:3 of the AD Agreement and Article VI:1-2 of GATT.
>
> (2) Use of Model Zeroing in the four original investigations violated Articles 2:4 and 2:4:2 of the AD Agreement, and Article VI:1–2 of GATT.
>
> (3) Use of Simple Zeroing in the thirty-seven Administrative Reviews violated Articles 2:4, 2:4:2, 9:3, and 11:2 of the AD Agreement, and Article VI:1–2 of GATT.
>
> (4) Reliance on zeroing in the eleven Sunset Reviews violated Articles 2:1, 2:4, 2:4:2, 11:1, and 11:3 of the AD Agreement.

Manifestly, the attack on zeroing brought by the EC was a broad one, as it covered the key phases of an AD case, and invoked the gamut of GATT-WTO provisions on the dumping margin calculation.

Unsurprisingly, given the breadth and depth of its attack, the EC demanded that the United States completely cease the use of zeroing in any AD proceeding in connection with the eighteen cases. The United States, of course, argued that it had not acted inconsistently with its GATT-WTO obligations by applying zeroing in these cases. Notably, the United States did not dispute the EC claim that Model Zeroing is illegal under Article 2:4:2 of the AD Agreement. Rather, the American defense focused on countering the EC claims that Model Zeroing was illegal under other provisions of the AD Agreement, and under GATT.[207]

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206. The AD Agreement is reproduced in several publications, including BHALA, *supra* note 101, at 339–65. The GATT is also reproduced in a variety of sources, including *id*. at 113–85.

207. *See* Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 3.3 n.9.

The Panel decided that the fourteen AD proceedings the EC had identified in its request for formation of a panel, but not in its request for consultations, were within the terms of reference of the Panel.[208] In contrast, the Panel found that claims by the EC in connection with the continued application of eighteen AD duties were not within its terms of reference, nor were four preliminary determinations the EC had identified in its panel request.[209] (The finding concerning continued application of the eighteen AD duties is discussed below.) Consequently, the Panel focused its efforts on resolving the EC claims concerning four original investigations, twenty-nine Administrative Reviews, and eight Sunset Reviews. The Panel held as follows:[210]

- In the four original investigations at issue, the United States violated Article 2:4:2 of the AD Agreement by using Model Zeroing.[211]

- In the twenty-nine Administrative Reviews at issue, the United States violated Article VI:2 of GATT and Article 9:3 of the AD Agreement by using Simple Zeroing.[212]

- In the eight Sunset Reviews at issue, the United States violated Article 11:3 of the AD Agreement, by relying on dumping margin calculations obtained through Model Zeroing in the prior original investigations.[213]

On all other substantive claims raised by the EC, the Panel applied judicial economy.[214] Thus, as to Model Zeroing in the four original investigations at issue, the Panel did not decide whether the United States violated Article 2:4 of the AD Agreement, or GATT Articles VI:1–2. As to the twenty-nine Administrative Reviews, the Panel did not decide whether the United States violated Articles 2:1,

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208. *See* Appellate Body Report, *United States – Contined Zeroing*, *supra* note 9, ¶ 4(a); Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.1(a).

209. *See* Appellate Body Report, *United States – Continued Zeroing*, ¶ 4(b)–(c); Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.1(b)–(c).

210. Note that one Panelist filed a separate opinion regarding the EC claims on Simple Zeroing in Administrative Reviews and Model Zeroing in original investigations, taking issue not with the conclusions of the majority, but with certain aspects of its legal reasoning. *See* Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶¶ 9.1–9.10.

211. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 4(d); Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.1(d).

212. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 4(e); Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.1(e).

213. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 4(f); Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.1(f).

214. *See* Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.2.

2:4, 2:4:4, and 11:2 of the AD Agreement by using Simple Zeroing. And, as to the eight Sunset Reviews, the Panel did not decide whether the United States violated Articles 2:1, 2:4, 2:4:2, and 11:1 of the AD Agreement by relying on dumping margins in prior investigations that used Model Zeroing.

c. Issues on Appeal

On appeal, two key substantive issues were raised:[215]

215. Also on appeal were the following issues:

- Did the Panel err in finding that the EC claims regarding the continued application of AD duties in eighteen cases were outside the terms of reference of the Panel? The Appellate Body ruled that the Panel did err, and that the eighteen AD orders were measures the EC could challenge. The Appellate Body then completed the analysis. It concluded that maintenance by the United States of these duties violated Article 9:3 of the *AD Agreement* and Article VI:2 of GATT, because the duties were calculated using zeroing, which inflated the dumping margins. Likewise, the Appellate Body held that in four specific cases, the United States violated Article 11:3 of the *AD Agreement*, because in Sunset Reviews pertaining to these cases it relied on dumping margin calculations using zeroing. *See* Appellate Body Report, *United States – Continued Zeroing*, ¶¶ 143(a)–(b), 149-99, 395(a)(i)–(v).

- Did the Panel err in finding that the EC claims concerning four preliminary measures were outside the terms of reference of the Panel? The Appellate Body agreed the Panel erred, i.e., that the claims were within its terms of reference. However, the Appellate Body found it could not complete the analysis as hoped for by the EC, essentially because to do so would be premature, as the U.S. Department of Commerce had not finished its investigations through to the final result stage. *See id.* ¶¶ 143(c)–(d), 200–12, 395(b).

- Did the Panel err in finding that the fourteen Administrative and Sunset Reviews, which the EC identified in its request for formation of a panel but not its request for consultations, were within the terms of reference of the Panel? The Appellate Body found that the Panel did not make a mistake on this matter. It held that the fourteen AD measures associated with the Administrative and Sunset Reviews were within the terms of reference of the Panel. *See id.* ¶¶ 144, 213–36, 395(c). On a related matter, the Appellate Body found that, contrary to the argument of the United States, the EC did identify in its request for consultations the eighteen AD cases at issue. *See id.* ¶¶ 144, 237–40.

The first of these issues is discussed in the commentary below. The other two issues are not discussed herein. The conclusions reached by the Appellate Body on the first

(1) Simple Zeroing as Applied in Administrative Reviews –

> Does Simple Zeroing in the twenty-nine Administrative Reviews violate Article 9:3 of the AD Agreement and GATT Article VI:2?[216] The Appellate Body answered in the affirmative, thereby upholding the Panel's conclusion.[217]

(2) Zeroing and Sunset Reviews –

> Does reliance in the eight Sunset Reviews on a prior dumping margin calculation that used zeroing violate Article 11:3 of the AD Agreement?[218] Again, the Appellate Body held in the affirmative, agreeing with the Panel.[219]

Both issues were raised by the United States, and to both of them, the United States argued the answer should be "no." Yet, as indicated, on both issues the EC persuaded the Appellate Body.

d. Simple Zeroing in Administrative Reviews: The Role of Precedent

In reaching its findings on Simple Zeroing in Administrative Reviews, the Appellate Body reviewed those of the Panel. The Appellate Body observed

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two of the issues were losses for the United States, and showed the willingness of the Appellate Body to expand on the victory earned by the EC at the Panel stage.

216. *See id.* ¶¶ 145, 395(d).

As a separate but related issue, the EC argued the Panel acted inconsistently with its duties under *DSU* Article 11, failing to make an objective assessment of the matter before it, including an objective assessment of the facts, by holding that the EC failed to demonstrate that the United States actually used Simple Zeroing in seven of the Administrative Reviews at issue. The Appellate Body agreed with the EC, i.e., it found the EC did indeed prove that the United States employed Simple Zeroing in the Administrative Reviews. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 146(a), 318–48, 395(e)(i). The EC urged the Appellate Body to reverse that Panel holding and to complete the analysis by finding that the United States violated Article 9:3 of the AD Agreement, and GATT Article VI:2, in these seven Sunset Reviews, as it had in the other such Reviews. The Appellate Body did so for five of the seven Sunset Reviews and found the United States violated these rules. *See id*. ¶ 146(b), 349–57, 395(e)(ii)–(iii).

217. *See id.* ¶¶ 242–317, 395(d). As this holding was a victory for the EC, the Appellate Body declined to rule on the conditional appeals that the EC had risen. *See id.* ¶¶ 358–68, 395(d).

218. *See id.* ¶¶ 147, 395(f).

