

WTO CASE REVIEW 2008[#]

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[#] This *WTO Case Review* is the ninth 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 2007*, 25 ARIZ. J. INT'L & COMP. L. 75-155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299-387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99-249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317-439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

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The WTO reports we discuss are available on the web site of the WTO, at 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 web site (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* (3rd ed. 2008). We endeavor to minimize footnotes and, towards that end, provide citations to indicate sources from which various portions of our discussion are drawn.

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PART I: INTRODUCTION

I. CASE LOAD AND MEMBERSHIP

The Appellate Body had a busy year in 2008. The Members heard eight total appeals, six regular appeals, and two under Article 21.5 of the DSU,¹ compared to only four (two of each type) in 2007.² At this writing (April 2009), the Appellate Body had decided one appeal³ and the DSB had adopted the Appellate Body's report in an additional case.⁴

Over 14 years, 97 notices of appeal to the Appellate Body have been filed, including thirteen during 2008, equaling the highest number filed in any single year in the past (2002).⁵ The appeals data counts filings individually, even when several filings are effectively consolidated for Appellate Body purposes, such as *Canada/US—Continued Suspension* (discussed in this case review) and *China—Auto Parts* (EC, US, Canada)⁶ to be discussed in the 2009 case review. They include both initial appeals and appeals from article 21.5 proceedings. The percentage of panel reports (including Article 21.5 reports) appealed has varied from a high of 100% (1996, 1997) to a low of 50% (2002, 2007); 82% were appealed in 2008.⁷ The thirteen year average is 68%.⁸

This substantial increase in Appellate Body case load in 2008, for the largest number of cases in a single year since 2000, was likely somewhat

1. 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) [hereinafter DSU], available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm. Article 21.5, provides in pertinent part that “[w]hen there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures” Our case reviews do not cover the Article 21.5 determinations by the Appellate Body.

2. See Appellate Body, *Annual Report for 2008*, at 5, WT/AB/11 (Feb. 9, 2009) [hereinafter *Annual Report 2008*]; Appellate Body, *Annual Report for 2007*, at 6, WT/AB/9 (Jan. 30, 2008).

3. Appellate Body Report, *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, (Feb. 4, 2009).

4. 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). This decision will be covered in the *WTO Case Review 2009*.

5. *Annual Report 2008*, Annexes 1, 3. The Annual Report contains, *inter alia*, extensive statistical data on the Appellate Body, biographies of the members, and short summaries of Appellate Body decisions.

6. *Id.* at 6.

7. *Id.* Annex 4.

8. *Id.* There were no appeals filed in 1995 due to the typical period of more than a year between the filing of a request for consultations and the issuance of a panel report.

complicated by the fact that four of the seven members of the Appellate Body had taken office since December 2007. Lillian R. Bautista (Philippines) and Jennifer Hillman (United States) began their four-year terms December 11, 2007. Shotaro Ohsima (Japan) and Yuejiao Zhang (China) began their terms June 1, 2008.⁹ Fortunately for the Appellate Body, the Director of the Appellate Body secretariat, Werner Zdouc, has held that position since 2006.¹⁰ Only one additional personnel change is expected before December 2009; Luiz Olavo Baptista (Brazil), whose term was scheduled to expire in December 2009, resigned as of February 2009 for health reasons.¹¹

II. WELCOME DEVELOPMENTS IN APPELLATE BODY TRANSPARENCY

Having decided for the first time in history to hold open hearings at the request of the EC, Canada, the United States, Australia, New Zealand, Chinese Taipei, and Norway in *Canada/United States – Continued Suspension*, the Appellate Body continued the practice in *United States – Continued Existence and Application of Zeroing Methodology*,¹² and in *EC – Bananas II*.¹³ In the *Canada/United States – Continued Suspension* proceedings, objections to open hearings by four of the third participants (Brazil, China, India, and Mexico) made it appropriate for the Appellate Body and its secretariat to use procedures in which members of the public and officials of WTO Member States that were not participants or third participants were permitted to view the hearings as they took place on a closed-circuit television in a separate room. With those arrangements, it was feasible to turn off the television feed while Brazil, China, India, and Mexico were making their oral presentations before answering questions from the members of the Appellate Body.

One can hope (and reasonably expect) that, at least in the vast number of Appellate Body proceedings that involve only the EU, the United States, and/or Canada, this long-overdue open hearing approach will be followed. Many opponents of the WTO are not likely to be mollified by a higher degree of transparency, but some may be positively affected. When and if the practice becomes routine, it will be interesting to see whether public interest will be

9. WTO, Dispute Settlement - Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Jan. 5, 2009).

10. *See Annual Report 2008, supra* note 2, at 55.

11. *Id.* at 5.

12. Appellate Body Report, *United States – Continued Existence of Zeroing Methodology*, WT/DS350/AB/R (Feb. 4, 2009).

13. Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, (Nov. 26, 2008) (*adopted* Dec. 11, 2008 (Ecuador); Dec. 22, 2008 (United States)).

sufficient to fill the public viewing room other than in the most politically sensitive cases. (See further discussion of public hearings in the review of *Canada/US – Continued Suspension*, Part III(D)(2)(f), *infra*.)

PART II: DISCUSSION OF THE 2008 CASE LAW FROM THE APPELLATE BODY

I. GATT OBLIGATIONS

ARTICLE II – TARIFF BINDINGS

A. Citation

Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R (Oct. 30, 2008) (*adopted* Nov. 17, 2008) (complaint by the United States with Australia, Chile, EC, Japan and Vietnam as third participants).¹⁴

B. Facts and Introduction

What on its face should have been a garden-variety violation of GATT Articles II:2 (imposing customs duties in excess of tariff bindings) and III:2 (imposing taxes discriminating against like foreign products) by India, primarily, but not exclusively, as a result of customs duties and other charges applied on the importation of alcoholic beverages, was made difficult for the United States to prove because of the lack of detailed evidence before the Panel that would either affirm or refute the United States' charges of inconsistency with GATT Article II and fundamental panel errors of interpretation. Unfortunately for the United States, there was no formal determination on the record that could have been the basis of a DSU recommendation that India alter its measures to bring them into compliance with GATT Article II.

Still, the United States prevailed on its principal claims against the Panel's rejection of India's violations of Article II of the GATT, and gained an important substantive finding from the Appellate Body, albeit conditionally, that India acted inconsistently with Article II. The U.S. Trade Representative considered the decision important for all WTO Members because the Appellate Body provided "clear guidance" and "reaffirmed a fundamental WTO rule that

14. Hereinafter Appellate Body Report, *India – Additional Duties*.

Members cannot impose duties on imports that exceed their tariff commitments.”¹⁵

The proceeding concerned a challenge by the United States against two types of border charges assessed and collected by India on imports of alcoholic beverages in addition to ordinary customs duties [OCDs] in order, in India’s view, to “counterbalance various internal taxes and charges.”¹⁶ These “other duties and charges” [ODCs] are of two types, the “Additional Duty” [AD] and the “Extra-Additional Duty” [EAD] as provided under Indian law.¹⁷ The AD applies only to alcoholic beverages and according to India is designed to be equivalent to state level excise taxes; the EAD also applies to milk and other agricultural products and certain industrial products, and is designed to be equivalent to various VAT, sales and other taxes and charges imposed by state or local governments.¹⁸ Neither the AD nor the EAD apply to domestic goods. Both are assessed at the time and point of importation and paid by the importers of the subject goods.¹⁹

The United States asserted that the AD and EAD were inconsistent with GATT Articles II:1(a) and II:1(b) because those charges are in excess of the bound tariff rates specified in India’s Schedule of Concessions.²⁰ India countered that the AD and EAD were charges “equivalent to internal taxes” imposed on domestic goods by Indian states not in excess of those taxes, and thus were imposed consistently with Articles III:2 and II:2(a).²¹

The Panel determined that the United States had failed to demonstrate that the AD and EAD were either OCDs or EADs, and on that basis found that the United States had not shown that such charges did not fall within the exception of Article II:2(a), and thus had failed to establish that they were violations of GATT Articles II:1(a) and II:1(b).²² Consequently, the Panel made no recommendations. During the proceedings, India had made changes to its AD and EAD regimes,

15. Press Release, U.S. Trade Representative, WTO Appellate Body Reverses Panel and Finds in Favor of the United States: Offsetting Duties on Imports in Excess of Taxes on Like Domestic Products Break WTO Rules, at 1 (Oct. 30, 2008), *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2008/October/asset_upload_file185_15196.pdf.

16. Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, ¶ 2.3, WT/DS360/R (Jun. 9, 2008) [hereinafter Panel Report, *India – Additional Duties*].

17. Appellate Body Report, *India – Additional Duties*, ¶¶ 1-3.

18. *Id.* ¶¶ 123, 131.

19. *Id.* ¶ 207.

20. *Id.* ¶¶ 3, 115.

21. *Id.* ¶¶ 4, 115-16. India is divided administratively into 28 states and 7 union territories. CIA - The World Factbook - India, *available at* <https://www.cia.gov/library/publications/the-world-factbook/print/in.html> (last visited Jan. 2, 2009).

22. Panel Report, *India – Additional Duties*, ¶¶ 8.1, 8.2.

exempting certain products from the AD or providing for a refund of the EAD.²³ The Panel generally ignored these changes in its analysis, limiting its findings to the AD and EAD as imposed at the time of the complaint, and neither party appealed this approach by the Panel. However, in its report, the Panel noted that its rejection of the United States' claims did not "necessarily imply that it would be consistent with India's WTO obligations for India to withdraw the relevant new customs notifications or otherwise re-establish the *status quo ante*"²⁴ India objected to this statement, but the objection was rejected by the Appellate Body,²⁵ as discussed briefly, *infra*.

Underlying the U.S. challenge of meeting its burden of proof were details regarding the "equivalent" state taxes and other charges purportedly levied on alcoholic beverages of local manufacture, which the United States was apparently unable to adduce, and which India refused to provide to the Panel. The OCDs and ODCs imposed by India on imported distilled spirits in the aggregate are often well over 300% of the CIF price (cost, insurance, and freight) of the merchandise. The basic customs duty on distilled spirits is 150% *ad valorem*; the additional duty is from 25% to 150% of the CIF price (depending on the CIF price of the distilled spirits) *plus* the OCD; and the extra-additional duty is 4% of the CIF price *plus* the OCD *plus* the EAD.²⁶ The AD according to India results from an averaging process, "whereby the Central Government tried to ensure that to the extent possible, the rate was a reasonable representation of the net fiscal burden imposed on like domestic products."²⁷

The underlying need for such an approach results in significant part from the fact that, under the Indian Constitution, individual states, rather than the central government, may impose excise taxes on alcoholic beverages produced within the state, and impose a "countervailing duty" on such beverages produced elsewhere in India.²⁸ Even for India, it would likely have been difficult to pinpoint the differing excise tax and other state and local charges imposed at differing rates by 28 Indian states, although India claimed that the rate at which it set the AD was a "reasonable approximation" of the differing state rates, meaning that it must have possessed some data that would have assisted the Panel with its analysis.

In any event, the allocation of burden of proof between the United States and India, first by the Panel and then by the Appellate Body, was ultimately dispositive of the proceeding. Had the Appellate Body decided that the United States had made its *prima facie* case of violations, and India failed to rebut that

23. Appellate Body Report, *India – Additional Duties*, ¶¶ 130, 136 (customs notifications 82/2007 and 102/227).

24. Panel Report, *India – Additional Duties*, ¶ 8.2.

25. Appellate Body Report, *India – Additional Duties*, ¶ 231(g).

26. *Id.* ¶¶ 119-34.

27. Panel Report, *India – Additional Duties*, ¶ 7.269.

28. Appellate Body Report, *India – Additional Duties*, ¶ 124.

case, the United States presumably would have prevailed on the merits and obtained the DSB recommendation that it sought.

In bringing the action, the United States evidenced its concern over extremely high import charges assessed by India. For example, if a case of Kentucky Bourbon whiskey valued at \$100 CIF is imported into India, the OCD would be \$150; the AD would be \$63.50 (25% of \$250), and the EAD would be \$12.54 (4% of 313.50), for total taxes and charges upon importation of \$326.04, or 326% of the CIF price! According to the U.S. Trade Representative, combined duties on imports of alcoholic beverages could reach 550% under the Indian system,²⁹ compared to a bound Indian rate of 150%. In recent years, the United States has been the world's sixth largest exporter of wine and the third largest of distilled spirits, although imports to India were low, presumably because of its extremely high tariffs and other border charges and taxes.³⁰

C. Major Issues on Appeal

The substantive issues before the Appellate Body all relate to the proper application and interpretation of GATT Articles II:1(b), II:2(a), and III:2 to the AD and EAD in terms of whether the Indian programs "inherently discriminate against imports," are "equivalent" to the local taxes for which they are a surrogate under Article II, and have been imposed consistently with the requirements of Article III:2. In the report, this analysis is bifurcated, with the Appellate Body analyzing the Panel's approach, then shifting to burden of proof issues, then effectively completing the analysis and opining, albeit conditionally, on the consistency of the AD and EAD with GATT Article II.

The overriding procedural issue is whether the onus was on the United States to demonstrate that the Indian AD and EAD were not justified under Article II:2(a), that is, that exception did not apply, or whether the United States, having made a *prima facie* case for violations of Article II, shifted the burden of proof onto India to adduce evidence demonstrating that the exception was applicable. Further, because India was not required by the Panel to provide the essential data, did the Panel fail to carry out an objective assessment of the matter, as required by Article 11 of the DSU?

Finally, the Panel took the unusual step of gently suggesting to India that, notwithstanding its victory before the Panel, India might want to keep in force the July 2007 and September 2007 administrative actions that appeared to have the effect of mitigating the discriminatory nature of the AD and EADs.

29. U.S. Trade Representative, *supra* note 15, at 1.

30. *Id.* at 3.

D. Holdings and Rationale

1. Errors in the Panel's Approach to GATT Articles II:1(b) and II:2(a)

The United States argued on appeal that the Panel erred when it found that Article II:1(b) covered only duties and charges that “inherently discriminate against imports” and that Article II:2 covers only those charges that are non-discriminatory. The United States also objected to the Panel’s definitions of the term “equivalent” and its refusal to read Article II:2(a) as requiring consistency with Article III:2.³¹ Perhaps most critically, the United States objected to the Panel’s conclusion that the United States’ *prima facie* case included a showing that the measures under challenge do not fall under the Article II:2(a) “equivalent” exception.³² India supported the Panel in all these respects.³³

GATT Article II: 1(b) provides as follows:

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 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.

As the Appellate Body explained, the principal obligation of the first sentence of this article is to “refrain from imposing OCDs on imported products in excess of those provided for in that Member’s Schedule.”³⁴ The second sentence requires that products be exempt from “all other duties or charges of any kind” imposed on imports that exceed the (maximum) levels of import duties which may be imposed as of the date of entry into force of GATT 1994 (January 1, 1995), as “bound” in the Member’s WTO Schedule of Concessions.³⁵

31. Appellate Body Report, *India – Additional Duties*, ¶ 147 & nn.294-96 (citing United States’ Appellant’s Submission, ¶¶ 13-38, 43-74 (Aug. 8, 2008)).

32. *Id.* ¶ 147 & n.297 (citing United States’ Appellant’s Submission, ¶¶ 39-42, 75-81).

33. *Id.* ¶ 148 & nn.298-99 (citing India’s Appellee’s Submission, ¶¶ 10-14, 22-23, 37, 49-50, 58, 62 (Aug. 26, 2008)).

34. Appellate Body Report, *India – Additional Duties*, ¶ 150.

35. *Id.* ¶ 151.

Article II:2 provides in pertinent part:

Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge *equivalent to an internal tax* imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part³⁶

Article II (in its entirety, thus clarifying the inter-relationship between Article II:2 and Article II:1(b)), according to the Appellate Body, makes it clear that the Member's tariff binding is the upper limit for OCDs and ODCs that may be imposed.³⁷

The Appellate Body, unlike the Panel, did not accept that OCDs and ODCs are necessarily "of the same kind"; they may differ. Nor must duties and charges "inherently discriminate against imports"; they may be applied for a variety of purposes unrelated to domestic production, including the raising of revenue.³⁸ The Appellate Body simply does not accept the Panel's pejorative language concerning duties and charges:

Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue. Indeed, under the GATT 1994, they are the preferred trade policy instrument, whereas quantitative restrictions are in principle prohibited. Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) as long as they do not exceed the Member's bound rates.³⁹

Under the circumstances, the Panel erred in concluding that Article II:1(b) applies only to duties and charges that are "inherently discriminatory against imports" and that Article II:2(a) applies only to charges that do not inherently discriminate.⁴⁰

36. *Id.* ¶ 152 (quoting General Agreement on Tariffs and Trade 1994, art. II:2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 1153 (1994)) (emphasis added).

37. *Id.* ¶ 153.

38. *Id.* ¶¶ 157-58.

39. *Id.* ¶ 159.

40. *Id.* ¶ 164.

With regard to interpreting Article II:2(a) and its exception for charges “equivalent” to internal taxes “consistent” with the GATT Article III:2, the Appellate Body refers first to the pertinent portion of Article III: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 applied, directly or indirectly, to like domestic products.

Most significantly for the Appellate Body, the terms “equivalent” and “consistency” cannot be interpreted in isolation from each other, but must, unlike the Panel’s approach, be interpreted “harmoniously.”⁴¹ The Appellate Body also indicated that “the term ‘equivalent’ calls for a comparative assessment that is both qualitative and quantitative in nature.” Otherwise, a border tax significantly greater in amount could be regarded as equivalent, a result that is incompatible with Article II:2(a).⁴² The Panel’s efforts to exclude the concept of “value” from this comparison were overly narrow and thus erroneous.

Further, the Panel also erred in concluding that a border charge equivalent to an internal tax but imposed inconsistently with Article III:2 would still be justified under Article II:2(a); for the Panel consistency with Article III:2 is not a “necessary condition” for application of the exception in Article II:2(a).⁴³ Not so said the Appellate Body:

[W]e believe that the requirements of “consistency with Article III:2” must be read together with, and imparts meaning to, the requirement that a charge and internal tax be “equivalent.” . . . We therefore consider that whether a charge is imposed “in excess of” a corresponding internal tax is an integral part of the analysis in determining whether the charge is justified under Article II:2(a).⁴⁴

Under this rationale, the Appellate Body noted that the complaining party does not have to “file an independent claim of violation of Article III:2 if it wishes to challenge the consistency of a border charge with Article III:2.”⁴⁵ The Panel thus erred in holding that the United States failed to demonstrate that the AD and EAD are inconsistent with Articles II:1(a) and II:2(b).⁴⁶

41. *Id.* ¶ 170.