219. *See id.* ¶¶ 369-83, 395(f).

that the Panel backed away from finding that a dumping margin may be determined on the basis of an individual export transaction. The Panel said it was "inclined to agree" that the calculation could be made on this basis under the AD Agreement.[220] The Panel even went so far as to say that it found the reasoning of an earlier panel, in the 2008 *United States – Stainless Steel (Mexico)* case (cited below), "persuasive." But, it admitted that whenever a panel had rendered this conclusion, the Appellate Body reversed it, stating that the dumping margin must be determined via an aggregation of all export transactions at issue. The reversals had occurred on three occasions, and in a telling footnote, the Zeroing Panel acknowledged this reality:

> We recall that the WTO-consistency of simple zeroing in periodic reviews has been raised in three disputes so far, *i.e.* in [*United States*] – *Zeroing (EC)*, [*United States*] – *Zeroing (Japan)* and [*United States*] – *Stainless Steel (Mexico)*. [The full citations for these cases are provided below.] In all three disputes, panels found simple zeroing in periodic reviews to be permissible under the *Anti-Dumping Agreement*. *All three panel reports were appealed and the Appellate Body reversed the panels on this issue in all three cases. We also note that in these cases the reasoning, respectively, of panels and the Appellate Body has generally been consistent on the legal issues concerning simple zeroing in periodic reviews. The panels and the Appellate Body have generally developed their reasoning based on previous reports.* We note that the most recent dispute in which simple zeroing in periodic reviews was at issue, *[United States] – Stainless Steel (Mexico)*, provides a comprehensive summary of the main legal issues and arguments raised by parties in disputes concerning this type of zeroing. For ease of reference, therefore, we have cited to the panel and the Appellate Body reports in *[United States] – Stainless Steel (Mexico)*, which reflect these previous panel and Appellate Body reports, rather than citing *seriatim* all earlier reports reaching similar conclusions.[221]

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220. Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 245 (quoting Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 7.162). *See also* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 249.

221. Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 7.162 n.112 (emphasis added).

The full citations to the three cases are: Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr.18, 2006) (*adopted* May 9, 2006) and WT/DS294/AB/R/Corr. 1 (Aug. 20, 2007) (*adopted* May 9, 2006); Appellate Body Report, *United States – Measures*

This footnote amounts to the proverbial "throwing in the towel," to use a sports metaphor. However much it might have liked to rule otherwise, the *Zeroing* Panel knew it had little choice but to show deference to the accretion of precedents, and ultimate authority, of the Appellate Body. Consequently, the Panel admitted that computing dumping margins on the basis of individual transactions would lead to several margins of dumping for each exporter and product.

Likewise, in deference to prior Appellate Body rulings that had reversed other panels, the *Zeroing* Panel found that dumping is an exporter-specific concept, and the AD Agreement does not permit calculation of importer-specific dumping margins.[222] In brief, the same definition of "dumping" applies throughout the AD Agreement: a practice of an exporter that is measured by summing all relevant transactions for the product under consideration as a whole (i.e., the subject merchandise). The Panel also sympathized with the American argument that prohibiting Simple Zeroing in Periodic Reviews would favor importers with high dumping margins vis-à-vis importers with low margins.[223] The United States said that if it is unable to calculate and assess AD duties on a transaction-specific basis, then importers of subject merchandise for which Export Price is less than Normal Value to the greatest extent will have an advantage over their competitors that import at fair value prices.

Why?[224] Because the prohibition on Simple Zeroing will mean the importers get the benefit of offsets. When computing a weighted average dumping margin, the large difference between the lower figure for Export Price and the higher figure for Normal Value will offset instances in which Export Price is higher than Normal Value (and not set to zero). These offsets, said the United States, will be a benefit vis-à-vis fairly priced imports of competitors. They will reduce the dumping margin substantially, and possibly eliminate it entirely. In turn, the importers of subject merchandise will be able to sell that merchandise to retail consumers at lower prices than the fair price for imports. In effect, any AD duty imposed on the importers will be small, and not impede them from under-pricing their competitors who price their wares fairly.

To avoid this consequence, the United States urged that it be allowed to calculate dumping margins, and assess duties, on a transaction-specific and

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Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) (*adopted* Jan. 23, 2007); and Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008) (*adopted* May 20, 2008) [hereinafter Appellate Body Report, *United States – Stainless Steel*] These cases are reviewed, respectively, in: Raj Bhala & David Gantz, *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299, 353–87 (2007); Raj Bhala & David Gantz, *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75, 115–55 (2008); and Bhala & Gantz, *supra* note 10, at 135–64.

222. *See* Appellate Body Report, United States – *Continued Zeroing*, *supra* note 9, ¶¶ 246, 248.

223. *See id.* ¶ 247.

224. *See id.* ¶¶ 288–89.

importer-specific basis, and practice Simple Zeroing in Administrative Reviews. But, the Panel again deferred to prior decisional law of the Appellate Body. The Panel added that a prohibition on Simple Zeroing would not prevent a WTO Member from conducting an importer-specific inquiry as to liability for an AD duty, as long as that liability did not exceed the exporter-specific dumping margin for the subject merchandise.

Finally, and also in keeping with respect for the prior decisions of the Appellate Body, the Panel accepted the legal reality that the Appellate Body had dismissed the American concern that prohibiting zeroing generally would render the second sentence of Article 2:4:2 of the AD Agreement (which authorizes WA-T comparisons) *inutile*.[225] This argument goes under the rubric of "mathematical equivalence,"[226] and centers on the text of Article 2:4:2, as follows:

> Subject to the provisions governing fair comparison in paragraph [four], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. *A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.*[227]

The United States contended that if zeroing is prohibited in contexts other than weighted average-to-weighted average comparisons of Normal Value and Export Price, then the second sentence of Article 2:4:2 would be redundant. Further, it is inconsistent with principles of treaty interpretation to read one provision of a treaty in a manner that renders another provision redundant.

The second sentence of Article 2:4:2 is about targeted dumping. This sentence allows for average-to-individual comparisons of Normal Value and Export Price, as an exception, under certain circumstances, to the average-to-average and individual-to-individual methods laid out in the first sentence. Those circumstances essentially are dumping targeted at particular buyers, times, or locations. The United States was concerned that a prohibition on zeroing in

225. *See id.* ¶ 250.
226. *See id.* ¶ 296.
227. Emphasis added.

average-to-individual transaction comparisons would yield the same quantitative dumping margins as would occur in an average-to-average comparison (where zeroing is forbidden). If equivalence occurs, then the second sentence is redundant. In fact, held the Panel, equivalence was not inevitable. Computation of dumping margins based on weighted average-to-individual transactions under the second sentence of Article 2:4:2 could lead to different mathematical results from computation based on the two preferred methodologies under the first sentence. The differences would arise if the calculations of weighted average Normal Value were based on price data from different time periods.

In effect, the Panel ruled in favor of the EC, holding that Simple Zeroing practiced by the United States in the twenty-nine Administrative Reviews violates GATT Article VI:2 and Article 9:3 of the AD Agreement for reasons of precedent. Indeed, it admitted as much in its discussion of the role of precedent in WTO adjudication:

> 252. Referring to the "*consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews*," the Panel turned to consider the role of prior jurisprudence. The Panel noted the Appellate Body's finding that, although "Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties," they are nevertheless "*often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes*." The Panel recalled the Appellate Body's statements in [*United States*] – *Stainless Steel (Mexico)* that "*the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system*" *and that ensuring* "*security and predictability*" *in the dispute settlement system* "*requires the development of a consistent body of case law and applying it to the same legal questions, absent cogent reasons.*"
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> 253. With regard to the hierarchical structure between panels and the Appellate Body, the Panel observed the Appellate Body's finding that any panel report that fails to follow the case law developed through adopted panel and Appellate Body reports would undermine the important function of jurisprudence to develop a consistent body of case law. The Panel also noted the Appellate Body's view that "the legal interpretation contained in adopted Appellate Body reports has implications that go beyond the specifics of the relevant

> dispute" and has to be taken into consideration in interpreting the rights and obligations of WTO Members.[228]

What are the Appellate Body and Panel saying in the above-quoted paragraphs? Surely, they are just making an argument that there are good reasons for following precedents of a higher court: security and predictability. Consequently, the Panel is admitting that precedents affect more than the immediate parties to the disputes from whence they arose. The Appellate Body then continued:

> 254. The Panel then observed that its duty to make an "objective assessment" under Article 11 of the *DSU* [Dispute Settlement Understanding, i.e., the WTO Agreement on Rules and Procedures Governing the Settlement of Disputes] did not exist "in a vacuum," but was to be read in the context of Article 3.2 of the *DSU*, which "establishes that the WTO dispute settlement system is intended to provide security and predictability to the multilateral trading system." The Panel agreed that such *security and predictability may* "*be furthered by the development of consistent jurisprudence and applying it to the same legal questions, absent cogent reasons to do otherwise.*" However, while concluding that "it is obviously incumbent upon any panel to consider prior adopted Appellate Body reports, as well as adopted panel reports, and adopted GATT panel reports, in undertaking the objective assessment required by Article 11," *the Panel said it did not believe that* "*the development of binding jurisprudence is a contemplated element to enable the dispute settlement system to provide security and predictability to the multilateral trading system*."
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> 255. The Panel reasoned as follows:
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> > Clearly, it is important for a panel to have cogent reasons for any decision it reaches, regardless of whether or not there are any relevant adopted reports, and whether or not the panel follows such reports. . . . In our view, however, *a panel cannot simply follow the adopted report of another panel, or of the Appellate Body, without careful consideration of the facts and arguments made by the parties in the dispute before it*. To do so would be to abdicate its responsibilities under Article 11. By the same token, however, neither

228. Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 252–53 (quoting Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 7.170, 7.173–.176 (emphasis added).

> should a panel make a finding different from that in an adopted earlier panel or Appellate Body report on similar facts and arguments without careful consideration and explanation of why a different result is warranted, and assuring itself that its finding does not undermine the goals of the system. . . .
>
> 256. Consequently, while the Panel said it "share[d] a number of concerns" expressed by the panel in [*United States*] – *Stainless Steel (Mexico)*, the Panel recognized that the Appellate Body had reversed the findings of that panel and that the Appellate Body report had "gained legal effect through adoption by the DSB." The Panel also noted that "this continues a series of consistent recommendations made by the DSB over the past several years following reports that *addressed the same issues based largely on the same arguments*."
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> 257. The Panel further observed that:
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> > *In addition to the goal of providing security and predictability to the multilateral trading system, . . . Article 3.3 of the DSU provides that* "*[t]he prompt settlement of situations* in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is *essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members*." *Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case*.[229]

What are the Appellate Body and Panel saying in these paragraphs? They are adding yet another argument for precedent: the prompt settlement of disputes.

To be sure, in none of the above-quoted paragraphs do the Panel or Appellate Body use the words "stare decisis." However, as argued elsewhere, it is important to appreciate what is really going on: de facto stare decisis, that is, the

229. *Id.* ¶¶ 254-57 (emphasis added).

adherence to prior decisional law to the extent it applies to the facts of a case, without an outright de jure requirement under WTO rules to do so.[230] Insofar as the Panel insists on careful consideration of a dispute in checking the facts and arguments, it is behaving no differently than a common law court. Moreover, the Panel, like a common law court, appreciates that precedents are not shackles to bind. Rather, there is room to maneuver, so that decisional law can evolve and change, even reverse itself, as facts and arguments warrant.

e. Simple Zeroing in Administrative Reviews: Key Appellate Body Findings

The "bottom line" for the Appellate Body was two-fold: first, as the Panel concluded, the United States violated Article 9:3 of the AD Agreement and Article VI:2 of GATT, in using Simple Zeroing in the twenty-nine Administrative Reviews at issue; second, the United States violated these provisions in five other Administrative Reviews.[231] In getting to this bottom line, the Appellate Body began by rejecting the American argument that the Panel misapplied the standard of review in Article 17:6(ii) of the AD Agreement.[232] This provision states:

> Where the panel finds that a relevant provision of the *Agreement* admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the *Agreement* if it rests upon one of those permissible interpretations.

The United States urged that the AD Agreement allows for more than one permissible interpretation as to the use of Simple Zeroing in Administrative Reviews and that the holding of the Panel rests on only one of those interpretations. In effect, the United States was pushing a *Chevron*-type argument: the Panel should defer to the underlying administering authority (the Department of Commerce) because the relevant statutory (that is, treaty) language admits of multiple interpretations, and the one followed by the authority, which is

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230. *See generally* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. J. TRANSNAT'L L. & POL'Y 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT'L L. REV. 873 (2001).

231. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 394, 395(d), 395(e)(ii).

232. *See id.* ¶¶ 259, 265–74.

charged with administering the statute, is reasonable.[233] The American argument reflected its hope that Article 17:6(ii), which was included in the AD Agreement following strong advocacy by the United States near the end of the Uruguay Round,[234] would serve as a restraint on judicial activism by WTO panels and the Appellate Body, and compel them to accord substantial deference to national administrative authorities.

The Appellate Body had none of it.[235] The Appellate Body pointed out that Article 17:6(ii) presupposes application of the rules of the 1969 *Vienna Convention on the Law of Treaties*:[236]

> 270. The Appellate Body has reasoned that the second sentence of Article 17.6(ii) presupposes "that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be '*permissible* interpretations[.]'" [Quoting Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 59, WT/DS184/AB/R (July 24, 2001) (*adopted* Aug. 23, 2001).[237]] Where that is the case, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations." As the Appellate Body has said, "[i]t follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*." [Quoting Appellate Body Report, *United States – Hot-Rolled Steel*, ¶ 60.]
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> 271. The second sentence of Article 17.6(ii) must therefore be read and applied in the light of the first sentence. We wish to make a number of general observations about the second sentence. First, Article 17.6(ii) contemplates a sequential

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233. *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (establishing the test for judicial deference to administrative agencies).

234. *See* Brendan McGivern, White & Case (Geneva), *Summary – WTO Appellate Body Report: United States – Continued Zeroing* (Feb. 11, 2009) (on file with authors).

235. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 275.

236. *See* 1155 U.N.T.S. 331 (1969), *reprinted in* 8 INT'L LEGAL MATERIALS 679 (1969).

237. This case is analyzed in Raj Bhala & David Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457, 554–607 (2002).

analysis. The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only *after* engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies. The structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence.

272. Secondly, the proper interpretation of the second sentence of Article 17.6(ii) must itself be consistent with the rules and principles set out in the *Vienna Convention*. This means that it cannot be interpreted in a way that would render it redundant, or that derogates from the customary rules of interpretation of public international law. However, the second sentence allows for the possibility that the application of the rules of the *Vienna Convention* may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.

273. We further note that the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty. The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions. Moreover, a permissible interpretation for purposes of the second sentence of Article 17.6(ii) is not the result of an inquiry that asks whether a provision of domestic law is "necessarily excluded" by the application of the *Vienna Convention*. Such an

> approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member's municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty.[238]

Simply put, the Appellate Body created a two-step sequential test for the use of Article 17:6(ii), application and permissibility, which is not quite like the *Chevron* test in American administrative law. In the first step, a WTO tribunal must apply customary rules of treaty interpretation, as embodied in the *Vienna Convention*. What interpretation or interpretations does application of those rules yield? In the second step, the tribunal must examine the interpretation or interpretations. Is it, or are they, permissible? In this step, the tribunal seeks harmony and consistency within or across GATT-WTO texts.

Thus, the Appellate Body explained that its mission in the case at bar is not to decide whether there are multiple possible interpretations that are reasonable and then to defer to one of them as picked by the underlying authority. Rather, now that the Panel has rendered a legal interpretation, namely, that the United States violated Article 9:3 of the AD Agreement and Article VI:2 of GATT, by practicing Simple Zeroing in Administrative Reviews, the task of the Appellate Body is to decide whether that interpretation is correct. In brief, the American argument was about judicial deference based on the standard of review. The Appellate Body rebuttal was that the American argument missed the mark: the issue was not the standard of review, but legal interpretation.