42. *Id.* ¶¶ 171, 175.

43. *Id.* ¶ 176.

44. *Id.* ¶ 180.

45. *Id.*

46. *Id.* ¶ 182.

2. Burden of Proof

a. Generally

As noted in the Introduction, burden of proof issues are decisive in this case, since the relevant data that would show that India's AD and EAD are "equivalent" to the state internal taxes, or are not equivalent, under Article II:2(a), is not before the Panel or the Appellate Body. Thus, the party responsible for providing the key evidence may ultimately lose the case on the merits.

The Panel, over the objection of the United States, had found that the United States' obligation to present a *prima facie* case extended to demonstrating that the Indian measures "fall outside the scope of Article II:2(a)."⁴⁷ The United States asserted that the exception is not an affirmative defense where the responding party (India) would bear the ultimate burden of proof. However, despite the fact that the complaining party (United States) bears the burden of proof of demonstrating that the measures fall outside the scope of and thus cannot be justified under Article II:2(a), the responding party (India) must still "substantiat[e] its own assertions."⁴⁸ In other words, if India asserts that the AD and EAD are "equivalent" to the state level internal taxes, it must adduce evidence to that end.

The Appellate Body's approach reflects the difficulty of applying general burden of proof rules to complex situations under a body of agreements which set forth rules, then exceptions to the rules, and in many cases exceptions to the exceptions.⁴⁹ Referring to its report in *US – Wool Shirts and Blouses*, the Appellate Body reiterates that "generally accepted legal principles" provide "that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." When the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing."⁵⁰

47. Panel Report, *India – Additional Duties*, ¶ 7.160.

48. Appellate Body Report, *India – Additional Duties*, ¶ 24 & nn.63-64 (citing United States' Appellant's Submission, ¶¶ 78, 80).

49. See, e.g., Agreement on Safeguards, art. 8(1) (providing a general right of trade concessions when a Member applies safeguard measures), art. 8(3) (providing an exception for the first three years unless the safeguard measures either are not taken based on an absolute increase in imports or do not conform fully to the Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994), available at http://www.wto.org/english/docs_e/legal_e/25-safeg_e.htm.

50. Appellate Body Report, *India – Additional Duties*, ¶ 185 (quoting Appellate Body Report, *United States – Wool Shirts and Blouses*, WT/DS33/AB/R, at 14 (Apr. 25, 1997) (*adopted* May 23, 1997) [hereinafter Appellate Body Report, *U.S. – Wool Shirts and Blouses*]).

More pertinent to this proceeding, the Appellate Body also reiterated its earlier rule that “[t]he party asserting that another party’s municipal law, as such is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.”⁵¹ It also affirms that the “nature and scope of arguments and evidence required to establish a *prima facie* case ‘will necessarily vary from measure to measure, provision to provision, and case to case.’”⁵² Even so, the principle does not resolve the issue of “who bears the burden of proving each specific fact alleged in a dispute.” For example, in *Japan – Apples*, the Appellate Body found that “although the complainant must establish the *prima facie* case in support of its complaint, the respondent bears the burden of proving the facts that it asserts in its defence.”⁵³

How do these principles apply to the instant case? According to the Appellate Body, the United States first tried to establish that the AD and EAD were inconsistent with GATT Article II:1(b) as either OCDs or ODCs in excess of India’s Schedule of Concessions. The United States had asserted that it needed only to show that the AD and EAD were duties and charges under Article II:1(b) and exceeded India’s bound rates. At that point, according to the United States, it was up to India to show that the charges were within the scope of the Article II:2 exception, as part of India’s obligation to refute the United States’ *prima facie* case.⁵⁴

Not so. Here, reiterating the need for a case by case approach, “the potential for application of Article II:2(a) is clear from the face of the challenged measures” and Articles II:1(b) (the prohibition) and II:2(a) (the exception) are interrelated, as the Appellate Body decided, *supra*. Consequently, “in order to establish a *prima facie* case of a violation of Article II:1(b), the United States was also required to present arguments and evidence that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a).”⁵⁵

The entire burden is not with the United States, but most of it is. According to the Appellate Body, when India asserted that the charges were justified under Article II:2(a), India “was required to adduce arguments in support of that assertion.” Once the responding party has made its rebuttal, “the complaining party, depending on the nature and content of the rebuttal submission, may need to present additional arguments.” The United States did so

51. Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 157, WT/DS213/AB/R (Nov. 28, 2002) (adopted Dec. 19, 2002).

52. Appellate Body Report, *India – Additional Duties*, ¶ 186 (quoting Appellate Body Report, *U.S. – Wool Shirts and Blouses*, at 14).

53. *Id.* ¶ 187 (citing Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, ¶ 157, WT/DS245/AB/R (Nov. 26, 2003) (adopted Dec. 10, 2003)).

54. Appellate Body Report, *India – Additional Duties*, ¶ 188 & n.365 (citing United States’ Appellant’s Submission, para. 76).

55. Appellate Body Report, *India – Additional Duties* ¶ 190.

here; “[a]t that point, it was for the Panel to decide the issues before it based on the arguments and evidence of the parties.”⁵⁶

How far does the complaining party’s obligation go? According to the Appellate Body, when a violation of Article II:1(b) is alleged, the complaining party is not required to “disprove in all cases that the challenged charge is justified under Article II:2, much less some other hypothetical category of charges.” Still, if “there is a reasonable basis to understand that the challenged measure may not result in a violation of Article II:1(b) because it satisfies the requirements of Article II:2(a), then the complaining party bears *some* burden in establishing that the conditions of Article II:2(a) are *not* met.”⁵⁷ Perhaps the key to the Appellate Body’s views is in the following sentence: “We do not find *unduly burdensome* the complaining party’s responsibility to establish a *prima facie* showing by adducing evidence and arguments also with respect to Article II:2(a).”⁵⁸ However, there is no discussion of the relative burdens for the complainant seeking to adduce the details of the respondent’s state laws and taxing practices, and the respondent state adducing its own state’s practices, which it presumably has already done for its “reasonable approximation” of the AD and EAD tax rates.

Having left the burden issue more than a little uncertain, the Appellate Body reiterates the requirement of the DSU that the parties cooperate with panels in dispute settlement proceedings.⁵⁹ Here, “where the challenged measures refer to certain internal taxes but do not specifically indicate how the border charges and the corresponding internal taxes are equivalent, it was particularly important that both parties respond fully and promptly to requests from the Panel concerning its enquiry whether or not the Additional Duty and Extra-Additional Duty are justified under Article II:2(a).”⁶⁰ However, India failed to respond to the Panel’s request,⁶¹ a fact to which the Appellate Body pays scant attention.

b. Burden of Proof and DSU Article 11

For the United States, the Panel’s failure to demand that India “identify the state-level excise duties to which the Additional Duty on alcoholic beverages is allegedly equivalent” put the United States under “an impossible burden.” The United States alleged that this misplaced action of the Panel forced the United States to “guess which state-level excise duties that India’s Additional Duty purports to offset or counterbalance, and then to provide that such duties do not

56. *Id.* ¶ 191.

57. *Id.* ¶ 192 (emphasis added).

58. *Id.* ¶ 193 (emphasis added).

59. DSU, *supra* note 1, art. 13.1 (providing that “[a] Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate”).

60. Appellate Body Report, *India – Additional Duties*, ¶ 194.

61. *Id.* ¶ 197.

exist or do not operate such that the Additional Duty offsets or counterbalances them.”⁶² The United States raised similar objections with regard to the Extra-Additional Duty.⁶³ These actions by the Panel, according to the United States, amounted to a failure by the Panel to carry out an objective assessment of the evidence as required by DSU Article 11.

Perhaps because, despite these objections, the Appellate Body did not believe that placing the onus on the United States was “unduly burdensome,” it simply noted again that “panels enjoy a certain margin of discretion in assessing the credibility and weight to be ascribed to a given piece of evidence.”⁶⁴ Since the Appellate Body had earlier reversed the findings of the Panel that the AD and EAD had not been proven to be inconsistent with Articles II:1(a) and II:2(b) of GATT, it declined to rule on the U.S. claim under DSU, Article 11, leaving for the future a determination whether the failure of the parties to adduce necessary evidence may put a panel in the position of failing to meet the requirements of Article 11.

3. Determining GATT Article II Violations (Conditionally)

While the Appellate Body never explicitly stated that it would complete the analysis, it effectively did so within the limits of the evidence before it, after noting that under prior jurisprudence, it may complete the analysis “only if the factual findings by the panel and the undisputed facts in the panel record provide a sufficient basis for the Appellate Body to do so.”⁶⁵ Further, the Appellate Body indicated that it permits itself to “complete the analysis only if the provision that a panel has not examined is ‘closely related’ to a provision that a panel has examined, and that the two are ‘part of a logical continuum.’”⁶⁶

The Appellate Body noted at the outset certain simplifying factors. Neither India nor the United States argued that the AD or EAD are “internal taxes” under GATT Article III:2, nor that the imported and domestic alcoholic beverages were not “like products.” India did not contest the United States’ assertion that the AD and EAD, in addition to the basic customs duty, may in the aggregate exceed the rates specified in India’s schedule of concessions. Rather, India argued that the state excise taxes, and the state VAT or sales taxes, central

62. *Id.* ¶ 197 (quoting United States’ Appellant’s Submission, para. 86).

63. *Id.* ¶ 198.

64. *Id.* ¶¶ 201, (citing Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 132, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998)).

65. *Id.* ¶ 204 & n.382 (collecting similar authorities).

66. *Id.* ¶ 204 & n.385 (quoting Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* 24, WT/DS31/AB/R (Jun. 30, 1997) (adopted Jul. 30, 1997)). According to the Appellate Body in the instant case, the second issue did not arise. *Id.* ¶ 204 n.385.

sales taxes, and other state or local taxes are “equivalent” to the AD and EAD, respectively.⁶⁷ Thus, according to the Appellate Body, its task was to consider two relationships, that between the AD and state level excise taxes on alcoholic beverages, and that between the EAD and various state level taxes and charges.⁶⁸

For the Appellate Body, the crucial factor in the analysis is that while the AD and EAD, as explained earlier, are flat-rate taxes assessed at the time and place of importation, the state level taxes are not, depending on the particular tax and the state or local jurisdiction that is assessing it. Under such circumstances, India faced an uphill battle in demonstrating “equivalency” between the AD and EAD, and the state and local assessments.

a. The Additional Tax (AD)

Despite the fact that under Indian law the AD was to be “equal” to the state excise taxes, the equality was not absolute. The Central Government was given the discretion to specify the rate of AD applicable to imported alcoholic beverages “having regard” to the excise taxes levied by various states.⁶⁹ The Central Government also has the discretion, while considering the varying tax rates of the states, to adopt or not to adopt one single tax rate for the AD.⁷⁰

Given the Appellate Body’s earlier conclusion that, contrary to the Panel’s conclusion, the comparison for equivalency *does* require a quantitative comparison, the Panel’s finding that there was a difference in amounts between the AD and the state level excise taxes is highly relevant, even though the Panel had no specific information on the duties actually levied or on their form and structure. Nor was there evidence indicating that excise taxes were actually imposed by the states on alcoholic beverages.⁷¹ Also, India had indicated to the Panel that the AD rates resulted from a “process of averaging, whereby the Central Government tried to ensure that, to the extent possible, the rate was a reasonable representation of the net fiscal burden imposed on like domestic products on account of the excise duty payable on alcoholic liquor.”⁷² India had further argued that while the excise tax rates in some states could be lower than the AD, they might be less in other states. The Panel had conceded that this meant that the AD rate exceeded the excise rate in some states and some price bands.⁷³

Under these facts, the Appellate Body concluded that the Additional Duty “would not be justified under Article II:2(a) of the GATT 1994

67. *Id.* ¶ 205.

68. *Id.* ¶ 206.

69. *Id.* ¶ 209.

70. *Id.* ¶ 210.

71. *Id.* ¶¶ 211-12.

72. Panel Report, *India – Additional Duties*, ¶ 7.269.

73. *Id.* ¶ 7.274.

[equivalency] insofar as it results in the imposition of charges on imports of alcoholic beverages in excess of the excise duties applied on like domestic products.” Thus, the AD would be inconsistent with Article II:1(b) (duties in excess of bound rates) “to the extent it results in the imposition of duties on alcoholic beverages in excess of those set forth in India’s Schedule of Concessions.”⁷⁴

b. The Extra-Additional Tax (EAD)

A similar analysis was applied by the Appellate Body to the EAD which, as noted earlier, was designed to “counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India.”⁷⁵ The Appellate Body observed that the Panel had no evidence before it as to whether states had imposed local charges on goods subject to the EAD (i.e., the goods had been subject to both the EAD and local taxes).⁷⁶ The Panel also found that goods subject to the EAD could also be subject to the local taxes and charges when the goods were resold or used in the manufacture of another product, just like other domestic products, without any opportunity for a refund at the time the action was brought.⁷⁷ Consequently, the Appellate Body concluded that, to the extent both the EAD and local taxes were being imposed without a credit, those goods would be “subject to duties ‘in excess’ of the internal taxes on like domestic products.”⁷⁸

India had sought to justify the 4% EAD tax rate on the grounds that it had been “‘calibrated’ to ensure equivalence between the Extra-Additional Duty and the various state VAT and sales taxes, Central Sales Tax, and other local taxes or charges.”⁷⁹ Again, the Panel found that “there could conceivably be circumstances” where the EAD was leveled at a higher rate than the rate resulting from the imposition of the internal taxes.⁸⁰ Under such circumstances, according to the Appellate Body, “the Extra-Additional Duty would not be justified under Article II:2(a) of the GATT 1994 insofar as it results in the imposition of charges on imports in excess of the sales taxes, value-added taxes, and other local taxes and charges that India alleges are equivalent to the Extra-Additional Duty.” Accordingly, the EAD is inconsistent with Article II:1(b) “to the extent it results in the imposition of duties in excess of those set forth in India’s Schedule of Concessions.”⁸¹

74. Appellate Body Report, *India – Additional Duties*, ¶ 214.

75. *Id.* ¶ 215 (quoting Customs Tariff Act § 3(5) (India)).

76. *Id.* ¶ 217 (citing Panel Report, *India – Additional Duties* ¶ 7.389).

77. Panel Report, *India – Additional Duties*, ¶¶ 7.366-7.367.

78. Appellate Body Report, *India – Additional Duties*, ¶ 218.

79. *Id.* ¶ 219 (citing Panel Report, *India – Additional Duties*, ¶ 7.359).

80. Panel Report, *India – Additional Duties*, ¶ 7.369.

81. Appellate Body Report, *India – Additional Duties*, ¶ 221.

4. When is a Recommendation not a Recommendation: The Panel's "Concluding Remarks"

As noted earlier, despite the absence of any Panel recommendations to India, the Panel included in its report certain "concluding remarks" to which India objected:

In the light of these conclusions, the Panel makes no recommendations under Article 19.1 of the DSU. However, we find it appropriate, in the particular circumstances of this case, to offer some concluding remarks. To recall, after the establishment of this Panel, India issued new customs notifications making certain changes to the AD on alcoholic liquor and the SUAD, "to address concerns raised by [India's] trading partners." It is therefore appropriate to note that the Panel's disposition of the US claims under Article II:1(a) and (b) does not necessarily imply that it would be consistent with India's WTO obligations for India to withdraw the relevant new customs notifications or otherwise re-establish the *status quo ante*, i.e., the situation as it existed on the date of establishment of the Panel. By the same token, in making this point, we do not wish to suggest that the entry into force of the new customs notifications necessarily implies that the AD on alcoholic liquor, to the extent it still exists, and the SUAD are WTO-consistent.⁸²

Despite the Panel's careful (if tortured) language, it seems evident that the Panel wished to direct more attention to the post-filing (July and September 2007) administrative actions that substantially reduced or eliminated the discrimination against imports of alcoholic beverages but by agreement of both parties were not analyzed by the Panel.

India asserted on appeal that these concluding remarks could not be recommendations since the Panel did not find India's measures to be inconsistent with their WTO obligations; thus, they were inappropriate policy suggestions and should be removed from the Panel Report. India also reiterated that, in its view, it was justified in continuing to impose such duties on imports. Consequently, the concluding remarks could "add to or diminish such rights and obligations and consequently contravene the provisions of Article 19.2 of the DSU."⁸³ The United States predictably disagreed, asserting (with the concurrence of the EC)

82. Panel Report, *India – Additional Duties*, ¶ 8.2.

83. Appellate Body Report, *India – Additional Duties*, ¶ 224 & nn.434-37 (citing India's Other Appellant's Submission, ¶¶ 21, 22, 30 (Aug. 18, 2008)). Also referred to by India, DSU art. 3.2 contains similar language; art. 11 requires a panel, *inter alia*, to "make an objective assessment of the matter before it."

that the concluding remarks were clarifications rather than suggestions under DSU, Article 19.1 and are not prohibited by any provision of the DSU.⁸⁴

Article 19.1 of the DSU provides:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned⁸⁵ 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.⁸⁶

The Appellate Body rejected the idea that the Panel's concluding remarks were somehow a legal finding or recommendation under Article 19.1, noting that the Panel had made it clear that it was making no finding of breach or recommendations, and recognized that the subject was outside its terms of reference. Under these circumstances, the concluding remarks were simply "explanations of the Panel's conclusions, which are permissible, but not findings in and of themselves."⁸⁷ Thus, the Panel in this respect acted consistently with Articles 3.2, 11 and 19.1 of the DSU.

E. Commentary

1. Burden of Proof

Arguably, the Appellate Body has further confused the law as to the scope of the complainant's *prima facie* case responsibilities in a situation, as with GATT Article II, where the extent of an exception to the GATT prohibition (duties and other charges above a Member's bound rates) is at issue. In deciding that the complainant's burden extends to demonstrating that the exception does *not* apply, the Appellate Body gives little weight to practical considerations as to which party most likely has access to the key factual data. In this instance, it would have been entirely reasonable for the Panel to have asked India to demonstrate the basis of its "reasonable approximation" in the AD of the state excise taxes, and the "calibration" of the EAD so as to be equivalent to other charges on domestic alcoholic beverages that it was designed to offset. India

84. Appellate Body Report, *India – Additional Duties*, ¶ 225.

85. DSU, *supra* note 1, art. 19.1. The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed. *Id.* art. 19.1 n.9.

86. *Id.* art. 19.1 & n.10. With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, *see* DSU art. 26 (applicable to "non-violation" complaints).