As for the Panel's legal interpretation, indeed, it was correct. The United States characterized the fundamental issue at stake as being the definition of "dumping" and "margin of dumping," as used in Article 9:3 of the AD Agreement and Article VI:2 of GATT.[239] Article 9:3 states:

> 9.3. The amount of the anti-dumping duty shall not exceed the *margin of dumping* as established under Article 2.
>
> 9.3.1. When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within [twelve] months, and in no case more than [eighteen] months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has

238. Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 270–73 (emphasis in original) (footnotes omitted).

239. *See id.* ¶ 277.

> been made. [The footnote to this sentence states: "It is understood that the observance of the time-limits mentioned in this sub-paragraph and in sub-paragraph 3.2 may not be possible where the product in question is subject to judicial review proceedings."] Any refund shall be made promptly and normally in not more than [ninety] days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within [ninety] days, the authorities shall provide an explanation if so requested.
>
> 9.3.2. When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the *margin of dumping*. A refund of any such duty paid in excess of the actual *margin of dumping* shall normally take place within [twelve] months, and in no case more than [eighteen] months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within [ninety] days of the above-noted decision.
>
> 9.3.3. In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.[240]

And, GATT Article VI:2 states:

> 2. In order to offset or prevent *dumping*, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the *margin of dumping* in respect of such product. For the purposes of this Article, the *margin of dumping* is the price difference determined in accordance with the provisions of paragraph 1.[241]

240. Emphasis added.
241. Emphasis added.

The Interpretative Note to paragraph 2, *Ad Article VI*, states:

> 1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.
>
> 2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of *dumping* by means of a partial depreciation of a country's currency which may be met by action under paragraph.
>
> 3. By "multiple currency practices" is meant practices by governments or sanctioned by governments.

Do the terms "margin of dumping" and "dumping" apply at the level of the subject merchandise or at the level of an individual export transaction?

The United States urged that Simple Zeroing is permitted in Administrative Reviews because "dumping" and "margin of dumping" can be found to exist and can be calculated, respectively, at the level of an individual transaction and for individual importers. These tasks can be done when an administering authority, such as the Department of Commerce, assesses liability for an AD duty for each importer of subject merchandise.[242] The United States further urged that these terms are used in several contexts in GATT-WTO agreements, and their meaning is flexible and should be interpreted in their particular contexts.

The Appellate Body rejected these arguments. It recalled the basic definition of "dumping" in GATT Article VI:1—namely, the introduction of a "product" of one country into the commerce of another country at less than the Normal Value of that product—and observed that Article 2:1 of the AD Agreement essentially adopts this definition.[243] Moreover, as Article 2:1 makes plain, the definition carries over throughout the *Agreement* in a coherent fashion. It does not vary in content or application. Additionally, as GATT Article VI:2 indicates, a "margin of dumping" is the difference between Export Price (or, in some cases, Constructed Export Price) and Normal Value. This difference exists in respect of a dumped "product."

The Appellate Body conceded that merely scrutinizing key terms such as "product" or "Export Price," as used in Article 2:1 of the AD Agreement, does not

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242. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 278.

243. *See id.* ¶¶ 279–82.

resolve conclusively the issue of whether "dumping" and "margin of dumping" relate to an individual transaction or whether they concern an aggregation of transactions attributable to an exporter. But, following Vienna Convention principles, the interpretation of "dumping" and "margin of dumping," the terms must be interpreted throughout the AD Agreement in a manner that does not produce contradictions. Thus, the Appellate Body turned to other provisions in the AD Agreement that use the term "margin of dumping."[244]

For example, it looked at Article 5:8, requiring termination of an AD investigation if a margin of dumping is de minimis. The plain meaning of that provision indicated that "margin of dumping" refers to a single margin. Likewise, Article 6:10 mandates calculation of an individual dumping margin for each known producer of the subject merchandise. Article 9:5, concerning new shippers, also plainly states that an administering authority must calculate an individual margin of dumping for any exporter that did not export subject merchandise during the period of investigation (POI). Consideration of the term "dumping" yielded a similar result, because that term must be interpreted harmoniously with "margin of dumping."[245] In brief, the Appellate Body found no textual basis for the American argument.

Moreover, the Appellate Body pointed out that this argument would create a mismatch between original investigations and Administrative Reviews.[246] Suppose a transaction examined in the original investigation occurs above Normal Value (i.e., Export Price exceeds Normal Value) and that no zeroing occurs in that investigation. This transaction would be considered a "dumped" one, albeit with a negative dumping margin that would offset one or more transactions with positive margins. Suppose further that in an Administrative Review, a transaction studied occurs above Normal Value, but Simple Zeroing occurs. Now, the difference between Export Price and Normal Value, i.e., the negative dumping margin, is set to zero. By setting the margin to zero, this transaction is treated as a non-dumped one. Consequently, the same economic phenomenon of a transaction in which Export Price exceeds Normal Value is treated differently: as dumped (with a negative margin) in the original investigation, but as non-dumped (because of Simple Zeroing) in the Administrative Review. This mismatch arises because, as per the American argument, zeroing, even if impermissible in original investigations, is permissible in Administrative Reviews. That mismatch cannot be allowed to occur, said the Appellate Body, and the way to prevent it is to reject the American argument that the key terms "dumping" and "margin of dumping" can have different meanings in different parts of the AD Agreement.

Moreover, precedent ran against the American argument. In two previous decisions, the Appellate Body held that the terms "dumping" and "margin of dumping" apply in the same manner throughout the AD Agreement:

244. *See id.* ¶ 283.
245. *See id.* ¶ 284.
246. *See id.* ¶ 285.

the 2007 *United States – Zeroing (Japan)* and 2008 *United States – Stainless Steel (Mexico)* cases.[247] Turning then to Article 9:3 of the AD Agreement, its over-arching obligation is that the level of an AD duty cannot exceed the margin of dumping as established under Article 2 of the *Agreement*. Article VI:2 of GATT indicates that a "margin of dumping" relates to the "exporter" of the "product" at issue (the subject merchandise). Putting these two provisions together and being mindful of the consistent way in which key terms must be interpreted means that the "margin of dumping" is established for an exporter and operates as a ceiling for the total amount of AD duties that can be imposed on entries of subject merchandise from that exporter. There is no basis in the AD Agreement or GATT to disregard comparisons in which Export Price exceeds Normal Value, as occurs under Simple Zeroing in Administrative Reviews.

Indeed, citing two precedents, the 2004 *United States – Softwood Lumber V* and 2008 *United States – Stainless Steel (Mexico)* cases, the Appellate Body recalled the textual fact that when the *AD Agreement* permits disregarding a matter, it does so explicitly.[248] Specifically, Article 2:2:1 sets out exclusive circumstances under which sales of a foreign-like product (i.e., the like product in the home country of the exporter) can be disregarded (namely, if the home market is not viable). Article 9:4 expressly directs that a zero or de minimis dumping margin be disregarded when computing a weighted average all-others dumping margin (i.e., a margin for exporters that are not individually investigated). Consequently, there was no textual basis for the United States to infer that implicit derogations exist. In turn, the Appellate Body made clear it disagreed with the American view that "dumping" can be determined at the level of individual transactions and that results of multiple comparisons each are "margins of dumping."[249] Rather, citing the 2008 *United States – Stainless Steel (Mexico)* case, the Appellate Body explained that a correct inquiry requires a determination as to whether an exporter is dumping based on its pricing behavior in all of the transactions of subject merchandise during the POI.[250]

In sum, the Appellate Body observed that, when the United States applies Simple Zeroing in Administrative Reviews, the Department of Commerce compares monthly weighted average Normal Values against the prices of

247. *See* Appellate Body Report, *United States – Stainless Steel*, *supra* note 221, ¶¶ 95-96. This case is analyzed in Bhala & Gantz, *supra* note 10, at 135–64.

248. *See* Appellate Body Report, *United States – Stainless Steel*, *supra* note 221, ¶ 103; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶ 100, WT/DS264/AB/R (Aug. 11, 2004) (*adopted* Aug. 31, 2004) [hereinafter Appellate Body Report, *United States – Softwood Lumber V*]. This case is analyzed in Bhala & Gantz, *supra* note 157, at 200–17.

249. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 287.