87. Appellate Body Report, *India – Additional Duties*, ¶ 230.

either had some data to substantiate and support its methodology, or had made up the AD and EAD percentages out of whole cloth. India failed to respond to the Panel's request, but was not directly penalized for doing so either by the Panel or the Appellate Body.⁸⁸

When is putting the onus on the complainant "unduly burdensome?" Is it more difficult for a complainant to adduce foreign nation-states' taxing practices than a central government and province's subsidies practices? Is it relevant that one of the two parties may have much easier access to (its own) data than the other? Finally, how should the Appellate Body avoid rewarding stonewalling without distorting normal principles regarding burden of proof? These issues will arise again in future DSB proceedings.

The above paragraphs represent what the Appellate Body said it did with burden of proof. However, when one reads the Appellate Body's conditional determination of violations, it becomes clear that, at this stage of the proceedings, India's failure to provide data may have been harmful to its interests. Had the data been made available in good faith to the Panel, and to the Appellate Body when it was completing the analysis, it is possible (although perhaps not likely) that India might have shown the "reasonable approximation" or "calibration" processes followed by the Central Government that would have produced AD and EAD tax levels that did not exceed the excise taxes (in the case of the AD) or double tax, or otherwise exceed domestic tax levels on imported products (in the case of the EAD).

2. Completing the Analysis (Conditionally)

Because of the lack of detailed data before the Panel and the Appellate Body, the Appellate Body could not formally complete the analysis *and* issue a recommendation that India cure its breaches of GATT Article II. However, the Appellate Body did the next best thing, by effectively completing the analysis when it determined conditionally that India had acted inconsistently with Article II, as charged by the United States, and in doing so firmly supporting the principle that the United States sought to establish, e.g., that Article II limits customs duties and related charges to the levels set out in the party's schedule of concessions.

Moreover, as further evidence of the United States' success, India, under the pressure created by the United States' complaint, significantly modified both

88. *Contra* Panel Report, *Turkey – Measures Affecting the Importation of Rice*, ¶¶ 8.1-8.4, WT/DS334/R (Sept. 21, 2007) (adopted Oct. 22, 2007) (where Turkey's failure to provide detailed information on its rice importation practices led to a recommendation in favor of the United States as complainant). See also David A. Gantz & Simon A.B. Schropp, *(R)ice Age: Comments on the Panel Report in Turkey – Measures Affecting the Importation of Rice*, 8 *WORLD TRADE REV.* (forthcoming 2009) (discussing the Panel's approach to the burden of proof and responsibilities for providing evidence to the Panel).

the AD and EAD in July and September 2007, respectively, as discussed earlier. Nor will India likely risk another DSU filing by rolling back those modifications, although the U.S. Trade Representative has raised concerns as to whether the modifications would bring India into compliance with its WTO obligations.⁸⁹

3. “Equivalency” and “in Excess of” are Precise Terms

As one might have expected given the Appellate Body’s general tendencies to interpret exceptions to GATT rules narrowly, the Appellate Body showed little sympathy for India’s professed efforts to approximate the equivalence of the AD and EAD with the state excise taxes and the other state taxes and charges that the AD and EAD were supposedly designed to counter-act. The Appellate Body showed no willingness to accept that “[i]n excess of” is anything other than a quantitative measurement, or to permit approximations in lieu of solid evidence that the equivalency requirements of Article II:2(a) had been met. A Member’s schedule of concessions is a firm cap on the duties that may be charged. In the absence of a showing of equivalence, such other duties and charges are illegal to the extent they exceed the Member’s bound rates for the merchandise being imported.

II. TRADE REMEDIES

A. Antidumping and Zeroing

1. Citation

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).⁹⁰

89. U.S. Trade Representative, *supra* note 15, at 1.

90. Referred to in this review as Appellate Body Report, *Stainless Steel*. Chile, China, the European Communities (EC), Japan, and Thailand participated as third parties at the Panel and Appellate Body stages. *Id.* ¶ 4.

2. Facts and Panel Holdings⁹¹

Between June 1999 and December 2005, the United States Department of Commerce (DOC) rendered a series of final affirmative antidumping (AD) determinations, conducted Administrative (i.e., Periodic) Reviews, and issued attendant orders for the imposition and collection of final AD duties on imports from Mexico of stainless steel sheet and strip coils.⁹² In the original

91 This discussion is drawn from: World Trade Organization, *Update of WTO Dispute Settlement Cases 72-74*, WT/DS/OV/33 (Jun. 3, 2008); Appellate Body Report, *Stainless Steel*; Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 1.1-3.2, WT/DS344/R (Dec. 20, 2007) (*adopted* May 20, 2008).

92 For an explanation and analysis of AD law, see RAJ BHALA, *MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE* chs. 25-29 (2005). Paragraphs 71-75 of the Appellate Body Report, *Stainless Steel* provide a helpful summary of the American system for the imposition and collection of AD duties, including the following important detailed points:

- During the preliminary dumping margin determination stage and assuming a preliminary affirmative injury determination by the International Trade Commission (ITC), the DOC:

- (1) Calculates “an overall weighted average dumping margin for each foreign producer-exporter [respondent] investigated.”
- (2) “[I]mposes an ‘estimated AD duty deposit rate’ (also called the ‘cash deposit rate’) equivalent to the overall weighted average dumping margin for each [respondent] individually investigated.” This rate is based on data from transactions during the period covered by the original investigation.
- (3) Calculates an “all-others” rate applicable to respondents not individually examined (which may not exceed the weighted average dumping margin established with respect to the respondents selected for investigation). This rate is based on data from transactions during the period covered by the original investigation.
- (4) Publishes a Notice of Antidumping Duty Order stating the estimated AD duty deposit rate and the “all-others” rate.

Appellate Body Report, *Stainless Steel*, ¶ 72. Up through February 22, 2007, the DOC used Model Zeroing in original investigations in connection with points (1) and (3). *Id.* ¶ 73.

- Following a final affirmative dumping margin determination stage by the DOC, and assuming a final affirmative injury determination by the ITC:

- (1) Retrospective assessment of AD duties occurs, meaning that final liability for payment of the duties is determined after the importation of subject merchandise, through an assessment review—the

Administrative Review—that covers a discrete period of time (typically, one year) after the subject merchandise is imported.

(2) Initial collection of cash deposits occurs upon each entry of subject merchandise.

(3) The collection of cash deposits in point (2) is at the estimated AD duty deposit rate for each individually-investigated respondent, and at the all-others rate for other respondents.

Id. ¶ 74. Note that the ability to require security—the cash deposits—is essential to the operation of a retrospective assessment system. Without these deposits, the administering authority, such as the DOC, has no security that it will be paid when it determines final liability for an AD or CVD duty later on (in the next phase, below). That is, without the obligation to post this security, an importer of subject merchandise would be allowed to enter merchandise despite being suspected of dumping, simply because the authority has not computed a final duty assessment rate for that merchandise, and could do so for about 12 months until the authority makes that calculation.

- Administrative (Periodic) Reviews:

(1) If no request is made for a Periodic Review, then the cash deposits made on entries of subject merchandise during the previous year (and collected in point (2) above) are automatically assessed as the final AD duties for that year. That is, if no Review occurs, then DOC instructs CBP to assess AD duties at the cash deposit rate, and liquidate entries of subject merchandise at that rate. In effect, the estimated AD duty deposit rate becomes the final duty assessment rate.

(2) Upon request by an interested party (which includes respondents, domestic entities, and importers), the DOC conducts an annual Periodic Review, during the anniversary month of the AD order.

(3) The purpose of a Periodic Review is to determine the final amount of AD duties owed during the previous year on entries of subject merchandise during that previous year.

(4) The Review covers all sales of subject merchandise made by the relevant respondent.

(5) The Review results in calculation of a going-forward cash deposit rate that applies to all future entries of subject merchandise from the relevant respondent (applicable at least until the time of the next annual Review). This rate is based on data from transactions during the period covered by the Review. Liability for posting the cash deposit rests with importers of subject merchandise.

(6) The Review also results in calculation of a “duty assessment rate,” which applies to each importer that imports subject merchandise from the relevant exporter. Sometimes, this rate is called the “final liquidation rate” because it is set at the same time the entries of subject merchandise are finally liquidated.

(7) Final liability for payment of the AD duties lies with the importer of subject merchandise, and is equal to the duty assessment rate. That is, the DOC calculates a duty assessment rate for each importer that

investigations and five Administrative Reviews, the DOC disregarded negative dumping margins. That is, the DOC employed zeroing, and thereby did not fully account for Export Prices of subject merchandise that exceed the Normal Value of the foreign like product.⁹³ Mexico claimed the result was a skewed calculation—one in which the dumping margin was biased upwards.

Specifically, in original investigations, the DOC practiced Model Zeroing.⁹⁴ The DOC divided the entire category of subject merchandise and corresponding foreign like product into sub-groups of stainless steel sheet and strip coils, calculated a dumping margin for each sub-group, and then aggregated the dumping margins of the sub-groups to obtain a dumping margin for the entire subject merchandise. However, when comparing weighted average Normal Value against weighted average Export Price and aggregating the results of those comparisons from different sub-categories of the subject merchandise, the DOC artificially set to zero any calculation for a sub-category in which the weighted average Export Price was above the weighted average Normal Value. As Mexico put it:

“model zeroing in investigations” occurs when the investigating authorities compare the weighted average normal value and the weighted average export price for each model of the product under consideration and treat as zero the results of model-specific comparisons where the weighted average export price

imports subject merchandise from an exporter of that merchandise (as per point (6)), and then sets the final liability for payment of AD duties by that importer equal to the duty assessment rate for that importer.

(8) Depending on the case, the duty assessment rate may equal the previous cash deposit rate, be greater than the cash deposits, or be less than the cash deposits. Where it is equal, no additional money is owed. Where the duty assessment rate is higher than the cash deposited, the importer of subject merchandise is liable for the difference. Where the assessment rate is lower than the cash that has been on deposit, the importer is eligible for a refund of the difference, with interest.

Id. ¶¶ 74-75. The DOC uses Simple Zeroing to calculate the going-forward cash deposit rate (used for the subsequent year) and the duty assessment rate (the final AD duty liability applied to the previous year).

93. For a brief explanation of zeroing, see RAJ BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW* 529-35 (entry on “zeroing”). For a full discussion, see RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* 1023-42 (3d ed. 2008).

94. The original investigation at issue in the underlying case was *Stainless Steel Sheet and Strip in Coils from Mexico*, 64 Fed. Reg. 30790 (Jun. 8, 1999), *subsequently amended as* *Stainless Steel Sheet and Strip in Coils from Mexico*, 64 Fed. Reg. 40,560 (Jul. 27, 1999).

exceeds the weighted average normal value, when aggregating comparison results in order to calculate a margin of dumping for the product as a whole.⁹⁵

In brief, via Model Zeroing in original investigations, the DOC did not allow non-dumped sales of one sub-group to offset dumped sales of another sub-group.

In Administrative Reviews,⁹⁶ the DOC used Simple Zeroing. The DOC disaggregated the foreign-like product into multiple sub-categories (again, also called “models”), and apparently also did so for the subject merchandise. The DOC compared weighted average Normal Value against Export Prices from individual export transactions. Consequently, note the rubric “Model” Zeroing is somewhat of a misnomer, because model groups are used in an incidence of so-called “Simple” Zeroing. Evidently, there would be no need to break down either the foreign like product or subject merchandise into models if Simple Zeroing takes the form of comparing individual transaction Normal Values against individual transaction Export Prices. That kind of Zeroing—with no product subdivisions and a comparison of individual transactions—truly would be “Simple.” Whenever individual Export Price exceeded weighted average Normal Value, the DOC disregarded the result, and set that particular comparison to zero. As Mexico pointed out:

By “simple zeroing in periodic reviews,” Mexico meant the method under which the USDOC, in periodic reviews for

95. Appellate Body Report, *Stainless Steel*, ¶ 2(a) & n.3. *See also id.* ¶ 67 (stating that “[b]y ‘model zeroing in investigations,’ Mexico meant the method under which the USDOC, in original investigations, makes a weighted average-to-weighted average (‘W-W’) comparison of export price and normal value for each ‘model’ of the product under investigation, and disregards the amount by which the weighted average export price exceeds the weighted average normal value for any model, when aggregating the results of model-specific comparisons to calculate a weighted average margin of dumping for the exporter or foreign producer investigated.”).

96. The Reviews at issue in the underlying dispute were:

- *Stainless Steel Sheet and Strip in Coils from Mexico*, 67 Fed. Reg. 6490 (Feb. 12, 2002), *subsequently amended as* *Stainless Steel Sheet and Strip in Coils from Mexico*, 67 Fed. Reg. 15542 (Apr. 2, 2002).
- *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 FR 6889 (February 11, 2003), *subsequently amended as* *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 Fed. Reg. 13686 (Mar. 20, 2003).
- *Stainless Steel Sheet and Strip in Coils from Mexico*, 69 Fed. Reg. 6259 (Feb. 10, 2004).
- *Stainless Steel Sheet and Strip in Coils from Mexico*, 70 Fed. Reg. 3677 (Jan. 26, 2005).
- *Stainless Steel Sheet and Strip in Coils from Mexico*, 70 Fed. Reg. 73444 (Dec. 12, 2005).

assessment of final liability for payment of anti-dumping duties, compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amount by which the export price exceeds the monthly weighted average normal value for each model, when aggregating the results of the comparisons to calculate the margin of dumping for the exporter and the duty assessment rate for the importer concerned.⁹⁷

In brief, with Simple Zeroing in Administrative Reviews, as with Model Zeroing in original investigations, the DOC did not allow non-dumped individual transaction sales to offset dumped sales.

Mexico filed suit against the United States in the WTO, pointing to violations of:

- GATT Articles VI:1-2, which condemn dumping, condone use of AD measures, and establish parameters for the dumping margin and injury determinations.
- Articles 1, 2:4, 2:4:2, 5, 6:10, 9:3, and 18:4 of the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping or AD Agreement)*, which lay out principles about AD measures (Article 1), explain how to calculate the margin of dumping

97. Appellate Body Report, *Stainless Steel*, ¶ 67 (internal citations omitted). *See also id.* ¶ 75, where the Appellate Body explains:

Under this methodology, the product under consideration is broken down into models, and a monthly weighted average normal value is determined for each model. When comparing the monthly weighted average normal value with the price of each individual export transaction, the USDOC considers the amount by which the normal value exceeds the export price to be the “dumping margin” for that export transaction. If, however, the export price exceeds the normal value, the USDOC considers the “dumping margin” for that export transaction to be zero. For each importer, the USDOC expresses the total of the “dumping margins” as a percentage of the total entered value of its imports of the subject merchandise from the relevant exporter, including the value of those transactions for which the dumping margin was considered to be zero. This percentage becomes the “duty assessment rate” for that importer, and it is applied to the total entered value of its imports from the relevant exporter during the period reviewed in order to determine the final anti-dumping liability of that importer. The same zeroing methodology is also applied to determine the going-forward cash deposit rate for all future entries of the subject merchandise from the exporter concerned.

(Articles 2:4 and 2:4:2) and conduct original investigations (Article 5), mandate determination of a dumping margin for each producer-exporter if practicable (Article 6:10), restrict the amount of any AD duty to the margin of dumping (Article 9:3), and require all WTO Members to conform their AD regimes with that of the *Agreement* (Article 18:4).

- Article XVI:4 of the *Agreement Establishing the World Trade Organization (WTO Agreement)*, which requires each WTO Member to ensure its laws conform with its WTO obligations as set out in the relevant texts.

At the Panel stage, Mexico claimed Model Zeroing in original investigations, and Simple Zeroing in Administrative Reviews, was illegal under the relevant aforementioned rules of GATT–WTO law. Mexico identified five categories of American AD law that condoned Zeroing and thereby ran afoul of one or more of the above multilateral provisions:

- Relevant statutory provisions, specifically sections in title 19 of the United States Code (U.S.C.).
- Relevant regulatory provisions, namely, in Title 19 of the Code of Federal Regulations (C.F.R.).
- Legislative history accompanying the *Uruguay Round Agreements Act of 1994*, particularly the *Statement of Administrative Action on the Antidumping Agreement*.
- The *Import Administration Antidumping Manual* of the DOC (1997 edition).
- The practice of the DOC, particularly in employing the zeroing methodology.

The WTO-challenge Mexico lodged was both “as such” and “as applied.” Mexico argued American AD law was inconsistent with WTO obligations, both on its face and in the way in which the United States implemented its law.

The American counter-argument was that Mexico failed to prove the WTO *Antidumping Agreement* prohibited Zeroing (whether Simple or Model) in Periodic Reviews. However, with respect to Model Zeroing in original investigations, the United States did not offer a rebuttal. Rather, it conceded that the reasoning of the Appellate Body in *United States – Final Dumping Determination on Softwood Lumber from Canada (Softwood Lumber V)* was applicable to the present action. In *Softwood Lumber V*, the Appellate Body held Model Zeroing in original investigations violates Article 2.4.2 of the *Antidumping*

Agreement.⁹⁸ In essence, the United States appreciated the weight of the adverse precedent.

The WTO Panel gave Mexico a split decision. On the one hand, the Panel held that Model Zeroing in original investigations was an as such inconsistency with Article 2.4.2 of the *Antidumping Agreement*. It further ruled that Model Zeroing as applied by the DOC violated this Article. This ruling was easy for the Panel to reach, given the American position about the applicability of *Softwood Lumber V*. It also was noncontroversial, because effective February 22 2007, the DOC ceased the practice of Model Zeroing in original investigations.⁹⁹

On the other hand, the Panel said Simple Zeroing in Administrative Reviews was neither an as such violation of GATT Article VI:1-2, nor of Articles 2.1, 2.4, or 9.3 of the WTO *Antidumping Agreement*. The gist of the Panel rationale, as summarized by the Appellate Body, was as follows:

The Panel reasoned that Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* do not “compel a definition of ‘dumping’ based on an aggregation of all export transactions” and that those provisions do not “exclude an interpretation that allows the concept of dumping to exist on a transaction-specific basis.” The Panel further reasoned that anti-dumping duties are paid by importers and that, therefore, the importer- or transaction-specific character of the payment of anti-dumping duties must be taken into consideration in interpreting Article 9.3 of the *Anti-Dumping Agreement*. The Panel emphasized that “an importer does not incur liability for the payment of anti-dumping duties on the basis of the totality of exports made by an exporter” and that Articles 9.3.1 and 9.3.2 must be interpreted in this light “because the former concerns the calculation of the final liability of individual importers (in the case of a retrospective system), and the latter the refund of duties paid in excess of the margin of dumping of individual importers (in the case of a prospective system).” For the Panel, “[t]he fact that final duties or refunds in duty assessment proceedings are calculated for individual importers . . . leads to the conclusion that Article 9.3 does not exclude an importer and import-specific calculation [of margin of dumping], and does not necessarily require a calculation on the basis of all sales made by an exporter.” The

98. See Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 76-117, WT/DS264/AB/R (Aug. 11, 2004) (adopted Aug. 31, 2004). This decision is reviewed in Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT’L & COMP. L. 99, 200-17 (2005).

99. See Appellate Body Report, *Stainless Steel*, ¶ 73.

Panel considered that “the fact that other importers do not dump, or dump at a lower margin, does not affect the liability of an importer who imports at dumped prices.” The Panel expressed its concern that, “[i]f . . . the authorities have to take into account the export prices paid by other importers importing from the same exporter or foreign producer, . . . importers with high margins of dumping would be favoured at the expense of importers who do not dump or who dump at a lower margin.” In essence, the Panel adopted an importer- and transaction-specific approach to the concepts of “dumping” and “margin of dumping” and concluded that simple zeroing in periodic reviews is not, as such, inconsistent with Articles VI:1 and VI:2 of the GATT 1994 and Articles 2.1 and 9.3 of the *Anti-Dumping Agreement*.¹⁰⁰

Consequently, the DOC did not commit an as-applied violation of these GATT–WTO rules by using Simple Zeroing in the Reviews.

The above recitation of the Panel’s rationale suggests its woolly-headedness. Just because an AD duty is paid by an importer does not impel the conclusion that payment of the duty should be considered on an importer- or transaction-specific basis under Article 9:3:1 of the *Antidumping Agreement*. That is a leap in logic, and ignores the central fact that AD law is designed to protect aggrieved domestic producers of a like product from injury (or threat thereof) caused by subject merchandise made abroad by a foreign producer-exporter. The importer is held liable for payment of AD duties partly for jurisdictional reasons—that is the party the United States Customs and Border Protection (CBP) can get its hands on, and that has assets in the territory of the United States. That also is because of common sense. An importer does not dump a product—it merely imports it at an Export Price. Dumping requires two transactions—a sale of a foreign like product in the home market of the producer-exporter, and a sale of subject merchandise to an importer. Only the producer-exporter is a party to both transactions—it sells at Normal Value in its home market, and it sells at the Export Price overseas.

In brief, producer-exporters, not importers, dump, and what they dump is a product as a whole, which they ship to a variety of importers. Put differently, dumping is not a crime committed solely by the importer. Rather, the importer willingly aids and abets in the crime that is masterminded (intentionally or not) by a foreign producer-exporter. That is why, as Mexico correctly argued, margins of dumping are calculated with respect to individual foreign producer-exporters for subject merchandise taken as a whole.¹⁰¹ Not surprisingly, then, the scope of the definition of the product subject to investigation determines the scope of any

100. *Id.* ¶ 77 (internal citations omitted).

101. *Id.* ¶ 78.

remedy—not the individual variations and circumstances among importers. Moreover, to define the scope otherwise, on an importer- or transaction-specific basis, would weaken the link between imposition of an AD duty and remedying injury caused by dumping. That link also would be weakened, and the overall structure of AD law would be less rational, if different computational standards with respect to zeroing applied to different stages of an AD case (i.e., original investigations versus reviews).¹⁰² Thus, critically, as the Appellate Body observed, “[i]n reaching this conclusion [that Simple Zeroing in Administrative Reviews is not illegal under GATT–WTO rules], the Panel disagreed with the jurisprudence and conclusions of the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*.”¹⁰³ This sentence was a harbinger that the Appellate Body was not pleased with the work of the Panel.

Regarding the claim by Mexico that Model Zeroing violated GATT Article VI:1-2 and Articles 2:1, 2:4, and 18:4 of the *Antidumping Agreement*, the Panel exercised judicial economy. Likewise, the Panel used judicial economy to avoid ruling on whether Simple Zeroing in Administrative Reviews violated Article XVI:4 of the *WTO Agreement* or Article 18:4 of the *Antidumping Agreement*.

3. Appellate Body Holdings

On appeal, Mexico strengthened its victory. The Appellate Body faced two key questions:

(1) The as such issue:¹⁰⁴

Is Simple Zeroing in Periodic Reviews an as such inconsistency with GATT Article VI:1-2 and Articles 2:1, 2:4, and 9:3 of the *Antidumping Agreement*?

(2) The as-applied issue:¹⁰⁵

Did the United States act inconsistently with the same multilateral rules—GATT Article VI:1-2 and Articles 2:1, 2:4,

102. *Id.* ¶ 79.

103. *Id.* ¶ 68. The *U.S. – Zeroing (EC)* case, 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), is covered in Raj Bhala & David A. Gantz, *WTO Case Review 2006*, 24 ARIZ. J. INT’L & COMP. L. 299, 353-86 (2007). The *U.S. – Zeroing (Japan)* case, Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) (adopted Jan. 23, 2007), is covered in Raj Bhala & David A. Gantz, *WTO Case Review 2007*, 25 ARIZ. J. INT’L & COMP. L. 75, 115-40 (2008).

104. See Appellate Body Report, *Stainless Steel*, ¶¶ 65(a), (c), 69-70.

105. See *id.* ¶¶ 65(b)-(c), 69-70.

and 9:3 of the *Antidumping Agreement*—by applying Simple Zeroing in five Periodic Reviews concerning Mexican stainless steel sheet and strip coils?

On the first issue, the Appellate Body replied “yes.”¹⁰⁶ In particular, the Appellate Body reversed the Panel, and held that Simple Zeroing in Administrative Reviews violates GATT Article VI:2 and Article 9:3 of the *Antidumping Agreement*:

[W]hen applying “simple zeroing” in periodic reviews, the USDOC compares the prices of individual export transactions against monthly weighted average normal values, and disregards the amounts by which the export prices exceed the monthly weighted average normal values, when aggregating the results of the comparisons to calculate the going-forward cash deposit rate for the exporter and the duty assessment rate for the importer concerned. *Simple zeroing thus results in the levy of an amount of anti-dumping duty that exceeds an exporter’s margin of dumping, which . . . operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by an exporter.* Therefore, simple zeroing is, as such, inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*.¹⁰⁷

The essential reason for the violation was that Simple Zeroing inflates the dumping margin calculation, thereby leading to imposition of an AD duty disproportionate to the correct margin.

On the second issue, the Appellate Body answered “yes,” thereby reversing the Panel again for the same reasons as on the first issue.¹⁰⁸ The Appellate Body held the United States violated GATT Article VI:2 and Article 9:3 of the *Agreement* by using Simple Zeroing in the Reviews in the case. The justification was the same as that on the first issue.

As to whether Simple Zeroing also violates GATT Article VI:1, or Articles 2:1 and 2:4 of the *Agreement*, in an as such or as applied sense, the Appellate Body exercised judicial economy, finding it unnecessary to issue a ruling on Article 2:1.¹⁰⁹ Because the finding of the Panel concerning Article 2:4 of the *Agreement* rested on its holdings under GATT Article VI:2 and Article 9:3 of the *Agreement*, and the Appellate Body reversed those holdings, it also reversed the Panel finding on Article 2:4. However, given its reversals under GATT

106. *See id.* ¶ 165(a).

107. *Id.* ¶ 133 (emphasis added).

108. *See id.* ¶¶ 137-139, 165(b).

109. *See id.* ¶ 135.

Article VI:2 and Article 9:3 of the *Agreement*, the Appellate Body also exercised judicial economy with respect to Article 2:4.¹¹⁰

Thus, the United States found itself in a worse legal position after the appeal than before it. Another precedent against Zeroing had been chalked up by the judges in Geneva. Simple Zeroing was wrong not only in original investigations, as the Panel had ruled, but also in Administrative Reviews, as the Appellate Body added. The consequent pressures were two-fold.

First, Congress would have to change American AD law, essentially to eradicate Zeroing in all forms and contexts, save (perhaps) for targeted dumping. But, full compliance with, through implementation of, Appellate Body Zeroing decisions was not likely. Given the tenor of the fall 2008 general election campaign, coupled with global economic recession, it was even less so with a new President, Barack H. Obama, and a new political party in control of Congress, the Democrats. Second, and alternatively, through the Doha Round, the United States would have to consider all other WTO Members and whether each one could be convinced that Article 2:4:2 of the *Antidumping Agreement* should be rewritten to allow Zeroing. That also was not likely. In late December 2008, the Chairman of the Rules Negotiations issued a new draft text that backed away from its predecessor on Zeroing.¹¹¹ The earlier (November 2007) edition essentially incorporated the American negotiating position. The new version stated forthrightly there was utterly no consensus on the matter.

4. Rationale

On appeal, the United States made two arguments that predictably would lose.¹¹² First, Article 9:3 of the *Antidumping Agreement* allows the use of Simple Zeroing in Administrative Reviews. At least, the *Agreement* does not expressly forbid its use. Indeed, Simple Zeroing in Administrative Reviews is a permissible interpretation of GATT Article VI:1-2 and Articles 2:1, 2:4, and 9:3 of the *Agreement*:

According to the United States, Article VI of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* do not require that margins of dumping necessarily be established on an aggregate basis for the “product as a whole.” Rather, for the

110. *See id.* ¶¶ 141-44, 165(c).

111. *See* Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45 *TEX. INT’L L.J.* (forthcoming 2009); Raj Bhala, *Doha Round Schisms: Numerous, Technical, and Deep*, 6 *LOY. U. CHI. INT’L L. REV.* (forthcoming Fall/Winter 2008), available at http://www.luc.edu/law/activities/publications/ilrsymposium/2008sym/bhala_doha_round_schisms_paper.pdf.

112. *See* Appellate Body Report, *Stainless Steel*, ¶ 70.

United States, “dumping” can be found to exist each time that a weighted average normal value exceeds the export price in a particular export transaction, and “margins of dumping” can be calculated for individual import transactions. The United States argues that Article 9.3 deals with only transaction-specific comparisons, and that it does not require the aggregation of the results of such comparisons in order to determine a margin of dumping for the relevant exporter. The United States submits that, once an anti-dumping investigation has been completed and an anti-dumping duty has been imposed, in all systems, “the focus in the duty assessment phase then shifts to individual import transactions,” because duties are assessed on individual import transactions. Thus, under its retrospective assessment system, final liability for payment of anti-dumping duties by each importer is determined on the basis of a comparison of a contemporaneous monthly weighted average normal value with the export price in each individual import transaction.¹¹³

Therefore, argued the United States, to banish the methodology from these Reviews would be to create a new obligation. The *Stainless Steel* Panel wisely recognized that it lacked that power, and the Appellate Body ought to come to this realization. Second, no panel is required to follow prior rulings of the Appellate Body. Rather, panels are duty-bound to take previous decisions of the Appellate Body into account, if they are relevant to the case at bar—but, that is all. Both losing arguments were systemic ones, in that they had repercussions for all WTO Members. The first one was about the proper conduct of Administrative Reviews and the creation of new legal obligations by judicial fiat. The second one was about the relationship between panels and the Appellate Body in the WTO structure.

The Appellate Body focused on the language of GATT Article VI:1-2 and Article 9.3 of the *Antidumping Agreement* and analyzed the American argument by trisecting it into the following issues:

(1) *Dumping and Exporters versus Importers:*

Are the concepts of “dumping” and “margin of dumping” inherently linked to an exporter, or can they be interpreted to refer to an importer, of subject merchandise?

(2) *Dumping and Transaction- and Importer-Specificity:*

Is it conceptually correct to say that “dumping” and a “margin of dumping” exist with respect to a particular transaction and

113. *Id.* ¶ 80 (internal citations omitted).

importer, i.e., are they transaction- and importer-specific concepts?

(3) *Zeroing in Administrative Reviews:*

In an Administrative Review, when calculating the duty assessment rate (i.e., under a retrospective assessment system like that of the United States, the final liability for AD duties in the preceding period, which is the time between the issuance of the first AD order and the first Administrative Review, or the time between the current and preceding Reviews), is it permissible to practice zeroing, that is, to disregard the amount by which Export Price exceeds Normal Value, in any export transaction of subject merchandise?

The gist of the American argument—that zeroing in Administrative Reviews is a legally permissible interpretation of the relevant GATT–WTO provisions—hinged on the premises that “dumping” and “margin of dumping” made sense in relation to importers, and in the context of specific transactions and importers.

The American argument dwelled on Article 9:3 of the *Agreement* (which limits the imposition and collection of an AD duty to the margin of dumping computed under Article 2), and the practice that liability for payment of the duty assessment rate in the retrospective AD regime maintained by the United States rests on the importer of subject merchandise. Stripped to its core, the United States was saying that because the importer is responsible for paying the final AD duty, it must be true that: (1) importers are the ones guilty of dumping, (2) a dumping margin exists for each individual importer and transaction, and (3) consequently, zeroing is permissible.¹¹⁴ To put the argument and its premises so plainly is to reveal their parlous nature. Things simply do not sound quite right, and indeed they are not, as the Appellate Body explained.

On the first issue, the Appellate Body recalled that under both GATT Article VI:1 and Article 2:1 of the *Antidumping Agreement*, “dumping” and “margin of dumping” refer to the pricing practice of an exporter, and are exporter-specific concepts. That is because these provisions define the major terms: “dumping” occurs when a product is “introduced into the commerce of another country” at an “export price” that is less than the “comparable price for the like product in the exporting country.”¹¹⁵

It also is because all relevant provisions of the *Antidumping Agreement* concerning an AD investigation (such as Articles 5:2(ii), 5:8, 6:1:1, 6:7, 6:10, and 9:4), and concerning reviews (such as Article 9:5, on New Shipper Reviews) clearly indicate the party on which an investigation or review is to focus. That

114. *See id.* ¶ 101.

115. *Id.* ¶ 86.

focus is on determining the existence and degree of dumping—i.e., computing a dumping margin—for known producer-exporters of the subject merchandise. There is a single dumping margin to be computed for each individual producer-exporter investigated. Likewise, the relevant textual provisions (e.g., GATT Article VI, and Articles 3:1, 3:5, 9:1, 11:1-3 of the *Agreement*) all link dumping to injury, establishing that the purpose of remedy is not to counteract all dumping, but only harmful dumping.

Put conversely, nothing in the *Agreement* remotely suggests it is permissible to interpret the terms “dumping” or “margin of dumping” as referring to “dumping margins” that exist at the level of individual importers.¹¹⁶ Moreover, there is no logical or practical reason to interpret these key terms differently for purposes of Article 9:3 of the *Agreement* vis-à-vis other provisions of the *Agreement*, i.e., the same terms should mean the same thing throughout multilateral AD law. Thus, the Appellate Body cogently summarized its finding on the first issue:

[I]t is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) “dumping” and “margin of dumping” are exporter-specific concepts; “dumping” is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) “dumping” and “margin of dumping” have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract “injurious dumping” and not “dumping” *per se*. It must be stressed that, under the *Anti-Dumping Agreement*, the concepts of “dumping,” “injury,” and “margin of dumping” are interlinked and that, therefore, these terms should be considered and interpreted in a coherent and

116. *See id.* ¶ 89. As the Appellate Body explained, still other provisions of the *Agreement* reinforce this interpretation, such as Article 8:1-2 and 8:5 concerning voluntary price undertakings—they speak of exporters. The Appellate Body also pointed out its view holds true under the French and Spanish versions of the *Agreement*, a point relevant because of Article 33(3) of the *Vienna Convention on the Law of Treaties*, which states the terms of a treaty authenticated in more than one language are presumed to have the same meaning in each language. The treaty interpreter, therefore, should give a meaning that gives simultaneous effect to the terms of the treaty as they are employed in each authentic language. *See id.* ¶ 88 n.200 (The official WTO languages, of course, are English, French, and Spanish).

consistent manner for all parts of the *Anti-Dumping Agreement*.¹¹⁷

To be sure, this finding did not intimate that an AD duty is levied on or collected from an exporter.¹¹⁸ The duty may well be imposed on or collected from importers. But, that practicality hardly alters the substantive legal point that dumping arises from the pricing strategies and practices of a producer-exporter in respect of Normal Value in its home market and Export Price in a foreign market, hence an importer cannot dump, or have a margin of dumping.¹¹⁹ Likewise, the point is not altered by the fact that Export Price may be negotiated between a producer-exporter and importer.

On the second issue, whether “dumping” and “margin of dumping” can be found to exist at the level of a transaction, the Appellate Body gave a clear answer – no.¹²⁰ The dumping margin determination is based on a study of the totality of the transactions by a producer-exporter. For the period of investigation (POI), price data from multiple sales of a foreign like product are examined to calculate Normal Value, and price data from multiple sales of subject merchandise yield Export Price. Appropriate and necessary adjustments then are made to Normal Value and Export Price. No one individual transaction is dispositive in this computation. Moreover, only if the aggregation of the transactions causes injury is dumping actionable. It makes little sense to say that a single transaction is the cause of injury, that one instance in which Normal Value exceeds Export Price is the reason for the woes of the petitioner. Finally, if a separate dumping margin were determined for each individual transaction, then every investigated producer-exporter would have several margins of dumping for the same subject merchandise. That, too, would be nonsense.

The third issue—is it permissible to engage in Simple Zeroing when calculating the AD duty assessment rate under Article 9:3 of the *Antidumping Agreement*—could be resolved by applying prior decisional law. Unsurprisingly, that is exactly what the Appellate Body did. However, it began by observing that whenever the Uruguay Round drafters of the *Agreement* intended to permit the disregarding of certain items in an AD case, they said so expressly.¹²¹

The Appellate Body re-read the text of the *Agreement* and pointed out that the drafters did so only twice. First, in Article 9:4, the drafters direct investigating authorities to ignore any dumping margin that is zero or *de minimis* (i.e., where the difference between Normal Value and Export Price equals zero or is small) when computing a weighted average dumping margin that is an all-others rate (i.e., that applies to respondents not individually investigated). Second, in

117. *Id.* ¶ 94 (internal citations omitted).

118. *See id.* ¶ 94 n.207.

119. *See id.* ¶ 95.

120. *See id.* ¶¶ 97-99.

121. *See id.* ¶ 103.

Article 2:2:1, where they provide circumstances when sales of the foreign like product can be disregarded when calculating Normal Value. The Appellate Body did well to highlight these two instances, because they add to the overall persuasive force of the jurisprudence against Zeroing.

That is because the Appellate Body has been tirelessly bombarded with the accusation that it is making new law in its zeroing jurisprudence, straying far beyond the plain meaning of the text of the *Agreement*.¹²² Yet, tarring an opponent with one's own failure is a disingenuous tactic. If (for whatever reason) an opponent did not get what it hoped for at the bargaining table when the text was drafted, then why not accuse the other side of misreading the text, which surely is flexible enough to accommodate the earlier negotiating position of the opponent?¹²³ In truth, it is the Appellate Body that has been scrupulous about checking the *Agreement* and faithful in meditating upon what the text means. Showing critics that the *Agreement* is explicit about when to ignore data from a dumping margin calculation is a lawyer's reasoned way of revealing the disingenuousness of the criticism.