250. *See* Appellate Body Report, *United States – Stainless Steel*, *supra* note 221, ¶ 98. This case is analyzed in Bhala & Gantz, *supra* note 10, at 135–64.

individual export transactions.[251] The Department disregards the amounts by which an individual Export Price exceeds the monthly weighted average Normal Value. That deliberate neglect occurs when the Department aggregates results of all the comparisons to compute the going-forward cash deposit rate for the exporter and duty assessment rate for the importer at issue. Consequently, Simple Zeroing leads to an AD duty that exceeds the dumping margin of an exporter. Article 9:3 of the AD Agreement demands that the dumping margin, as calculated under Article 2, is the ceiling for the amount of the AD duty that can be levied. In other words, Simple Zeroing artificially inflates a dumping margin from its true value, as computed in accordance with the precepts of Article 2.

f. Simple Zeroing in Administrative Reviews: Rejection of Four American Arguments

The United States offered four additional reasons to support its contention that Simple Zeroing in Administrative Reviews is lawful under Article 9:3 of the AD Agreement and Article VI:2 of GATT. First, it made the consequential argument that a prohibition on Simple Zeroing, and on calculating transaction-specific, importer-specific dumping margins, would benefit importers of subject merchandise vis-à-vis their competitors, if the importers deal in merchandise for which Export Price is far less than Normal Value, and their competitors deal in fairly priced imports. The United States made this argument at the Panel stage too, of course (as discussed above). It was unsuccessful at that stage and, likewise, at the Appellate Body level.[252] The Appellate Body reiterated its finding that the AD Agreement makes clear that "dumping" and "margins for dumping" relate to the pricing behavior of the relevant foreign exporter or producer, based on an aggregation of transactions. Accordingly, while an importer of subject merchandise is legally liable for payment of an AD duty, and while Export Price may be a matter for negotiation between the importer and foreign exporter, the incentive to change pricing behavior created by the duty affects the exporter of that merchandise.

Second, under Article 9:4(ii) of the AD Agreement, the United States offered a somewhat confusing argument regarding the calculation of liability for payment of an AD duty based on a so-called "prospective Normal Value."[253] This provision states:

> 9.4. When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article

251. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 314–15.

252. *See id.* ¶¶ 290–91.

253. *See id.* ¶¶ 292–95.

> 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in sub-paragraph 10.2 of Article 6.

The United States said it would be absurd to interpret Article 9 as forbidding Simple Zeroing and, thus, requiring offsets, in a retrospective duty collection system (which the United States uses), but limiting the liability of an importer to pay AD duties based on individual transactions in a prospective system (which the EU and various other WTO Members use).[254] The apparent concern of the United States was a kind of mismatch: lower AD duties would result from Simple Zeroing in a retrospective system, but, in a prospective system, the duties somehow would be capped based on individual transactions engaged in by the importer.

The United States had made this argument in previous appellate cases, with no success. In the 2008 *United States – Stainless Steel (Mexico)* case, the Appellate Body explained that an AD duty collected at the time of importation under a prospective Normal Value system does not represent the "margin of dumping" under Article 9:3.[255] Rather, that margin is calculated on the basis of all the sales of subject merchandise of an exporter. Liability may or may not be final at the time of importation. Typically in a prospective system, it is not, i.e., collection of an AD duty based on prospective Normal Value is an intermediate stage of collection. The key point is that this collection is subject to a final assessment and prompt refund (upon request) under Article 9:3:2. That is because

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254. On the difference between the two systems, see BHALA, *supra* note 200, at 381 (entry for "retrospective basis (retrospective remedy)").

255. *See* Appellate Body Report, *United States – Stainless Steel*, *supra* note 221, ¶ 120.

Article 9:3:2 anticipates that the amount of AD duties collected on a prospective basis is subject to review under Article 9:3, and the latter provision contains the basic mandate that the amount of an AD duty must not exceed the margin of dumping under Article 2. The same precepts apply to liability under a retrospective system; thus, the Article 9:3 rules created a level playing field for both kinds of duty collection systems.

Third, the United States proposed a mathematical equivalence argument.[256] This justification, too, is one the United States offered at the panel stage (as explained earlier) and in previous cases. The Appellate Body rejected it. Even if equivalence were to occur, said the Appellate Body, that fact alone would be insufficient to support a conclusion that the second sentence of Article 2:4:2 of the AD Agreement was ineffective.

Finally, the United States made a historical argument.[257] It said the concept of dumping has historically been understood to apply to individual transactions. The United States pointed to various documents, including the 1960 Group of Experts Report concerning GATT Article VI. The United States had offered this argument in previous cases, but this time contended that the Appellate Body in those cases had misapprehended the Report and its implications. To be sure, as the Appellate Body admitted, the Report states that:

> [T]he "ideal method" for applying anti-dumping duties "was to make a determination . . . of both dumping and material injury in respect of each single importation of the product concerned."[258]

It is administratively impractical to calculate dumping margins for individual transactions. But, the United States urged, the Appellate Body was wrong to conclude that this impracticability meant that in the Tokyo and Uruguay Rounds, countries agreed to a completely different way of calculating dumping margins—namely, one that has no relation to individual transactions.

The United States made the same argument in the 2005 *United States – Softwood Lumber V (Article 21:5 – Canada)*[259] and 2008 *United States – Stainless Steel (Mexico)*[260] cases. In the case at bar, the Appellate Body began by rejecting the characterization by the United States of its precedents. Contrary to the American view, the *Stainless Steel (Mexico)* case did not state that the 1960

256. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 296–98.

257. *See id.* ¶¶ 299–303.

258. *Id.* ¶ 299 (citation omitted).

259. *See* Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada; Recourse by Canada to Article 21:5 of the DSU*, ¶¶ 59-60, WT/DS257/AB/RW (Dec. 5, 2005) (*adopted* Dec. 20, 2005).

260. *See* Appellate Body Report, *United States – Stainless Steel*, *supra* note 221.

Report resolved the issue of zeroing or permitted it. In that case, the Appellate Body said the Report did not resolve the issue of whether the negotiators of the AD Agreement intended to prohibit zeroing. Moreover, even if the Report did authorize zeroing under GATT Article VI, the advent of the AD Agreement means the Appellate Body must interpret Article VI harmoniously with the AD Agreement, especially Articles 2:1, 2:4, 2:4:2, and 9:3.

The Appellate Body then turned to two GATT Panel Reports, the unadopted 1995 *European Communities – Audio Cassettes* case[261] and the adopted 1995 *European Economic Community – Cotton Yarn* case,[262] along with several Uruguay Round proposals. These cases and proposals, said the United States, demonstrate that Uruguay Round negotiators were unable to agree on a general prohibition on zeroing. From this fact, and the lack of modification of the language of GATT Article VI during the Uruguay Round, it may be inferred that the drafters of the AD Agreement intended no change in meaning—i.e., zeroing was permissible under the Agreement as it supposedly was before the Agreement.

Not so, said the Appellate Body. Turning to its 2005 *Softwood Lumber V Compliance Report* and 2008 *Stainless Steel* cases, the Appellate Body reminded the United States that, in those cases, it looked at the GATT Panel Reports and Uruguay Round proposals. As for the Panel Reports, their relevance was diminished by the fact that the Tokyo Round Antidumping Code (to which the Reports related) were plurilateral accords separate from GATT, and the Code has been terminated.[263] Thus, the legal status of zeroing under that Code, whatever it was, is of little relevance today. As for the negotiating proposals, they simply did not reflect the views of all the countries engaged in the Uruguay Round.[264] In effect, to the American argument about history, the Appellate Body replied, "objection: asked and answered."

In this regard, one member of the Appellate Body filed an eloquent concurring opinion.[265] In supporting the decision of the Appellate Body that the United States violated Article 9:3 of the AD Agreement and Article VI:2 of GATT, the concurrence stated:

> There is little point in further rehearsing the fine points of these interpretations. In my view, there is every reason to survey this debate with humility. There are arguments of substance made

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261. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 301 n.660 (citing Report of the Panel, *EC – Audio Cassettes*, ADP/136 (Apr. 28, 1995) GATT B.I.S.D. (unadopted)).

262. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 301 n.660 (citing Report of the Panel, *EEC – Cotton Yarn*, (Oct. 30, 1995), GATT B.I.S.D. (42d Supp.) at 17 (1995).

263. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 302.