122. See, e.g., Rossella Brevetti, *Maruyama Blasts Appellate Body for Overreaching in WTO Disputes*, 25 INT'L TRADE REP., 1692, 1692-93 (2008) (reporting on the criticisms leveled by the then-General Counsel of the United States Trade Representative against the Appellate Body for "overreaching" on issues such as zeroing in AD cases and causation in safeguard cases, and rendering decisions without textual foundation).

It should not go unmentioned that India is the largest employer of AD measures, with Brazil, China, and South Africa also significant users. See *id.* at 1693. Surely American exporters do not relish the prospect of being subject to zeroing in foreign jurisdictions, which could occur either if the United States were to have its way and all Members were authorized to use zeroing, or if other Members simply zeroed in retaliation against the United States. In other words, aside from textual arguments and substantive merits about the methodology, one concern about the official American position on zeroing is that it is dominated entirely by one perspective, that of petitioners.

123. In a separate portion of its Report, the Appellate Body addressed the recourse by the United States to supplementary means of treaty interpretation under Article 32 of the *Vienna Convention on the Law of Treaties*, namely, to three categories of historical materials: (1) a 1960 Group of Experts Report, (2) two GATT panel reports (both from 1995, one adopted, one unadopted) that dealt with zeroing under the plurilateral *Tokyo Round Antidumping Code*, and (3) negotiating proposals made during the Uruguay Round. See Appellate Body Report, *Stainless Steel*, ¶¶ 128-32. The Appellate Body did not consider it necessary to resort to supplementary means, because its analysis under Article 31 of the *Vienna Convention* had not led to an interpretation of the Antidumping Agreement that was either ambiguous or obscure, or manifestly absurd or unreasonable. That said, the Appellate Body dispensed forcefully with the historical materials. First, the United States referred only to negotiating proposals that favored its pro-zeroing position, and the fact they were rejected shows there was no consensus in support of them. Second, the *Softwood Lumber V* Appellate Body Report dealt with the same materials, and found they did not yield a clear expression of intent by Uruguay Round negotiators. Third, the 1960 Report manifestly was dated, and the GATT panel reports concerned a Tokyo Round text that was less detailed than the *Antidumping Agreement*, with no analog to Article 2:4:2.

Moving on to its precedents on Simple Zeroing, the Appellate Body looked to three key cases: (1) from 2004, *Softwood Lumber V*; (2) from 2006, *U.S. – Zeroing (EC)*; and (3) from 2007, *U.S. – Zeroing (Japan)*.¹²⁴ In *Softwood Lumber V*, the Appellate Body held Model Zeroing in original investigations violates Article 2:4 and 2:4:2 of the *Antidumping Agreement*. In *U.S. – Zeroing (EC)*, the Appellate Body held Model Zeroing in duty assessment proceedings, i.e., Administrative Reviews, is illegal under Article 9:3. In *U.S. – Zeroing (Japan)*, it held Simple Zeroing in these Reviews violates this Article. In the *Japan* case, the Appellate Body stressed it is incongruous to disregard non-dumped sales (where Normal Value is less than Export Price) via Zeroing in the dumping margin calculation, but to consider those same sales as dumped (albeit negatively) in the injury determination. In the case at bar, the Appellate Body applied the same logic:

107. We fail to see a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as “dumped” for purposes of determining the existence and magnitude of dumping in the original investigation and as “non-dumped” for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review. Such treatment brings about the following inconsistencies. First, . . . the transactions that are disregarded may well pertain to a model, type, or class that fell within the definition of the product under investigation and were treated as “dumped” in the original investigation. *By excluding these transactions at the duty assessment stage, a mismatch is created between the product considered “dumped” and the product as defined by the investigating authority.*

108. Secondly, and more importantly, *this treatment is inconsistent with the manner in which injury was determined in the original investigation, where transactions that occurred at above the normal value were taken into account in order to calculate the volume of dumped imports for purposes of injury determination.* Obviously, we do not suggest that there need be a fresh injury determination at the duty assessment stage; rather, *we wish to point to the contradiction that arises when the same type of transactions are treated as “dumped” for purposes of injury determination in the original investigation and as “non-dumped” in periodic reviews for duty assessment.*¹²⁵

124. *See id.* ¶¶ 104-06.

125. *Id.* ¶¶ 107-08 (emphasis added) (citations omitted).

The unambiguous and sweeping conclusion was that “[a] margin of dumping is properly calculated under the *Anti-Dumping Agreement* only if all transactions are taken into account, including those where the export prices exceed the normal value.”¹²⁶

As a capstone rationale for this holding, the Appellate Body offered a powerful consequential argument. Suppose Simple Zeroing were lawful in a Periodic Review under Article 9:3 of the *Agreement*. Then, WTO Members could circumvent the prohibition on it under Article 2:4:2 (first sentence) in an original investigation. That is because in the first Review after the original investigation, the duty assessment rate takes hold for each producer-exporter of subject merchandise, and the importer of that merchandise is liable for payment at that rate. This assessment rate applies retrospectively to entries of subject merchandise from the date the original antidumping order was imposed. Yet, in the original investigation, the estimated AD duty deposit rate (i.e., the cash deposit rate) was calculated for each producer-exporter without zeroing. In other words, from the time of the AD order, an importer would be held liable to deposit estimated AD duties at an initial cash deposit rate that is computed without zeroing. But, following a Review, that same importer would be held liable to pay final AD duties, on the same subject merchandise, for the same period (the year following the issuance of the order), at an assessment rate computed with zeroing. Therein would lay the back-door introduction of Zeroing—what was barred from the original investigation would be permitted in the Review. Only if a Review never occurred would that back door be closed. But, the petitioning domestic industry would have an obvious incentive to trigger a Review, namely, the use of Zeroing in it to inflate the dumping margin vis-à-vis the calculation from the original investigation.

Ironically, allowing Simple Zeroing in an Administrative Review would undermine the consistency of American legal argumentation.¹²⁷ The Appellate Body posited a Review in which all sales made by a producer-exporter to a particular importer are at Export Prices above Normal Value. All such sales are non-dumped; hence the DOC would treat them as zero. In a Review, the DOC would set the duty assessment rate for that importer at zero. Suppose, further, that to other importers, the same producer-exporter made dumped sales, where Normal Value exceeded Export Price. During the Review, the DOC would compute a going-forward cash deposit rate, which would apply to all importers, even the one to which the exporter had not been making dumped sales in the period prior to the Review. That is because the going-forward cash deposit rate applies to all importers of subject merchandise, regardless of the duty assessment rate that applied to them for the previous period.

126. *Id.* ¶ 113 (emphasis added).

127. *See id.* ¶ 110 & n.229.

What logic supports collection of the deposit from the first importer, to which no dumped sales had been made? At oral argument before the Appellate Body, the United States responded that the pricing behavior of the producer-exporter is unpredictable. Maybe that producer-exporter will commence dumped sales to the importer, after the first Review. Maybe, indeed, but that response implied a significant inconsistency. The earlier American argument was that duty assessment and collection in a retrospective system are importer-driven, and may be thought of in terms of individual importers and transactions. If so, then the predictability of the pricing behavior of producer-exporters should be immaterial.¹²⁸

5. Commentary

a. The Audacity of the Panel

An intriguing issue the Appellate Body faced—and eschewed—was whether the Panel failed to discharge its duties under Article 11 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*Dispute Settlement Understanding*, or *DSU*).¹²⁹ Entitled “Function of Panels,” Article 11 states:

The function of panels is to assist the DSB [Dispute Settlement Body] in discharging its responsibilities under this understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and

128. For similar reasons, the statement about the significance of the pricing behavior of producer-exporters to justify collections at the going-forward cash deposit rate undermined concerns the United States voiced that in its retrospective system, an importer with a high dumping margin would be favored at the expense of importers that do not dump. The Appellate Body bluntly stated that the United States, and the Panel, seemed not to have understood that the dumping margin is an exporter-specific concept. It stressed its holding is about how to calculate a dumping margin, and this holding does not infringe on the sovereignty of WTO Members to choose retrospective or prospective assessment and collection systems. *See id.* ¶¶ 111-14. The Appellate Body also dispensed with points the Panel had made that a prohibition on Simple Zeroing in Periodic Reviews would create an administrative burden, concerns about calculating Normal Value in a prospective system, and contextual arguments about Article 2:4:2 (second sentence) of the *Agreement* (which concerns targeted dumping). *See id.* ¶¶ 115-27. Notably showing restraint, the Appellate Body offered *dicta* on targeted dumping, but expressly declined to rule on whether any kind of zeroing is permitted in such an instance, as the issue was not properly before it. *See id.* ¶ 127.

129. *Id.* ¶¶ 65(d), 146-61.

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.

The Panel clearly and deliberately contradicted findings rendered by the Appellate Body in previous cases.¹³⁰ The *Stainless Steel* Panel ruling was the third time a panel ruled that WTO rules do not forbid zeroing and the second time a panel expressly evaluated and rejected contrary Appellate Body precedents.¹³¹

The Appellate Body implied strongly, and immediately, in the first paragraph of the introduction to its findings and rationale, the gravity of the matter:

The issue of “zeroing” has been raised on appeal on numerous occasions in different contexts. The Appellate Body has examined the WTO-consistency of the zeroing methodology in original investigations, periodic reviews, new shipper reviews, and sunset reviews. In each context, the Appellate Body has held that zeroing is inconsistent with the relevant provisions of the GATT 1994 and the *Anti-Dumping Agreement*. More specifically, the Appellate Body has found zeroing to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in the *original investigations* in five disputes. The Appellate Body has also found zeroing in *periodic reviews* to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* in two disputes. In one of those disputes, the Appellate Body further found zeroing in new shipper reviews to be inconsistent with

130. *See id.* ¶ 146 (stating “the Panel decided not to follow the legal interpretation of the Appellate Body in *US – Zeroing (EC)* and *US – Zeroing (Japan)*, where the Appellate Body found that simple zeroing in periodic reviews is inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*” and “[i]nstead, the Panel relied on findings in panel reports that the Appellate Body has reversed.”). *See also* Daniel Pruzin, *Mexico Appeals WTO Ruling on Zeroing, Slams Panel’s Findings in Favor of U.S.*, 25 INT’L TRADE REP. 206, 206 (2008) (quoting the Panel as stating, “we have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews”).

For a tabular summary of the zeroing precedents of the Appellate Body, see BHALA, *DICTIONARY OF INTERNATIONAL TRADE LAW*, *supra* note 92 at 529-35 (entry on “zeroing”).

131. *See* Daniel Pruzin, *WTO Dispute Panel Issues Mixed Verdict in Mexico’s Complaint over U.S. Zeroing*, 25 INT’L TRADE REP., 28, 29 (2008).

Article 9.5 of the *Anti-Dumping Agreement*. Moreover, in that same dispute, the Appellate Body found that the United States had acted inconsistently with Article 11 of the *Anti-Dumping Agreement* because it relied on margins of dumping calculated in previous proceedings in using zeroing in two sunset review determinations.¹³²

Put bluntly, in the above-quoted passage, the Appellate Body was saying that the *Stainless Steel* Panel was temerarious, and in light of prior decisional law, it had better have a good reason for its temerity.

The Appellate Body was steadfast—there was no compelling reason for changing the international common law of trade that had emerged regarding dumping. Moreover, the rulings of the Appellate Body must be respected—or, it might have said in alternate language, *stare decisis* operates not in a *de jure* manner, but in a *de facto* sense, in WTO jurisprudence. Hence, the Appellate Body overruled the Panel on the questions of whether Simple Zeroing constitutes as such and as applied violations of GATT Article VI:2 and Article 9:3 of the *Antidumping Agreement*.

The Appellate Body did so, not because a system of precedent is wooden and incapable of evolution, nor because precedents cannot be overturned. Manifestly as the Anglo-American legal experience shows, these fears are unfounded (and reflect a misunderstanding of the common law and what *stare decisis* means). Like lower courts, panels must steer a fine line between temerity, on the one hand, and inquiry, on the other hand. It is one thing to rebel based on personal preferences. It is quite another thing to question based on well-reasoned analogies and distinctions, and careful consideration of new circumstances and contexts. Of a lower court, or WTO panel, slavish adherence is not expected, but more than personal preference is required.

In *Stainless Steel*, the Panel fell on one side of this line. The Appellate Body could not condone such a brazen departure from so many of its case rulings without better rationale than the Panel could muster. If the Panel wanted to exert influence over the Appellate Body, which has power over it in the judicial hierarchy, then the Panel would have to use reason, better reason than found in all the previous Appellate Body rulings on zeroing. Mere ideological belief that the Appellate Body had repeatedly erred, without more, would not do.

That said, the Appellate Body did not take the further step of faulting the *Stainless Steel* Panel under *DSU* Article 11, as Mexico had hoped it would do.¹³³ It said, instead:

161. In the hierarchical structure contemplated in the *DSU*, panels and the Appellate Body have distinct roles to play. In

132. Appellate Body Report, *Stainless Steel*, ¶ 66 (citations omitted).

133. *See id.* ¶¶ 147, 154, 165(d).

order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the *DSU*, the Appellate Body is vested with the authority to review “issues of law covered in the panel report and legal interpretations developed by the panel.” Accordingly, Article 17.13 provides that the Appellate Body may “uphold, modify or reverse” the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote “security and predictability” in the dispute settlement system, and to ensure the “prompt settlement” of disputes. *The Panel’s failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements as contemplated under the DSU.* Clarification, as envisaged in Article 3.2 of the *DSU*, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, *the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.*

162. *We are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system* Nevertheless, we consider that the Panel’s failure flowed, in essence, from its misguided understanding of the legal provisions at issue. Since we have corrected the Panel’s erroneous legal interpretation and have reversed all of the Panel’s findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under Article 11 of the *DSU*.¹³⁴

134. *Id.* ¶¶ 161-62 (emphasis added).

Might there be a case that a panel violates the second sentence of this provision when it challenges so boldly a consistent line of Appellate Body precedents? Is there a kind of judicial malpractice in failing to apply clear rules from a past decision of the higher authority in a case that raises the same issues as that past decision? Is the better choice for a rebellious panel to apply the law as it is, and indicate in *obiter dicta* its profound disgust at that law—and articulate why? No doubt for reasons of political diplomacy, in terms of relations with future panels and with WTO Members, the Appellate Body wisely sidestepped these questions.

b. World Reaction

The losing American arguments¹³⁵ evoked reaction from the WTO Membership. On whether Zeroing in Periodic Reviews violated GATT–WTO rules, the clear response was to welcome the re-confirmation from the Appellate Body that it did. Australia, Chile, Colombia, European Communities (EC), India, Hong Kong, Japan, Norway, and Thailand all lined up to tell the United States to change its deviant law and practice, and India called for an explicit ban on Zeroing in any Doha Round agreement on trade remedies. One private practitioner hailed the Appellate Body Report as “address[ing] completely and substantively all the legal arguments advanced by all parties, especially the U.S.,” and “the most detailed and comprehensive analysis of the zeroing issue to date,” and declared that “[the Report] should put to rest the issue [of] whether zeroing truly violates the Antidumping Agreement, . . . [because] all the issues have truly been decided.”¹³⁶

As for whether panels must toe the Appellate Body line, that was a dicey matter for WTO Members. Some Members argued that a clear line of jurisprudence arising from previous Appellate Body rulings, which are relevant to a case at bar, must be used by a panel hearing that case. The EC summarized this argument cogently:

The European Communities argues that the Panel erred by not following previous Appellate Body findings on the same issues of law and legal interpretations involved in this dispute. In so doing, the Panel attributed to previous Appellate Body findings that have been adopted by the DSB the same legal significance

135. See World Trade Organization, Dispute Settlement – The Disputes – DS344, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds344_e.htm (last visited Apr. 2, 2009) (DSU’s May 20, 2008 adoption of Panel and Appellate Body Reports).

136. Daniel Pruzin, *WTO Appellate Body Issues Ruling Affirming Illegality of Zeroing in Mexican Steel Decision*, 25 INT’L TRADE REP. 660, 661 (2008) (quoting an unnamed lawyer).

as it attributed to previous panel findings that have been reversed by the Appellate Body. This subverts the hierarchical structure provided in the *DSU*, which confers to the Appellate Body the “final say” on issues of law and legal interpretations developed by Akjt’ panel. For the European Communities, panels are not only “expected” to follow Appellate Body conclusions in earlier disputes, “especially where the issues are the same,” but are also “*de jure*” obliged to follow the findings of the Appellate Body where the Appellate Body has interpreted the same legal questions. This is consistent with the need to provide security and predictability to the multilateral trading system, as well as the need for prompt settlement of disputes. Moreover, the Panel’s view on the value of precedent defeats the object and purpose of the appeal mechanism provided in the *DSU*, because panels would be entitled to examine all legal issues “afresh” in every dispute. The European Communities suggests that, in performing its treaty interpretation task under the *DSU*, the Appellate Body seeks to ascertain the common intent of all WTO Members in relation to the provisions of the covered agreements. For this reason, the Appellate Body’s interpretation “necessarily transcends the particular facts of one case, and is not confined to the Members who are parties to a particular dispute.” A rule whereby panels must follow Appellate Body findings on legal questions would not prevent panels from departing from earlier decisions, provided there are “cogent reasons” for doing so. In this dispute, however, such departure on the part of the Panel was not justified, because it was grounded solely on the Panel’s disagreement with previous Appellate Body findings. While panelists might not always agree with the findings of the Appellate Body on particular legal issues, the role of the Appellate Body is “to definitively settle such disagreements over points of law.” Therefore, the Appellate Body should reaffirm that all panels are not only expected, but are “obliged” to follow its findings in relation to the issue of zeroing.¹³⁷

Japan and Thailand also put forth a similar argument, emphasizing the legitimate expectations created by prior adopted Appellate Body reports, and the virtues of efficiency, cost-minimization, certainty, and predictability in WTO

137. Appellate Body Report, *Stainless Steel*, ¶ 51 (citations omitted). See also *id.* ¶ 149 (summarizing the EC, Japanese, and Thai arguments).

adjudication that are manifest when panels follow those reports in subsequent cases involving the same issues and claims.¹³⁸

138. *See id.* ¶ 58 (presenting Japan's argument that refusal by a panel to follow an Appellate Body report addressing exactly the same trade measures and claims is a failure to conduct an objective assessment under *DSU* Article 11, and upsets the legitimate expectations among WTO Members that are created when the Dispute Settlement Body (DSB) adopts that report), ¶¶ 59-69 (containing Thailand's argument that while not strictly binding, previous Appellate Body findings create legitimate expectations among Members, hence panels are expected to apply those findings to the same issues in a new case, and failure of panels to do so upset the effective functioning, undermines the security and predictability, and increases the costs of WTO dispute settlement, the latter to the particular detriment of developing countries). *See also id.* ¶¶ 149-51 (summarizing the Japanese and Thai arguments). Mexico, of course, made the same points about prompt settlements of disputes and efficient functioning of the WTO dispute settlement system. *See id.* ¶ 147.