264. *See id.* ¶ 303.

265. *See id.* ¶¶ 304–12.

> on both sides; but one issue is unavoidable. In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of Article 17(6)(ii). The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.[266]

This statement was a diplomatic, but firm, rebuke to the United States and might well have been anticipated, with careful forethought. It certainly is a lesson for future litigation. And, from a systemic perspective, the United States should welcome it, because it is entirely consistent with a fundamental aim of American foreign economic policy: advancement of the international rule of law.

g. Model Zeroing in Sunset Reviews

The Panel held that the United States violated Article 11:3 of the *AD Agreement* by relying on zeroing in original investigations or subsequent Administrative Reviews to perform the eight Sunset Reviews at issue.[267] Article 11:3 states:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made

266. *Id.* ¶ 312.
267. *See id.* ¶¶ 369–71.

> by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. [The footnote to this sentence states: "When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under sub-paragraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."] The duty may remain in force pending the outcome of such a review.

The underlying original investigations all occurred before the Department of Commerce announced in its December 2006 notice that it would change its policy and cease practicing Model Zeroing in original investigations, effective February 22, 2007. The notice said:

> The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.[268]

Not surprisingly, precedent was the cornerstone of the Panel's finding.

The Panel looked to the 2007 Appellate Body Report in *United States – Zeroing (Japan)*.[269] In that case, first, the Appellate Body held that, to the extent a dumping margin relied on a Sunset Review is inconsistent with GATT-WTO agreements, the resulting Sunset Review also is inconsistent with the relevant agreements. Second, said the Appellate Body in *United States – Zeroing (Japan)*, Model Zeroing in an original investigation violates Article 2:4:2 of the *AD Agreement*. Hence, said the Zeroing Panel, relying on Model Zeroing in a Sunset Review also must be illegal, specifically under Article 11:3. At the Panel stage, the United States did not contest either of the two *United States – Zeroing (Japan)* findings or the reliance on them by the Panel.[270]

At the appellate stage, the American argument was based on Article 11 of the DSU, which states:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an *objective*

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268. Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 377 (citation omitted).

269. *See* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, *supra* note 219. This case is analyzed in Bhala & Gantz, *WTO Case Review 2007*, *supra* note 221, at 115–55.

270. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 374.

> *assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[271]

The United States asserted that the Panel failed to make an "objective assessment" when reaching the specious conclusion that the EC made out a prima facie case that the margins in the original investigations underlying the eight Sunset Reviews were, in fact, obtained through Model Zeroing.[272] The United States said the sole basis for the Panel's finding was the December 2006 Department of Commerce notice stating that it no longer would use Model Zeroing in WA-WA comparisons. From that, the Panel agreed with the EC that the United States did use such Zeroing in the cases prior to the key date of February 22, 2007, including the original investigations at issue. The United States demanded a better evidentiary record than the notice on which to base an inference that the Department employed Model Zeroing. A general policy statement, such as the notice, is not evidence as to whether such Zeroing was used in a specific original investigation.

This demand was ironic, even annoying. At the Panel stage, there was no disagreement as to whether the Department of Commerce used Model Zeroing in the original investigations underlying the eight Sunset Reviews.[273] Technically correct as it might be—i.e., that a general statement is not conclusive evidence of practice in a particular instance—the Appellate stage was not the time to make it. Moreover, in the same notice that announced cessation of Model Zeroing in original investigations effective February 22, 2007, the Department also clearly said it applied the methodology prior to this date.[274] There was no dispute, moreover, that all the original investigations were completed before this date.[275] Not surprisingly, the Appellate Body sided with the EC.[276] The inference about the use of Model Zeroing was properly drawn by the Panel from the facts available in the record.[277] At no point did the United States contest this record or submit evidence in rebuttal.

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271. Emphasis added. The *DSU* is reproduced in several publications, including BHALA, *supra* note 101, at 559–85.

272. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 372, 376–78.

273. *See id.* ¶ 374.

274. *See id.* ¶¶ 379–80.

275. *See id.* ¶ 381.

276. *See id.* ¶¶ 382–83.

277. *See id.* ¶ 373, 375.

h. Commentary

i. Ongoing Conduct as a New Category of Justiciable Measures, Plus an Insight from Islamic Law

At the Panel stage, the EC made claims under Articles 9:3 and 11:3 of the AD Agreement, and under Article VI:2 of GATT, regarding the continued application of AD duties in eighteen cases. The Panel ruled that these claims were outside its terms of reference. The EC appealed the matter and won.[278] The Appellate Body ruled the Panel erred, and that the eighteen AD orders were measures that the EC could challenge. In completing the analysis for the Panel, the Appellate Body held maintenance by the United States of AD duties violated Article 9:3 of the AD Agreement and Article VI:2 of GATT. This was because the duties were calculated using zeroing, which inflated the dumping margins. Likewise, the Appellate Body held that in four specific cases, the United States violated Article 11:3 of the Agreement. This was because in Sunset Reviews pertaining to these cases, it relied on dumping margin calculations using zeroing.

Ostensibly, this portion of Appellate Body's report is unremarkable. However, it may well prove to be a dramatic change in the WTO dispute settlement system. Hitherto, it has been understood there are two basic types of challenges that may be brought under the DSU: an "as such" challenge, which takes aim at an existing trade law, regulation, or rule, or an "as applied" challenge, which attacks the use of a particular law, regulation, or rule in a specific instance. These types are not mutually exclusive, meaning that an "as such" and "as applied" challenge can be brought simultaneously; as where, for example, it is argued that an AD statute is inherently inconsistent with a GATT-WTO provision, and the application of that statute violates one of the GATT or WTO provisions. Of course, whether challenging a regime (that is, a law, regulation, or rule), or the application of a regime in a specific case, the nature of the claim could take one of two forms: violation nullification or impairment; or, non-violation nullification or impairment, pursuant to the distinction grounded in GATT Article XXIII.

In the *Continued Zeroing* case, with respect to the eighteen AD duty orders, the EC lost at the Panel stage because the Panel said those eighteen measures had been the subject of an earlier dispute settlement ruling.[279] The EC agreed, but said the United States had failed to implement the recommendations from that ruling. The Panel replied that it did not have authority in the case at bar to render a compliance ruling as to the earlier case. On appeal, the EU argued that the Panel dismissed its claims regarding the eighteen cases without providing proper reasoning. In so doing, it helped create what arguably is a new category of

278. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶¶ 143(a)–(b), 149-99, 395(a)(i)–(v).

279. *See* Pruzin, *supra* note 199, at 1462.

challenges, in the zone between "as such" and "as applied"—namely, "ongoing conduct."

The EC was not challenging zeroing as such, but neither was it limiting its challenge to the use of zeroing in specific Administrative or Sunset Reviews. Rather, it was attacking the continuing use of zeroing, stemming from an original investigation. The central EC argument was that an original AD duty order on subject merchandise from a particular country, plus all of the subsequent Administrative Reviews, and any Sunset Review are part of the same duty order.[280] Therefore, the original order, and all of the Reviews, should be considered as part of a single trade measure and be susceptible to WTO litigation in a single case. Herein lies the reason for the name of the case at bar—"continued existence and application of zeroing methodology." The EC argued that once the order is set, every future proceeding associated with that order is part and parcel of the same trade remedy. Were that not so, said the EU, then it would be necessary to bring a separate case for each part of the remedy—the original investigation, every Administrative Review, and every Sunset Review. That would make challenging a trade remedy akin to shooting a "moving target."[281] Better put, perhaps, it would mean challenging multiple moving targets. Obviously, the result would be that the country implementing the measure would have a kind of de facto immunity—it would lose a proceeding on zeroing concerning an initial investigation, but go on with impunity to use zeroing in an Administrative or Sunset Review.

The EC, thus, raised an issue that is familiar in many domains of law: when are two or more events properly regarded as a single transaction, versus when are the events rightly viewed as a series of discrete transactions? The issue arises, for instance, in customs law when exporters ship parts of a finished good separately, and customs officials must decide whether to classify the shipments as a single, finished good, or as components.[282] They employ decision rules, embodied in the World Customs Organization (WCO) General Rules of Interpretation (GRI), such as GRI Rule 2(a), which covers incomplete, unfinished, unassembled, or disassembled goods, and GRI Rule 3(b), which contains the "Essential Character Test." Likewise, American courts have developed the "Doctrine of the Entireties." No doubt, tax lawyers have plenty of material from which to draw analogies.