It must not go unnoticed that Mexico and Japan are civil law countries, and Thailand could be characterized as that or a mixed legal jurisdiction. Thus, one observer remarks:

Thailand generally follows the civil law system. However, one must realize that Thailand belongs to the civil law system only by the fact of its codification. The contents of the codes are as varied as the major legal systems of the world.

Charunon Sathitsuksomboon, *Thailand's Legal System: Requirements, Practice, and Ethical Conduct*, Thailand Lawyers Attorneys & Legal Services Law and Legal Services Mission in Thailand, <http://asialaw.tripod.com/articles/charununlegal.html> (last visited Jan. 9, 2009). That Thailand does not fit neatly into the civil law country is further explained by another observer:

Most of the Thai lawyers of the time had been trained in England but they recognized the disadvantages of the Common Law system for their country. So Thailand picked the best of both systems and began the process of adapting them to the Thai situation. The result is that the penal law is Italian, Indian, French, and Japanese inspired; the Civil Law greatly influenced by French, German, and Swiss law; the Commercial Law primarily British; the Law of Evidence founded on an English model; the Civil and Criminal Procedure Codes being taken from their English and French counterparts; while the courts were organized along the lines of French courts of law. All of these Codes were also influenced by Thai customs and heritage of the period but were also quite democratic in tenor.

Id. (citing David Lyman, *An Insight into the Functioning of the Thai Legal System*, THAI-AM. BUS. MAG., Jan.-Feb. 1975).

To be sure, in modern times, in civil law jurisdictions, citation to prior relevant case law is not regarded as the heresy that it once was under the orthodox civil law approach, which held that such citation elevated the significance of earlier decisions and,

The United States countered with a different view of certainty and predictability. The Panel had decided rightly, and the Appellate Body had overreached.¹³⁹ Interstitial legislating by the Appellate Body makes international trade law less certain and predictable:

39. The United States submits that, because its approach to periodic reviews rests on a permissible interpretation of the GATT 1994 and the *Anti-Dumping Agreement*, under Article 17.6(ii) of the *Anti-Dumping Agreement*, the Panel was required to find this approach to be in conformity with the United States' WTO obligations. Article 17.6(ii) was added to the *Anti-Dumping Agreement* in the closing days of the Uruguay Round negotiations. This, in the United States' view, reflects the negotiators' recognition that they had left certain issues unresolved in the *Anti-Dumping Agreement* and that customary rules of interpretation of public international law would not always yield only one permissible reading of a given provision. For the United States, the absence of a similar provision in other WTO agreements demonstrates that WTO Members were aware that the anti-dumping text "would pose particular challenges and in many instances would permit more than one legitimate interpretation."

40. The United States requests the Appellate Body to reject Mexico's claims. For the United States, "it is plain that Mexico and others are trying to get through the Appellate Body what they did not achieve at the negotiating table in the Uruguay Round." According to the United States, to read a new obligation into Article VI of the GATT 1994 and the *Anti-Dumping Agreement* "would only contribute to further

therefore, the unelected judges who rendered them. The point is simply that the power of the past in WTO adjudication is not lost on WTO Members, more or less regardless of their legal heritage.

139. Compare Frances Williams, *WTO Court Rules Anti-dumping "Zeroing" is Illegal*, FINANCIAL TIMES, May 1, 2008, at 2 (quoting Gretchen Hamel, spokeswoman, United States Trade Representative, as saying: "The appellate body has, unfortunately, once again gone beyond the agreement that WTO Members negotiated [D]uring the Uruguay Round negotiations, WTO members considered and declined to adopt a prohibition on zeroing."), with Pruzin, *supra* note 131, at 29 (quoting United States Trade Representative Ambassador Susan Schwab as saying: "This [Panel ruling] is further proof of what the United States has been saying all along – that WTO rules do not prohibit zeroing and that WTO Appellate Body reports to the contrary have overreached.").

uncertainty and unpredictability, and further diminish the vital role of the WTO negotiations in expanding world trade.”¹⁴⁰

Other Members, too, sided with the American argument.¹⁴¹ The underlying premise of this argument is that a panel or Appellate Body action is little more than arbitration between two countries, hence a holding and rationale are binding only on the parties to that action. Query whether that premise is increasingly untenable.

In three intriguing paragraphs, the Appellate Body walked forward hesitatingly while looking to its own past, and then stopped with a blessing of the arguments favoring the Mexican position:

158. It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. [Citing the 1996 *Japan – Alcoholic Beverages II* case, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996), the Appellate Body also quoted in a footnote its statement in the earlier case that: the *Statute of the International Court of Justice* has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.] This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. In *Japan – Alcoholic Beverages II*, the Appellate Body found that:

[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.

159. In *US – Shrimp (Article 21.5 – Malaysia)* [i.e., *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*,

140. Appellate Body Report, *Stainless Steel*, ¶¶ 39-40 (citations omitted). See also *id.* ¶ 148 (summarizing the American argument).

141. See, e.g., *id.* ¶¶ 41, 152 (summarizing Chile’s argument that it is appropriate and expected that panels follow previous Appellate Body findings, although they are not bound to do so).

WT/DS58/AB/RW (adopted 21 November 2001)], the Appellate Body clarified that this reasoning applies to adopted Appellate Body reports as well. In *US – Oil Country Tubular Goods Sunset Reviews* [i.e., *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (adopted 17 December 2004)], the Appellate Body held that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.”

160. Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are 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. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. *Ensuring “security and predictability” in the dispute settlement system*, as contemplated in Article 3.2 of the DSU, implies that, *absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.*¹⁴²

The above *obiter dicta* from the Appellate Body are unsurprising. The Appellate Body cannot say openly that its prior decisions are binding. To do so would transform WTO adjudication into a *de jure stare decisis* regime. The Appellate Body knows well it lacks authority to effect that change. Rules about rules – namely, the sources of law – are a legislative function for the WTO Ministerial Conference. Yet, to ignore the *de facto* importance of precedent – “*acquis*” as the Appellate Body insists on calling it – would be to ignore reality.

142. *Stainless Steel* Appellate Body Report, ¶¶ 158-60 (emphasis added) (citations omitted).

c. More Uncertainty

The United States has had an international legal obligation to comply with Appellate Body rulings on Simple Zeroing since at least May 9, 2006. On that date, the DSB adopted the Appellate Body Report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*.¹⁴³ However, the American strategy on zeroing is to shift the forum, from the courtroom to the legislature, as it were, and rewrite the rules. The United States has insisted in Doha Round negotiations that any accord on rules must expressly permit zeroing.¹⁴⁴ Given the worldwide disagreement with that position, and the state of the Round, compliance by the United States with the *Stainless Steel* Appellate Body Report is anything but certain.

B. Antidumping and Reasonable Security for Duty Payment

1. Citation

Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand* and *United States – Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R (July 16, 2008) (adopted Aug. 1, 2008)¹⁴⁵

143. See 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). This case is reviewed in Raj Bhala & David A. Gantz, *WTO Case Review 2006*, 24 ARIZ. J. INT’L & COMP. L. 299, 353-86 (2007).

144. See Bhala, *Resurrecting the Doha Round*, *supra* note 111, at pt. IV.A (forthcoming 2009).

145. Referred to in this review as Appellate Body Report, *Customs Bond Directive*.

Due to the similar subject matter, the appellate proceedings (in which Thailand and India appealed on April 17, 2008 and the United States appealed on April 29, 2008) were consolidated. Thus, despite the two case names on the cover of the Report, the Appellate Body issued a single, unified Report covering both underlying actions. In those actions, the same three panelists issued the rulings.

In the panel case brought by Thailand, the third parties were Brazil, Chile, China, the EC, India, Korea, Japan, and Mexico. Vietnam also reserved third-party rights in the case, but did not provide a written submission. See Panel Report, *United States – Measures Relating to Shrimp from Thailand*, ¶ 5.1 & n.48, WT/DS343/R (Feb. 29, 2008) (adopted Aug. 1, 2008), ¶ 5.1 & n.48 [hereinafter Panel Report, *Customs Bond Directive (Thailand)*]; World Trade Organization, *Update of WTO Dispute Settlement Cases* 67, WT/DS/OV/33 (Jun. 3, 2008). In the action brought by India, the third parties were Brazil, China, the EC, Japan, and Thailand.

2. Facts and Basic Panel Findings¹⁴⁶

The United States imposed AD duties on imports of frozen warm water shrimp from Thailand and India. In so doing, the DOC employed Model Zeroing (involving weighted average comparisons of Export Prices and Normal Value) in the original investigation, at both the preliminary and final dumping margin determination stages. The dumping margins on Thai shrimp ranged from 5.29 to 6.82 percent, with an all-others rate of 5.95 percent. The dumping margins on Indian shrimp were between 4.94 and 15.36 percent, with an all-others rate of 10.17 percent.

Before the Panel, Thailand raised claims against Zeroing arising under GATT Articles II-III and VI:1-2, and Articles 1, 2:1, 2:4, 2:4:2, 3:1-5, 5:8, 7:1-2 7:4, and 9:2-3 of the *Antidumping Agreement*. Additionally, Thailand lodged claims against the so-called “Enhanced Continuous Bond Requirement” (EBR) of the United States, both as such and as applied to Thai shrimp exports. Thailand made these claims under GATT Articles I:1 (the Most-Favored-Nation [MFN] obligation), II:1(a)-(b) (tariff binding rules), III (national treatment requirements), VI:2-3 and associated Interpretative Note, *Ad Article VI, paragraphs 2 and 2 (item I)* (dumping), X:3(a) (transparency), XI:1 (the prohibition on quantitative restrictions), and XIII:1 (parameters for administering allowable quantitative restrictions), and said the United States could not justify them as an administrative necessity exception of Article XX(d).¹⁴⁷ Logically, Thailand also made its claim against the EBR under Article 18:1 of the *WTO Agreement on Antidumping*. This provision explicitly links GATT and the *Agreement*, stating that no AD action

At the Appellate stage, the third-party participants were Brazil, Chile, China, EC, Japan, Korea, Mexico, and Vietnam. Technically, Thailand and India qualified as both appellants/appellees and third-party participants (each in the appeal of the other).

The appearance of Vietnam as a third-party participant was significant, given its recent accession to the WTO on January 11, 2007 and status as a developing country. Its participation in the case was its first-ever appearance in a WTO adjudicatory proceeding. To be sure, Vietnam, along with Brazil, China, Ecuador, India, and Thailand, had an immediate commercial interest at stake. The AD order of February 1, 2005 (discussed below) covered shrimp from their countries. See Appellate Body Report, *Customs Bond Directive*, ¶ 183 n.183.

146. This discussion is drawn from: Appellate Body Report, *Customs Bond Directive* ¶¶ 1-21, 182-95, 256; Panel Report, *Customs Bond Directive (Thailand)*; Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R (Feb. 29, 2008) (adopted Aug. 1, 2008) [hereinafter Panel Report, *Customs Bond Directive (India)*]; World Trade Organization, *Update of WTO Dispute Settlement Cases* at 65-67.

147. For a discussion and analysis of these provisions, see BHALA, *supra* note 91, chs. 1-3 (MFN), 4-6 (national treatment), 11 (tariff bindings), 14-15 (quantitative restrictions and their administration), 16 (transparency), 19 (general exceptions), and 25-29 (dumping).

The Appellate Body refers to the *Ad Article* as the *Ad Note*; thus, herein these two appellations, along with “Interpretative Note,” are used interchangeably.

may be taken except in accordance with GATT, as interpreted under the *Agreement*.

Thailand also explained (to the DSB meeting at which the United States blocked the Thai request for formation of a panel) that the EBR measure threatened the “livelihood and sustainability” of the Thai shrimp industry.¹⁴⁸ That was because 50 percent of Thai shrimp exports go to the United States market. It also was because many shrimp farmers were recovering from the December 2004 tsunami. That disaster caused \$500 million worth of damage to the Thai shrimp industry, and a large number of farmers were barely able to pay off debts they incurred to recover from it.

The EBR is a measure imposed by the United States CBP since 1 February 2005. It applies to imported frozen warm water shrimp that is subject to an AD or CVD order. Under American trade remedy law, there are three deposit requirements incumbent on importers of subject merchandise:

(1) Basic Bond Amount (BBA) – Post a bond, which is required of all importers of any merchandise into the United States, whether or not that merchandise is subject to a trade remedy order. The CBP will not permit release from its custody of merchandise unless this bond is posted.¹⁴⁹ The BBA equals the greater of U.S. \$50,000 or 10 percent of the duties, taxes, and fees paid during the preceding year. The resulting figure is then rounded to a figure set out in the formula. The BBA also is known as a “single entry bond” or “continuous bond.”

(2) Cash Deposit – Post a cash deposit equal to the margin of dumping or subsidization rate calculated in the original investigation, or most recent Administrative (Periodic) Review in which a duty assessment rate is computed, which is standard practice under the retrospective duty assessment system in American AD/CVD proceedings.

(3) EBR – Post an enhanced continuous bond equal to 100 percent of the AD or CVD rate established in the original investigation or most recent Review for an exporter of subject merchandise, multiplied by the value of imports of that merchandise entered by the importer during the previous 12 months.

148. Daniel Pruzin, *U.S. Blocks Thailand's Request for WTO Panel on Shrimp Duties*, 23 INT'L TRADE REP. 1438, 1438 (2006) (quoting an unnamed representative from Thailand).

149. See 19 C.F.R. § 142.4(a) (2009).

The EBR was introduced on July 23, 1991 via a 1991 Customs Directive.¹⁵⁰ It has been amended on four occasions—in July 2004, January 2005, August 2005, and October 2006—and these changes constitute the so-called “Amended Continuous Bond Directive” (Amended CBD). The changes occurred after a review commenced by CBP in 2003 to identify areas in which there were serious difficulties in collecting customs duties. The review uncovered a substantial increase in importer defaults on AD duties over recent years. Historically, the annual uncollected amount of AD duties had been low, rarely over \$10 million.¹⁵¹ But, by 2004 the outstanding liability for AD duties hit an unprecedented level of \$225 million just for agriculture and aquaculture cases (specifically, shrimp and shrimp-related products), and jumped to \$629 million by the end of 2006.¹⁵²

Accordingly, the Amended CBD changed the EBR for “covered cases” within “special categories” of merchandise. The only special category designated by the CBP is “agriculture/aquaculture merchandise.” The only “covered case” the CBP has identified is “shrimp covered” by an AD or CVD order.¹⁵³ Thus, effective 1 February 2005, CBP implemented the EBR with respect to subject shrimp—shrimp subject to an AD or CVD order. The essence of the changes is that CBP can impose enhanced bond amounts on subject shrimp. The changes also allow CBP to depart from the standard formula for the EBR and make an individualized bond determination to determine the EBR amount, on a case-by-case basis, to ensure that duties owed by an importer are collected.¹⁵⁴ Not coincidentally, the AD order published by the DOC on subject shrimp also was dated 1 February 2005. Since then, CBP has applied the EBR only to this merchandise, meaning that only importers of it have been obligated to maintain enhanced continuous bond coverage. When an importer tenders payment of its final liability for AD duties—specifically, when CBP assesses that liability and

150. See Appellate Body Report, *Customs Bond Directive*, ¶¶ 3-4.

151. See *id.* ¶ 190 n.194.

152. See Daniel Pruzin, *WTO Makes Public Ruling in Bond Dispute with U.S. Customs; No Word on U.S. Appeal*, 25 INT’L TRADE REP. 360, 360 (2008); Daniel Pruzin, *WTO Panel Issues Final Ruling in U.S. Customs Bond Dispute*, 24 INT’L TRADE REP. 1617, 1617 (2007).

153. Interestingly, the United States Court of International Trade (CIT) issued a preliminary status quo injunction against the CBP with respect to applying the EBR and Amended CBD to certain parties because of the likelihood CBP had acted arbitrarily and capriciously by selecting only subject shrimp as the “covered case.” See Appellate Body Report, *Customs Bond Directive*, ¶ 195. At the time of the WTO litigation, the CIT action on the merits was pending.

154. An importer must request an individualized determination and submit data on its financial condition pertinent to its risk of default on payment of duties. CBP then examines this data, along with its records of the compliance history of the importer, its view of the ability of the importer to pay, and other relevant information.

liquidates entries of subject merchandise to which the liability relates—then the CBP releases the EBR posted by the importer.

In general, there are three parties to a customs bond transaction: (1) the bond principal, which typically is the importer; (2) the surety, which is a guarantor that agrees to pay any liability that might arise if the bond principal fails to perform its obligations under American trade laws and regulations; and (3) the beneficiary, which is the CBP. The bond itself, therefore, is accessory or ancillary to the principal obligation that it is supposed to guarantee.

Accordingly, like any bond, a customs bond like the BBA and EBR are legal instruments designed to secure payment of a possible liability that arises from failure by an importer to adhere to United States trade laws and regulations affecting imported merchandise.¹⁵⁵ The EBR operates in conjunction with the BBA, as well as cash deposits, but—as intimated above—the EBR has a special purpose. It is supposed to secure the potential additional liability that might arise from an increase in the dumping margin that is over and above the margin established for a producer-exporter in the original investigation or most recent Administrative Review. Under the American retrospective assessment system, whether there will be an additional liability is not known with certainty until the final liability for payment of AD duties is assessed in the first or a subsequent Administrative Review, and entries of subject merchandise are liquidated.

This is because through an Administrative Review, the duty assessment rate for an importer that establishes its final liability is computed. (If no interested party requests a Review, there is no additional liability beyond the cash deposit because the cash deposit rate established in the original investigation, or the going forward cash deposit rate set in the last Review, becomes the duty assessment rate.) This assessment rate could go up, in which case the EBR secures payment. But, it could go down. That is, it is possible that a Review shows a duty assessment rate for an importer that is lower than the previously estimated cash deposit rate for the corresponding exporter of subject merchandise. In that case, the importer would be entitled to a refund of the difference, with interest. It is even possible that in a Review, the dumping margin computed for an exporter increases, but the duty assessment rate for a particular importer is lower than the margin for that exporter from which the importer imports subject merchandise. In that instance, the importer also would be entitled to a refund, with interest. In brief, the additional liability incumbent on an importer of subject merchandise above the cash deposit rate, which the EBR is supposed to secure, may—or may not—arise with respect to a particular importer.