Notably, Islamic legal scholars dealt with this issue centuries ago.[283] They devised religiously acceptable methodologies to avoid the prohibition against interest (*ribā*). Islamic legal scholars use step-by-step transactions and

280. *See* Daniel Pruzin & Amy Tsui, *EU Files Appeal Against WTO Ruling on Key Aspects of U.S. Use of Zeroing*, 25 INT'L TRADE REP. 1612, 1612–13 (Nov. 13, 2008).

281. *Id.* (internal citation omitted).

282. *See* BHALA, *supra* note 108, at 523.

283. *See* RAJ BHALA, UNDERSTANDING ISLAMIC LAW (*SHARĪ'A*) (forthcoming 2010-11) (manuscript on file with author).

sequence them together, with each step complying with *Sharī'a* (Islamic Law) precepts. These devices, or legal fictions, are known as "*hiyal*" (noun, plural), which refers to legal fictions, formalisms, or evasions. The results are two commonly used methods to avoid the payment or receipt of interest: a sleeping partnership (*sharikah al-mudārabah*) and cost-plus pricing (*murābaha*).

Ultimately, the debate is about form versus substance. Should the underlying economic substance of a sequence of events determine its characterization as a single transaction? Or, should form matter—that is, should the fact that the transaction is deliberately structured as discrete events be accorded respect? Islamic legal scholars focus on form in constructing *ḥiyal* devices. Surprisingly enough, the United States took the same approach in the *Continued Zeroing* case. It intoned that the subsequent Administrative and Sunset Reviews were distinct proceedings.[284] Each one should be respected on its own merits and challenged—if at all—separately. After all, for any given importation of subject merchandise, the imposition of an AD duty depends on a particular decision—an original investigation, an Administrative Review, or a Sunset Review. These decisions are not free-standing measures that have a life of their own beyond their particular context—that is, they are isolated determinations.[285] Thus, urged the United States, the links between these proceedings were insufficient to tie them up into a single bundle susceptible to one adjudicatory proceeding. Put simply, then, the Appellate Body had to decide when is a measure continuing, and when does it cease?

In siding with the EC on the issue, the Appellate Body agreed the United States used zeroing repeatedly in a string of determinations. In four of the eighteen cases, the determinations were rendered sequentially through Administrative and Periodic Reviews, over an extended period of time:

> The continued use of the zeroing methodology in a string of determinations can be illustrated by the following example. With respect to one of the [eighteen] cases listed in the panel request—*Ball Bearings and Parts Thereof from Italy* (Case II – Nos. 5–9)—the Panel found that simple zeroing was used in the four periodic reviews (Nos. 5–8) conducted for the four consecutive years between 1 May 2001 and 30 April 2005. The Panel further found that, in the sunset review pertaining to this order (of which the likelihood-of-dumping determination was issued on 5 October 2005), the USDOC [United States

284. *See* Daniel Pruzin, *EU Argues at WTO Hearing Against U.S. Use of Zeroing in Probes, Administrative Reviews*, 25 INT'L TRADE REP. 576, 576 (Apr. 17, 2008).

285. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 51. The American analogy to a "free-standing measure" perhaps undermined its case, at least rhetorically: the United States indeed wanted the Appellate Body to hold that each decision stands on its own, and must be challenged separately.

> Department of Commerce] relied on the margin from the original investigation, which was calculated with the zeroing methodology. The Panel record further indicates that the sunset review (No. 9) resulted in continuation of the original anti-dumping duty order. Thus, the Panel's factual findings show that the USDOC used the zeroing methodology in all of the above periodic reviews. Moreover, the USDOC relied on margins calculated with zeroing in the sunset review that led to the continuation of the anti-dumping duty order. This string of determinations demonstrates the continued use of the zeroing methodology in successive proceedings, whereby duties resulting from the anti-dumping duty order on *Ball Bearings and Parts Thereof from Italy* are maintained. In the following subsection, we discuss whether there are sufficient factual findings and undisputed facts in the record that establish the existence of the measures at issue in respect of each of the [eighteen] cases.[286]

With respect to the last sentence, in 4 of the 18 cases, the Appellate Body said the "density" of the facts meant that the "string of successive proceedings pertaining to the same antidumping order" is a sufficient basis to conclude that the United States would continue to employ zeroing in future proceedings.[287] As to the other fourteen cases, the Appellate Body said it had insufficient facts to make a finding that zeroing would continue or to complete the analysis.

No matter, as the Appellate Body had opened the door to ongoing conduct as a potential new basis for bringing a WTO claim, the Panel erred in not considering the eighteen cases, and the EC had made its point on four of them. The Appellate Body wrote:

> 171. For the Panel, "another flaw" in the European Communities' arguments was that "the remedy sought by the European Communities will affect the determinations that the USDOC might make in anti-dumping proceedings that may be conducted in the future." The Panel reasoned that "Article 6.2 of the DSU, in principle, does not allow a panel to make findings regarding measures that do not exist as of the date of the panel's establishment" unless they "come into existence during the panel proceedings." The Panel appeared to consider that, because the remedy sought by the European Communities was prospective in nature, the "measures" with respect to which such remedy was sought could not be regarded as specifically

286. *Id.* ¶ 184.
287. *Id.* ¶ 191.

identified in the panel request. In our view, the remedy sought by the complainant may provide further confirmation as to the measure that is the subject of the complaint. . . . [W]e are of the view that it can be discerned from the panel request, read as a whole, that the measures at issue consist of an ongoing conduct, that is, the use of the zeroing methodology in successive proceedings in each of the [eighteen] cases whereby anti-dumping duties are maintained. The prospective nature of the remedy sought by the European Communities is congruent with the fact that the measures at issue are alleged to be ongoing, with prospective application and a life potentially stretching into the future. Moreover, it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy program[] with regularly recurring payments.

. . .

181. Thus, the measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations; rather, they are the use of the zeroing methodology in successive proceedings, in each of the [eighteen] cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the [eighteen] cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the [eighteen] measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation. At the oral hearing, the European Communities confirmed that it is not seeking the revocation of the [eighteen] anti-dumping orders but, rather, the cessation of the use of the zeroing methodology by which the duties are calculated and maintained in these [eighteen] cases. In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology

> in these [eighteen] cases, under the scrutiny of WTO dispute settlement.[288]

In a helpful footnote, the Appellate Body explained why it found it logical to consider the original investigations, Administrative Reviews, and Sunset Reviews as a bundle:

> More specifically, the USDOC issues an anti-dumping duty order at the conclusion of an original anti-dumping investigation if the USDOC finds that dumping existed during the period of investigation, and the USITC finds that domestic industry was materially injured, or threatened with material injury, by reason of dumped imports. Generally, this order imposes an estimated anti-dumping duty deposit rate for each exporter individually examined. Subsequently, if a request for a periodic review is made, the USDOC will determine the final amount of anti-dumping duties owed on sales made by the foreign exporter during the previous period. In addition, the USDOC will calculate a going-forward cash deposit rate that will apply to all future entries of the subject merchandise from that exporter. In a sunset review of an order, the authorities determine whether revocation of the anti-dumping duty order would likely lead to continuation or recurrence of dumping and injury. As we understand it, an affirmative sunset review determination, while providing a distinct legal basis for the continued imposition of the relevant anti-dumping duties, *nonetheless derives from the same underlying anti-dumping order under which duties have been imposed over the preceding five years*. In this respect, we further note that, under Article 11.3 of the *Anti-Dumping Agreement*, the termination of the anti-dumping duty at the end of five years is the "rule" and its continuation beyond that period is the "exception."[289]

Whether any of the above-quoted language proves to be a major innovation in WTO dispute settlement, adding to the "as such" and "as applied" categories a third one, "ongoing conduct," remains to be seen. Almost certainly, there will be debate as to the proper test for whether conduct is indeed ongoing, i.e., as to whether to respect form or pierce it and look to substance. In the end, might the test be a case-by-case analysis, with general guidelines, akin to the test for like products?