Regarding the formula for the EBR, by way of example, suppose an importer brings into the United States \$20 million of subject shrimp during the preceding year. Assume the AD duty is 50 percent. This importer would have to post a bond—the EBR—to secure payment of \$10 million (the full AD rate of 50

155. *See* 19 C.F.R. § 113.62 (2009).

percent times the \$20 million import value).¹⁵⁶ Obviously, the first and second bond requirements listed above were not remarkable. But, the third requirement was particularly controversial. Indeed, it is the third requirement that is truly the “enhancement” to the first two requirements. Thus, the acronym “EBR” most properly refers to the third requirement.

There was dispute at the Panel stage in both the Thailand and India cases as to the quantitative impact of the EBR on importers of subject shrimp. Some importers tried to require their exporters to ship subject shrimp on a delivery duty paid (DDP) basis, and thereby pass on the cost of the EBR to exporters by making the exporter the importer of record subject to CBP bond requirements. However, there was little doubt on two points. First, the importers faced significantly higher security requirements (and attendant collateral and fee obligations) than before on entries of shrimp. Second, because of that additional security, the importers incurred an opportunity cost. They had to forego other commercial opportunities they might otherwise have pursued.

On Zeroing, the Panel ruled in favor of Thailand, holding that the United States practice ran afoul of Article 2.4.2 of the *Antidumping Agreement*. The United States did not appeal this finding, likely because it abandoned the practice of Model Zeroing in original investigations on February 22, 2007. The Panel also held in favor of Thailand on its EBR claims. The EBR did in fact violate Article 18.1 of the *Agreement*, as well as the *Ad Article* to GATT Article VI (the Interpretative Note to paragraphs 2-3). Moreover, said the Panel, the United States could not justify the violation under GATT Article XX(d). However, the Panel exercised judicial economy too, declining to rule on whether the EBR violated GATT Articles I:1, II:1(a)-(b), X:3(a), of XI:1.

India brought a separate parallel action against the EBR and made claims against the Amended CBD. The Indian attack on the EBR and Amended CBD was somewhat broader than that made by Thailand. Like Thailand, India made arguments under GATT Articles I:1, II:1(a)-(b), VI:2-3 (including the *Ad Article* to these provisions), X-XI, and XIII. Also like Thailand, India made claims under the *Antidumping Agreement*, not only Articles 1, 9.1-3, and 18.1, but also Articles 7.1(iii)-2 and 7.4-5 (concerning provisional measures), 18.4 (a mandate to ensure conformity of domestic AD measures with the *Agreement*), and 18.5 (a requirement to notify the WTO of changes to AD measures). Further, India argued the American measure ran afoul of provisions in the WTO *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*—Articles 10 (which requires consistency with GATT Article VI in the application of CVDs), 17.1(c), 17.2, and 17.4 (all concerning provisional measures), 19.2-4 (concerning the

156. See Daniel Pruzin, *India Challenges U.S. Bond Requirements for Farm, Fish Goods Under AD, CVD Orders*, 23 INT’L TRADE REP. 868, 869 (2006) (stating that “[a]s an example, an importer slapped with a 40 percent antidumping duty and with \$1 million of exports to the United States over the previous year would be required to pay an additional \$400,000 bond.”).

imposition and collection of CVDs), 32.1 (also concerning consistency with GATT), 32.5 (which mandates conformity of domestic CVD measures with the *SCM Agreement*), and 32.6 (which requires notification to the WTO of changes in CVD measures).

The Panel ruled against India on several claims. The Panel held the EBR and Amended CBD were not as such violations of GATT Article VI:2-3, Articles 1, 7.1-2, 7.4, 9.1-3, 18.1, and 18.4 of the *Antidumping Agreement*, or Articles 10, 17.1(c), 17.2, 17.4, 19.2-4, and 32.1 of the *SCM Agreement*. Exercising judicial economy, the Panel also declined to rule on India's as such and as applied claims under GATT Articles I:1, II:1(a)-(b), X:3(a), XI:1, and XIII, and India's as applied claims under Articles 7.1(iii) and 7.4-5 of the *Antidumping Agreement*. But the Panel ruled in favor of India on four key points: (1) application of the EBR to shrimp from India violated Articles 1 and 18 of the *Antidumping Agreement*, as well as the *Ad Article* to GATT Article VI; (2) application of the EBR to Indian shrimp before the imposition of the relevant AD order violated Article 7.2 of the *Agreement*; (3) failure by the United States to notify the WTO Antidumping and SCM Committees of its Amended CBD measure was a violation, respectively, of Article 18.5 of the *Antidumping Agreement* and Article 32.6 of the *SCM Agreement*; and (4) GATT Article XX(d) did not justify the EBR.

3. Key Aspects of the Panel Proceedings¹⁵⁷

At the Panel stage, the essence of the debate between Thailand and India, on one side, and the United States, on the other side, was over Article 18.1 of the *Antidumping Agreement*, the *Ad Article* to GATT Article V:2-3, and the administrative necessity exception of GATT Article XX(d). Article 18.1 of the *Agreement* states:¹⁵⁸

18.1. No *specific action against dumping* of exports from another Member can be taken except *in accordance with the provisions of GATT 1994*, as interpreted by this Agreement.²⁴

²⁴ This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

157. This discussion is drawn from: Appellate Body Report, *Customs Bond Directive*; Panel Report, *Customs Bond Directive (Thailand)*; Panel Report Panel Report, *Customs Bond Directive (India)*; World Trade Organization, *Update of WTO Dispute Settlement Cases*, at 65-67.

158. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 18.1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994), available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf (emphasis added).

Item 1 of the Interpretative Note, the *Ad Note* to GATT Article VI:2-3, provides:¹⁵⁹

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.

GATT Article XX(d) states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a *disguised restriction on international trade*, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(d) *necessary* to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;¹⁶⁰

Thailand and India argued that applying the EBR to subject shrimp constitutes “specific action against dumping” under Article 18.1, which is not “in accordance” with GATT and, therefore, illegal. The United States countered that this application is not “specific action against dumping.” In the alternative, even if it were a specific action, the EBR is nonetheless “in accordance” with GATT because it is “reasonable security” within the meaning of the *Ad Article* to GATT Article VI:2-3.

In ruling in favor of Thailand and India, the Panel relied on the precedent set by the Appellate Body in the *1916 Antidumping Act* case.¹⁶¹ In that case, the

159. General Agreement on Tariffs and Trade 1994, Annex 1, Ad art. VI, ¶¶ 2-3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 1153 (1994) (emphasis added).

160. *Id.* art. XX(d) (emphasis added).

161. See *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) (adopted Sept. 26, 2000). This case is covered in Raj Bhala & David A. Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT’L & COMP. L. 1, 44-52 (2001).

Appellate Body held that proof of a violation of Article 18.1 of the WTO *Antidumping Agreement* has three elements:

- (1) The measure at issue is specific to dumping.
- (2) The measure is an action “against” dumping, i.e., it operates against dumping.
- (3) The measure is not in accordance with GATT.

Looking to this precedent was a smart move by the Panel because the American argument in the *Customs Bond Directive* case was redolent of that in the *1916 Act* case. In both disputes the first line of defense by the United States was that the measure was not a specific action against dumping.

In the case at bar, the Panel held the EBR was “specific action against dumping” for three reasons. First, the EBR is inextricably linked to, or strongly correlated with, the elements of dumping (i.e., the EBR can be applied only to merchandise subject to an AD order). Those constituent elements, said the Panel, are implicit in the express legal prerequisites for the application of the EBR. The formula in the Amended CBD for calculating the EBR directly refers to the AD duty rate. That is, the formula to compute the EBR expressly mentions the AD duty rate. Therein was the link to the elements of dumping.

Second, the EBR operates “against” dumping. That is because – as previous Appellate Body jurisprudence like the *1916 Act* case indicated – the EBR deters or dissuades foreign producer-exporters from engaging in the practice of dumping. The deterrence or dissuasion mechanism is the additional cost borne by the importers of subject merchandise, but ultimately impacting producer-exporters associated with the EBR. In effect, in the end, the EBR adversely affects producer-exporters of subject merchandise by imposing additional costs on them. Illustrations of those costs include fees and collateral requirements demanded by surety companies to issue an enhanced bond.

Significantly, the United States did not appeal the Panel holding that the EBR is “specific action against dumping.” Thus, the Appellate Body expressed no opinion as to the correctness of this holding.¹⁶²

Also of significance was the finding of the Panel that the *Antidumping Agreement* and *Ad Article* are related. The *Agreement* should not be read to prevent a WTO Member from demanding certain types of security that are authorized by the *Ad Note*, even if the *Agreement* does not expressly foresee these devices. In other words, the *Agreement* should not unduly constrain what that *Note* authorizes:

The Panel examined the relationship between the *Ad Note* and the *Anti-Dumping Agreement*, and addressed the question of whether the *Ad Note* authorizes the imposition of security

162. See Appellate Body Report, *Customs Bond Directive*, ¶ 201.

requirements that are not expressly envisaged by the *Anti-Dumping Agreement*. The Panel considered that the Appellate Body Report in *Brazil – Desiccated Coconut* [i.e., *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (Feb. 21, 1997) (adopted March 20, 1997)] makes it clear that Article VI of the GATT 1994 (including the *Ad Note*) was not superseded by the *Anti-Dumping Agreement*. The Panel reasoned that, whereas Article VI may not be interpreted so as to justify action that is prohibited by the *Anti-Dumping Agreement*, Article VI can be an appropriate legal basis for authorizing a conduct that is not prohibited by the *Anti-Dumping Agreement*. According to the Panel, “[a]ny other approach would deprive the *Ad Note* of meaning and legal effect, and would effectively mean that it has been superseded by the *Anti-Dumping Agreement*.” . . . The Panel therefore concluded that “the relationship between the *Ad Note* and the *Anti-Dumping Agreement* is not such as to preclude the *Ad Note* authorizing certain types of security that are not expressly envisaged by the *Anti-Dumping Agreement*.”¹⁶³

In so holding, the Panel relied on the ordinary meaning of the language of the *Ad Article*, especially the phrase that reasonable security may be required “pending final determination of the facts in any case of suspected dumping or subsidization.” Surely, “suspected” refers (*inter alia*) to dumping that might occur after issuance of an AD order, and that suspicion is reasonable because of the finding in the original investigation that merchandise was dumped. As for “pending final determination of the facts,” the Panel said that the language is not limited to a final determination in an original investigation but also covers final determination in a Periodic Review under Article 9:3:1 of the *Antidumping Agreement*. Indeed, that would have to be the interpretation in a retrospective duty assessment system, wherein final liability for payment of AD duties occurs after entries of subject merchandise are made, and the question of whether those entries were dumped is settled.

To buttress its finding, the Panel also cited the context of the *Antidumping Agreement*, including Articles 5:1 and 7. It also observed that nothing in the negotiating history of GATT Article VI and the Interpretative Note indicated that the *Ad Article* is limited to provisional measures taken before a final dumping determination. The bottom line was that Thailand and India were wrong to think that dumping cannot be suspected after its existence is determined in an original investigation simply because that determination is not necessarily dispositive of future import entries.

163. *Id.* ¶ 206.

Thus, the Panel ruled the *Ad* Article authorizes imposition of security requirements both during an original AD investigation and after imposition of an AD order. In itself, that ruling favored the United States. Thailand and India had hoped the Panel would find that recourse to the *Ad* Article was unavailable once a measure, such as the EBR, was found to be a specific action against dumping. Their logic was that the *Ad* Note cannot be applied independently of the WTO *Antidumping Agreement* and that the *Ad* Note is not an independent basis for fighting dumping. In turn, reasoned Thailand and India, the EBR went beyond the three responses permitted by GATT and the *Agreement*—provisional remedies, final AD duties, and price undertakings—and was itself a distinct, illegal fourth response. The Panel disagreed, finding that the EBR falls within the temporal scope of the *Ad* Article.

But, crucially, the Panel held that the EBR as applied by CBP does not conform to the *Ad* Article, which requires that the security be “reasonable.” The estimated AD duty deposit rate (i.e., the cash deposit rate) is designed to secure duty liability that results from an AD duty order and the going-forward cash deposit rate is supposed to secure duty liability following an Administrative Review. The EBR is applied in conjunction with these cash deposits. The EBR aims to secure any additional liability that would occur if there were increases in the dumping margin over and above the rate established in the original investigation or more recent review. The Panel checked the ordinary meaning of “reasonable,” which is “not irrational or absurd,” and applied it to the context of financial security.¹⁶⁴ “Reasonable” security would be an amount “not greatly less or more than might be thought likely or appropriate.”¹⁶⁵

In turn, the United States committed an as-applied violation of that provision and of Article 18:1 of the *Antidumping Agreement*. Only if the duty rate provided for in an AD order is likely to increase, and the likely amount of the increase is clear, would the EBR be “reasonable.” That is, the United States would have to (1) prove the duty rate probably will increase, and (2) provide an estimate of the amount of that increase before the EBR could be dubbed “reasonable.” Otherwise, following an original investigation, the estimated AD duty deposit rate is the best available estimate of the AD duty the DOC ultimately may assess. Likewise, following an Administrative Review, the going-forward cash deposit rate is the best available estimate of the AD duty the DOC ultimately may assess. Indeed, these deposit rates are the only available estimates. Any security exceeding this rate is unreasonable under the *Ad* Article.

Unfortunately for the United States, it did not engage in an analysis that would have made the EBR “reasonable.” It provided evidence that one-third of the time, the duty rates increased in AD cases involving the agriculture and aquaculture industries generally. The United States did not adduce any evidence on shrimp merchandise specifically. The Panel also held the EBR runs afoul of

164. *See id.* ¶ 245.

165. *Id.*

Article 7:2 of the *Agreement*. This is because the EBR results in a provisional measure on subject merchandise before imposition of a final AD duty, which is in excess of the duty provisionally computed.

The American defense of administrative necessity under GATT Article XX(d) failed to persuade the Panel. The United States failed to show the AD duties likely would increase above the cash deposit rates and thus the additional security of the EBR was not “necessary.” In sum, the Panel said the United States demanded more money from importers of subject merchandise without explaining why it needed the additional deposit to ensure payment of AD duties. Certainly a general sense of insecurity without a particularized foundation, let alone greed, is not “reasonable.”

4. Appellate Body Holdings¹⁶⁶

Not surprisingly, given the similarity of the claims and issues concerning the EBR and the identical composition of the underlying Panels, the Appellate Body consolidated the appellate proceedings and issued a single decision covering both underlying actions. The basic issue on appeal was whether the application of the EBR to subject shrimp was consistent with GATT, specifically the Interpretative Note to Article VI:2-3, as that Note is interpreted by the WTO *Antidumping Agreement* under Article 18:1. In other words was the EBR consistent with the *Ad Article*? The Appellate Body broke this issue down into three key questions.¹⁶⁷

166. *See id.* ¶¶ 181, 196-325.

167. The Appellate Body also dealt with the following less significant issue concerning the underlying *Customs Bond Initiative (Thailand)* Panel Report: was the Panel correct in concluding that estimated cash deposits collected following issuance of an AD order under the American retrospective AD duty assessment system are not AD duties governed by Article 9 of the *Antidumping Agreement*? The Appellate Body said it was unnecessary to resolve this question, but declared the finding of the Panel to be of no legal effect. *See id.* ¶¶ 181(a)(ii), 234-42, 320(b), 323(b).

On the *Customs Bond Directive (India)* Panel Report, the Appellate Body dispensed with the following minor issues:

- (1) Was the Panel correct in finding that the Amended CBD, through which the EBR is imposed, is not an as such violation of Articles 1 and 18:1 of the *Antidumping Agreement* and Articles 10 and 32:1 of the *SCM Agreement*? The Appellate Body agreed with this Panel finding. The additional security requirement was within the temporal scope of the *Ad Article* to GATT Article V:2-3. Hence, it could not be said that all instances of requiring such security automatically were inconsistent with the stated Articles. *See id.* ¶¶ 181(c)(i), 270-75, 323(e).
- (2) Was the Panel correct in holding that the Amended CBD is not inconsistent as such or as applied with Articles 9:1-3 of the

(1) *The Temporal Scope of the Ad Article* –

Does the scope of the *Ad Note* to GATT Article VI:2-3 cover only the original investigation period of an AD case, or does it also extend to the period after the imposition of an AD order?¹⁶⁸

The Appellate Body upheld the Panel finding that application of the EBR falls within the temporal scope of the *Ad Article* and this scope includes the period after imposition of an AD order. That is, the *Ad Article* authorizes the imposition of security requirements both during an investigation and after imposition of an order.

(2) *Reasonable Security Under the Ad Article* –

Was the Panel right in holding that the additional security requirement of the EBR on subject shrimp is not “reasonable” under the GATT Article VI:2-3 *Ad Note*?¹⁶⁹

The Appellate Body upheld the Panel finding. The reasonableness analysis of the Panel was correct, i.e., the *Ad Note* does not justify the EBR. However, the Appellate Body

Antidumping Agreement, and not inconsistent as such with Articles 19:2-4 of the *SCM Agreement*? The Appellate Body agreed with this Panel finding. In so doing, the Appellate Body said that bonds issued under the Amended CBD are not AD duties under the *Antidumping Agreement*, or CVDs under the *SCM Agreement*. See *id.* ¶¶ 181(c)(ii), 276-81, 323(f).

(3) Was the Panel correct in ruling that particular provisions of United States trade remedy law (Section 1623 of the *Tariff Act of 1930*, 19 U.S.C. § 1673e(a)(3) and 19 C.F.R. § 113.13) were outside its terms of reference? The Appellate Body agreed with the Panel. See *id.* ¶¶ 181(c)(iii), 286-96, 323(h).

(4) Whether the Panel violated Article 11 of the *DSU* by failing to make an objective assessment of the matter before the Panel (on the ground that the Panel made a *prima facie* case for the United States in the Panel’s analysis of GATT Article XX(d) by considering American trade measures other than those specifically cited by the United States in its own defense)? The Appellate Body cleared the Panel of any wrongdoing. See *id.* ¶¶ 181(c)(iv), 297-303, 323(i).

The Appellate Body found it unnecessary to make a finding on India’s claim that the Amended CBD is as such inconsistent with Article 18:4 of the *Antidumping Agreement* and Article 32:5 of the *SCM Agreement*. See *id.* ¶¶ 282-85, 323(g).

168. See *id.* ¶¶ 181(a)(i), 320(a), 323(a).

169. See *id.* ¶¶ 181(b), 320(c)-(d), 323(c)-(d).

reversed a corollary finding of the Panel that, in the context of applying the EBR, the *Ad Note* does not require an assessment of the default risk of individual importers. In truth, the Appellate Body ruled that a default risk assessment is required under the *Ad Note*. This reversal provides useful technical guidance as to some of the disciplines imposed through the *Ad Article*.