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288. *See id.* ¶¶ 171, 181.
289. *See id.* ¶ 181 n.213 (emphasis added).

An additional point worth pondering is whether the United States might come to regard itself as grateful for this ruling. Uncomfortable as the ruling is when being in the position of the respondent, surely the United States will find it a handy precedent when it is the complainant. Certain respondents may prove especially vulnerable, namely China. Indeed, the Appellate Body (intentionally or not) hinted as much in Paragraph 171 (quoted above), when it spoke about granting prospective remedies against subsidies.

ii. Guidance on Compliance: Why Not?

The EC asked the Panel to suggest how the United States could implement its ruling.[290] That is, the EC wanted the Panel to offer guidance to the Dispute Settlement Body (DSB) on the question of compliance: How could the United States best cease using zeroing when computing dumping margins in the eighteen AD duty orders the EC had identified in the annex to its request for the establishment of a panel? Evidently, the EC was worried that the United States would not comply with the Panel ruling. Thus, rather than issue the generic customary recommendation to the effect of "bring your law into conformity with GATT-WTO obligations," the EC wanted the DSB to tell the United States precisely what to do. The United States was incensed by the European request, calling it "unreasonable" to make because it presumed there would be a dispute as to compliance.[291]

Candidly, there was nothing unreasonable about it. While compliance disputes occur in only a minority of WTO cases, they have occurred in several high-profile cases, and the United States has been on both sides of these disputes. Specific guidance on compliance, if given, could help to avoid not only the expenditure of time and effort by a losing party, but also bitter acrimony between the winning and losing parties, simply by producing an acceptable change in legal regime with alacrity and without debate. Those benefits were the explicit motivation for the EC request.[292] More generally, a WTO Member genuinely interested in the international rule of law and the enforcement of trade rules—a stated and oft-repeated plank of the trade policy of the Administration of Barack H. Obama, for example—should welcome such guidance.

In any event, the Panel refused the EC request. It pointed to Article 19:1 of the DSU, which says:

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290. *See id.* ¶ 5; Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶¶ 8.4–.7.

291. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 385 (quoting the United States' comments to the European Communities' response to Panel Question 4).

292. *See id.* ¶¶ 391–92.

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, *the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations*.[293]

The Panel pointed out that the second sentence of Article 19:1 clearly gives it the authority to offer concrete practical suggestions for implementation. However, it said it would not do so in this case:

> In our view, it is evident under the *DSU*, particularly Article 19.1 thereof, that Members must implement DSB recommendations and rulings in a WTO-consistent manner. *We cannot presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings*. We therefore reject the EC's request.[294]

As the italicized language indicates, the reason for the Panel's rejection is that it did not want to presume bad faith on the part of the United States. Under the public international law principle of *pact sunt servanda* (agreements must be kept), countries are expected to comply with their treaty obligations. The principle presumes good faith, i.e., that countries will implement their binding obligations, and creates reciprocal expectations among them of adherence to commitments.[295] Only in the event that a preemptory norm (*jus cogens*, or compelling law) is at stake, or there has been a fundamental change in circumstances (*rebus sic stantibus*), might they be relieved of compliance with those obligations. Indubitably, in the *Continued Zeroing* case, neither exception was at stake.

The Panel might have added another reason, which, at best, it intimated in the first sentence. There really is no other way to comply than to stop zeroing. In other words, the options are limited to two, with no middle ground—either an administering agency zeroes, or it does not, in original investigations, Administrative Reviews, and Sunset Reviews. If it does practice zeroing, then the only question is one of detail—does it use Simple or Model Zeroing?

The EC appealed the holding of the Panel, arguing it committed legal error by not providing detailed guidance as to how the United States ought to

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293. Emphasis added.

294. Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 8.7 (emphasis added).

295. *See* Igor I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT'L L. 513, 513 (1989).

comply with the relevant rulings.[296] Yet, the Appellate Body sided against the EC.[297] The Appellate Body explained that the first sentence of DSU Article 19:1 creates a mandatory obligation that a losing party brings its controversial trade measure into conformity with its GATT-WTO obligations. In contrast, the second sentence confers a discretionary right on panels and the Appellate Body to suggest how the losing party might implement recommendations in a report.[298] Declining to give advice logically cannot amount to legal error, because doing so is voluntary (the operative word in the second sentence is "may").

The Appellate Body pointed out that it had just upheld the conclusion of the Panel that the United States violated Article 9:3 of the AD Agreement, and Article VI:2 of GATT with respect to twenty-nine Administrative Reviews, and that it violated these provisions with respect to five additional such Reviews. The Appellate Body also reminded the EC that it had upheld the Panel finding that, in eight Sunset Reviews, the United States violated Article 11:3 of the AD Agreement. Given these findings, the Appellate Body did not think it was "necessary" to offer guidance on the continued application of the zeroing methodology in the eighteen cases the EC identified in its panel request.[299] Accordingly, the Appellate Body declined to exercise its discretion, under the second sentence of Article 19:1, and to offer guidance on compliance to the United States.

Unfortunately, the Appellate Body did not explain why offering guidance was "unnecessary." It seems to say, crassly put, that doing so would be "piling it on" the United States, in light of its holding on the Administrative and Sunset Reviews. It also seems unlikely that the Appellate Body meant to use the word "necessary" in the technical sense of the word, as it is employed, for instance, in the *chapeau* to GATT Article XX. That high bar would constrain panels and the Appellate Body from offering guidance. Instead, the Appellate Body simply may have believed offering guidance would be "unhelpful." The United States knew what it was supposed to do, and some members of Congress might misperceive advice from the Appellate Body as a condescending lecture infringing on American sovereignty.

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296. *See* Appellate Body Report, *United States – Continued Zeroing*, *supra* note 9, ¶ 148.

297. *See id.* ¶¶ 384–94, 395(g), 396.

298. *See id.* ¶¶ 388-89.

299. *See id.* ¶ 394.

iii. Still Too Secret

The Panel hearings were open to public viewing, as was a portion of the meeting of the Panel with third parties.[300] Of course, such viewing was only by live closed-circuit television to a separate room, meaning physical presence in that room in Geneva was required. Further, a third party could suspend the transmission at any moment to maintain confidentiality of its statements.[301]

As for the oral hearing in the Appellate Body proceedings, all of the participants and third parties, except for Brazil, China, Egypt, and India, agreed to public observation. Brazil, China, Egypt, and India argued that oral hearings form part of the Appellate Body proceedings and, therefore, are subject to the requirement of Article 17:10 of the DSU. This provision states: The proceedings of the Appellate Body shall be confidential. The Appellate Division issued a Procedural Ruling, on November 28, 2008, stating that public observation of the oral hearing is permitted for participants and third parties that requested it.[302] The oral hearings thus proceeded as such on December 11–12, 2008:

> Public observation took place via simultaneous closed-circuit television broadcast to a separate room. Pursuant to the additional procedures adopted by the Division, China, Egypt, India, Korea, Mexico, and Thailand each requested that its oral statements and responses to questions remain confidential and not be subject to public observation. Brazil agreed to public observation of its participation in the oral hearing without prejudice to its position on the permissibility of public observation of the oral hearing before the Appellate Body.[303]

Opponents of public observation may well be on solid legal footing to argue against public observation of Appellate Body oral arguments. The language of Article 17:10 is clear.

However, on policy grounds, the opponents are on the wrong side of the issue. The less transparent the WTO appears, the less legitimacy it has. They might do well to re-think their positions and consider whether what really drives those positions is an obsession with secrecy. In addition, the WTO might do well to make oral hearings available worldwide via technologies like web casting. Following the collapse of financial institutions and markets in many countries, triggered by the Lehman Brothers failure in September 2008, there is plenty of public cynicism about domestic and international economic institutions. The

300. *See id.* ¶ 7; Panel Report, *United States – Continued Zeroing*, *supra* note 198, ¶ 1.9.

301. *See* Appellate Body Report, United States – *Continued Zeroing*, *supra* note 9, ¶ 7.

302. *See id.* ¶ 9.

303. *Id.*, ¶ 10 n.10.

WTO and its Members need not add to it. Further, if they believe in public education to help build legal capacity in developing and least developed countries, broadcasting of DSU oral arguments can advance that cause.