(3) *Justification of the EBR as Administratively Necessary – Does GATT Article XX(d) justify the EBR?*¹⁷⁰

The Appellate Body upheld the Panel finding. The administrative necessity defense does not protect the EBR simply because the EBR is not “necessary” under Article XX(d).

As a result of these key rulings, the Appellate Body—like the Panel—held that imposition of the EBR on subject shrimp was an as applied violation of the *Ad Article* to GATT Article VI:2-3 and Article 18:1 of the *Antidumping Agreement*.¹⁷¹

To its credit, the United States did not waste much time in endeavoring to comply with the adverse decision.¹⁷² The Southern Shrimp Alliance (SSA), a non-profit group consisting of American shrimp producers in eight states, was none too pleased. The SSA observed that \$26 million in AD duties and CVDs had not been collected, even with enhanced bonding in place, and argued the remedial relief it won would be gutted if the duties went uncollected. Yet, it appeared the EBR—unlike zeroing—was not an issue the United States was going to force any further.

5. The Temporal Scope of the *Ad Article*

As listed above, the first issue on appeal concerned the temporal nature of the *Ad Article* to GATT Article VI:2-3.¹⁷³ The *Ad Article* is relevant, of course, because of Article 18:1 of the *Antidumping Agreement*, which mandates conformity for any specific action against dumping with the provisions of GATT.

170. See *id.* ¶¶ 181(a)(i), (c)(iv), (d)(i), 320(e), 323(j).

171. See *id.* ¶¶ 181(c)(i), 321, 324.

172. E.g., Daniel Pruzin, *U.S. Reaches Deal with India, Thailand on Deadline for Implementing Bond Ruling*, 25 INT’L TRADE REP. 1617, 1617-1618 (2008). On January 12 2009, the CBP issued a proposed ruling to end the EBR for shrimp covered by AD or CVD orders. See Rossella Brevetti, *CBP Proposes End of Enhanced Bonding Requirements for Shrimp*, 26 INT’L TRADE REP. 83, 83-84 (2009).

173. See Appellate Body Report, *Customs Bond Directive*, ¶¶ 203-43.

The two sides largely repeated on appeal the arguments they had made at the Panel stage.¹⁷⁴ Thailand and India argued that the temporal scope of the *Ad* Article is restricted to a security (e.g., a bond or cash deposit) that is taken as a provisional measure. They said the Panel erred by finding the *Ad* Note authorizes the imposition of a security requirement after the imposition of an AD order. In other words, the *Ad* Note is time-bound, empowering the DOC to demand reasonable security up until the moment the DOC issues a final AD duty order. Once it issues that order, the DOC is barred from requiring additional security and the *Ad* Note does not authorize such a requirement. The United States countered that the Panel properly gauged the relationship between the *Ad* Note and the *Antidumping Agreement*, that the *Agreement* does not forbid the EBR, and that proof of the existence of dumping with respect to past import entries during a POI does not establish the existence of dumping with respect to future entries of a subject covered by the AD order.

Central to resolve the first issue, said the Appellate Body, was the proper interpretation of the phrase in the GATT Article VI:2-3 *Ad* Article “pending final determination of the facts in any case of suspected dumping.” In particular:

- What is the ordinary meaning of “final determination of the facts”? Does the phrase refer narrowly to the determination pursuant to which an AD order is imposed at the end of an original investigation, as Thailand and India argue, in which case the Interpretative Note bars the EBR because it occurs after that determination? Or, does “final determination of the facts” refer broadly to the determination of the final liability for payment of an AD duty pursuant to an Administrative Review in a retrospective assessment system, as the United States argues, in which case the Interpretative Note permits the EBR because it is within the temporal scope of the Note? In other words, in the life of an AD measure, is there only one “final determination of the facts,” namely the original investigation, as Thailand and India argue, or are there multiple such determinations, as the United States suggests?

- What is the ordinary meaning of “suspected dumping”? Does the term connote that dumping is suspected only until the imposition of an AD order, as Thailand and India argue, in which case the Interpretative Note bars the EBR because that order resolves the suspicion? Or, as the United States argues, does the term allow for the possibility that dumping remains suspected until final liability is determined in successive assessment reviews—during the entire lifetime of an AD order

174. *See id.* ¶¶ 214-19.

under a retrospective duty assessment system—in which case the *Ad Article* permits the EBR?

Unsurprisingly, the Appellate Body looked carefully at the plain meaning and context of the key words.

On the first question, the Appellate Body ruled that the United States had the better argument on the first issue. First, the critical phrase “pending final determination of the facts in any case of suspected dumping” occurs in the context of security to obtain “payment” of an AD or CVD order. The word “payment” sets the temporal scope of the *Ad Article* because it defines the nature of the obligation, the performance of which the security seeks to guarantee. That obligation is payment of the AD or CVD duty; hence, the *Ad Note* recognizes the right of each WTO Member to take a reasonable security precaution against the risk of a lawfully established remedial duty. The risk can materialize in an original investigation and, under Article 7 of the WTO *Antidumping Agreement*, a Member can impose a provisional measure in the form of a security to protect against this risk.

But, in a retrospective duty assessment system, in which the determination of final liability for an AD or CVD duty is made pursuant to Article 9:3:1, the risk of default also can materialize after imposition of an AD or CVD order. This is because there may be a difference between the

- (1) Amount collected at the time of import entry (i.e., the estimated AD duty deposit rate or cash deposit rate) and
- (2) Final liability computed in the Administrative Review (i.e., the duty assessment rate), when determination of the amount of an AD duty payable by an importer is decided.

Thus, “final determination” includes not only the period of an original investigation, but also the time thereafter, namely when assessment of final liability for payment of remedial duties is calculated. The word “facts” refers to any information needed to calculate properly the duty assessment rate.

The Appellate Body pointed out that even when this calculation is not through an Administrative Review (because no interested party requests one), a factual determination is made. In that instance, the DOC instructs CBP to assess AD duties and liquidate entries of subject merchandise at the cash deposit rate that was required on import entry. In other words, the estimated AD duty deposit rate becomes the duty assessment rate if there is no Review. In itself, that instruction qualifies as a factual determination.

On the second question, the meaning of “suspected dumping,” the Appellate Body again ruled that the United States had the better argument. It rejected the Thai-Indian view that once a determination of injurious dumping is made in an original investigation under Article 5 of the WTO *Antidumping*

Agreement and an AD order has been issued, the existence of dumping no longer is “suspected.” Rather, it is established. Not so, said the Appellate Body.

In a retrospective duty assessment system like that of the United States, the amount of the dumping margin (but not the existence of dumping) remains “suspected” even after the original investigation and issuance of an AD order.¹⁷⁵ The amount by which dumping occurs for imports of subject merchandise entering the United States after that order is uncertain. This is because the data used in the original investigation, and on which the order is based, to calculate the estimated AD duty assessment rate are from past entries of subject merchandise (specifically, those entries during the POI), not data from post-order entries. Only when an Administrative Review occurs is there certainty about the dumping margin for the post-order entries. In brief, for entries of subject merchandise made after imposition of the AD order, the magnitude of dumping is a matter of suspicion and remains so until an Administrative Review is complete and these entries are liquidated.

The consequence of the Appellate Body findings was apparent. “Final determination of the facts” includes determination of the final liability for AD duties after the original investigation and issuance of an order in an assessment review. The magnitude of the dumping margin remains “suspected” after issuance of an order up until final liability is calculated. Thus, the Interpretative Note, the *Ad Article* to GATT Article VI:2-3, not only covers, but also authorizes, the taking of reasonable security after imposition of an AD order in a retrospective assessment system.

6. Reasonable Security Under the Ad Article

The United States won the major interpretative dispute in the *Customs Bond Directive* case – the first issue, discussed above. Yet, it lost the remaining two issues, which meant the EBR could not stand in the eyes of the Appellate Body. (As indicated in the Commentary below, the victory exceeded the defeats because it helped safeguard the sovereign right of WTO Members to use retrospective assessment systems.) The essence of the second issue was the reasonableness of the EBR, at least as it is applied by CBP to subject shrimp, under the *Ad Article*.¹⁷⁶

175. The Appellate Body distinguished its emphasis on the amount or magnitude of the dumping margin, on the one hand, from the existence of dumping *per se*, on the other hand, and rebuked the panel for conflating the two and reasoning that the existence of dumping remains uncertain. *See id.* ¶¶ 225-26. Arguably, the practical import of this distinction is less significant and the Panel was not as off base as the Appellate Body suggests. The two terms are intimately linked: if the dumping margin is zero or positive, then there is no dumping.

176. *See id.* ¶¶ 244-69.

On the second issue, reasonableness, the Appellate Body generally upheld the work of the Panel. The Panel opined it would be appropriate to call for increased security via the EBR if the dumping duty rates in an AD order were likely to increase by such an amount that the cash deposits would not provide sufficient security for the final liability. That showing would imply a determination of the likely amount of the increase, to ensure that the additional security under the EBR was not substantially more than the amount by which the final liability likely would exceed the cash deposit. Conversely, if there were no analysis of the likely increase in the AD duty rate, then the best—indeed, the only—available proxy for duties that ultimately would be assessed would be the rate in the AD duty order. Any security in excess of that rate would be unreasonable.

The United States did only a modicum of analysis. It restated its explanation that:

the EBR is a “security” measure that seeks to ensure the *full* collection of the *final* anti-dumping duties that may be assessed in an assessment review. Therefore, whether United States Customs requires additional security depends on “the *amount* of potential [additional] liability being secured and the likelihood of default” by importers. According to the United States, the amount of potential additional liability depends on “the likelihood of an increase in the margin of dumping during the assessment review, the likely size of that increase, and the total value of shipments subject to that margin of dumping.” As regards the “likelihood of default” by importers, a range of factors may be relevant to establish non-collection risk, including “industry characteristics, ability to pay, and compliance history.”¹⁷⁷

However, that explanation dealt with the application of the EBR, not the justification underlying the need for the measure.

On this latter, critical point, the United States looked at historical data on AD duty rates in the agriculture and aquaculture sectors as a whole. The duty rates increased 33 percent of the time, did not change 11 percent of the time, and actually fell 56 percent of the time. In the one-third instances of default on AD duties, importers of agriculture and aquaculture merchandise accounted for the bulk of non-payments. Overall, the potential additional liability was significant, said the United States, because the value of shipments subject to AD orders was

177. *Id.* ¶ 257 (alteration in original) (citations omitted).

considerable (\$2.5 billion in 2003 from India, Thailand, and four other shrimp-exporting countries).¹⁷⁸

Manifestly, this evidence hardly commended the application of the EBR to subject shrimp as “reasonable.” Of itself, the value of shipments was irrelevant.¹⁷⁹ That is because the estimated AD duty assessment rate (i.e., the cash deposit rate from the original investigation and the going-forward cash deposit rate from any Administrative Review) secured payment of AD duties on that total value at the existing AD duty rates. If those rates increased modestly, then the BBA would offer protection. On the other data furnished by the United States, the Appellate Body intoned:

[As set out in step one of the two-step test, articulated below,] the application of a security such as the EBR cannot be viewed as reasonable unless, at the time it is applied, a likelihood of an increase in the margin of dumping of an exporter resulting in significant additional liability has been properly determined on a sufficient evidentiary foundation. *We believe that an analysis showing that margins of dumping had increased in 38 percent of cases, in the agriculture and aquaculture sectors as a whole, is not a sufficient evidentiary basis to conclude that margins of dumping were likely to increase for subject shrimp. Moreover, the cases in which an increase of the margin of dumping was allegedly found did not include subject shrimp.* In this respect, we also note the Panel’s statement that “[India ha[d] demonstrated – and the United States ha[d] not disputed – that rates increased for a very small proportion of shrimp imports from India.”¹⁸⁰

What is the link between general historical data, on the one hand, and the likelihood of increased rates in the particular context of dumping shrimp, on the other hand? That was a question for which the United States had no persuasive answer.¹⁸¹ Ironically, the give-and-take was redolent of the winning American

178. See Daniel Pruzin, *WTO Panel Rejects India, Thai Complaint Against U.S. Customs’ Bond Requirements*, 24 INT’L TRADE REP. 1430, 1430 (2007).

179. See Appellate Body Report, *Customs Bond Directive*, ¶ 267.

180. *Id.* ¶ 265 (emphasis added) (citations omitted).

181. The United States tried unsuccessfully to argue that preliminary results from the first Administrative Review conducted by the DOC indicated some shrimp producer-exporters would have an assessment rate that was substantially higher than the cash deposit rate set in the original investigation. The problem with this attempt was that the Review results were preliminary, and amounted to an *ex post* rationalization because they were established after the United States had imposed the EBR. Moreover, the increased rates would cover only a small proportion of Thai and Indian shrimp exports to the United States. See *id.* ¶ 248 & n.304.

argument in the famous *Beef Hormones* case. The European Union (EU) adduced evidence alleging the growth hormones at issue were carcinogenic. The United States astutely pointed out that the studies cited by the EU did not pinpoint the hormones at issue.

In ruling that the EBR ran afoul of the Interpretative Note to GATT Article VI: 2-3, the Appellate Body articulated a two-step test for “reasonableness”:

In our view, a two-step approach is necessary to assess the “reasonableness” of a security such as the EBR. The first step involves a determination of the “likelihood” of an increase in the margin of dumping of an exporter as a result of which there will be a *significant additional liability* to be secured. This determination should have a rational basis and be supported by sufficient evidence. The second step involves a determination of the “likelihood of default” on the part of importers in respect of whom such additional liability is likely to arise. It is evident that the second step of the process would become pertinent only if the likelihood of increase in the margin of dumping has been properly established under the first step. If the determination of the likelihood of significant additional liability itself lacks a sufficient evidentiary foundation, the imposition of a security cannot be justified. Furthermore, should the determination of likelihood under the first step be properly made and thereby the second step of the process become relevant, an evaluation of the reasonableness of the amount of security demanded would depend on the magnitude of the likely additional liability and the risk of default by importers. A security must obviously reflect and be commensurate with the likely magnitude of the non-payment or non-collection risk that has been established on a proper basis. Taking security from an importer who may have no additional liability to pay or from an importer who presents no risk of default, as revealed by available and pertinent evidence, would obviously be unreasonable. Finally, security requirements that impose excessive additional costs on

Notably, the website of CBP had posted some egregious illustrations of significant liability increases. In one case involving Chinese garlic imports, the MFN rate before initiation of an AD investigation was below 5 percent, but the final liquidation rate was 376 percent, and the increase was not covered by normal bond requirements. In another case, which involved imported crawfish, the cash deposit rate was 91.5 percent, but the duty assessment rate was 201 percent. *See* Pruzin, *supra* note 156, at 869.

the importers may convert the security into an impermissible specific action against dumping.¹⁸²

In sum, (first) what is the probability of a higher dumping margin, and thereby a significant additional liability to be secured, and (second) what is the probability of default by the importers in question?

On the first step, Thailand averred that the dumping margin increased on only 1.92 percent of the trade covered by the original AD duties at stake in the case. That clearly indicated that the likelihood of an increase was minimal.¹⁸³ The second step is a contingent one. Only if the AD duty assessment rate is likely to increase such that the cash deposits mandated under the AD duty order are insufficient as security for suspected dumping is there a reason to proceed to the second inquiry. “Likelihood” of an increased dumping margin, which triggers a higher rate, does not mean conjecture or speculation. Even “a mere possibility is not sufficient to establish likelihood of increase,” as the Appellate Body stated.¹⁸⁴ Rather, “likelihood” must have a rational basis, with sufficient supporting evidence, both as to the increase itself, and the amount of that increase. Without a clear idea of the additional liability, it is impossible to ascertain whether additional security is commensurate with that liability.

The second step also is a particularized examination. Default risk must be ascertained not generally over a class of merchandise or importers, but with respect to the importers in the case at bar. A correlative point the Panel made, with which the Appellate Body agreed, concerned an inherent risk in a retrospective assessment system.¹⁸⁵ The dumping margin rate could increase by such a huge amount that the corresponding increase in security needed to secure payment of the additional AD duty liability is not reasonable. In turn, importers might default on the excess. The *Ad Article* does not allow a WTO Member to eliminate the increased risk of default by applying an unreasonably excessive security requirement, even if premised on a huge dumping margin increase.

Applying its two-step test, the Appellate Body found the EBR did not pass muster under the first inquiry. There were three reasons. First, as quoted above, the Appellate Body was entirely unconvinced by the general figure, from the agriculture and aquaculture sectors as a whole, that one-third of AD cases showed an increase in dumping margins.

Second, remarked the Appellate Body, the EBR formula was based on an assumption with no credible basis. The EBR requires in security an amount equal to the dumping margin multiplied by the value of imports in the previous 12 months. That presumes the final liability for payment of AD duties will roughly

182. Appellate Body Report, *Customs Bond Directive*, ¶ 258.

183. See Daniel Pruzin, *WTO Ruling on Food Import Customs Bond May Give U.S. Leeway to Maintain Measures*, 25 INT’L TRADE REP. 386, 387 (2008).

184. Appellate Body Report, *Customs Bond Directive*, ¶ 260.

185. See *id.* ¶ 260.

double in each Administrative Review, compared to the previously computed margin.¹⁸⁶ The Appellate Body did not elaborate on its point here, but its logic might have been as follows: suppose the dumping margin is 25 percent, and the value of imports in the previous year is \$2 million. The EBR would require posting an additional \$500,000. That requirement would be equivalent to saying in the next Review the assessment rate for an importer will be 50 percent, based on a doubling of the dumping margin for the exporter from 25 to 50 percent, and a \$1 million import value of transactions during the Review period.

Third, the EBR neglects the fact that in an Administrative Review, there may be an increase in the going-forward cash deposit rate for an individually-investigated producer-exporter. If that rate increases, then the upwardly-adjusted cash deposit rate will capture an increase in the duty liability for all importers purchasing subject merchandise from that exporter. In that sense, the EBR was both superfluous and excessive.

Overall, therefore, there was no significant potential unsecured liability in respect of the AD duty liability on subject shrimp. There could be one only if there was a significant increase in the dumping margin of an exporter in comparison with the margin established for it in the original investigation or Administrative Review. The United States could not prove that likelihood. Given the poor showing on step one, there was no need to proceed to step two, a default risk analysis.

The Appellate Body also rejected the American argument that the Panel had relied on an erroneous standard—“substantial certainty” for determining whether an increase in the AD duty rate likely would increase between imposition of an AD order and final assessment.¹⁸⁷ It would be reasonable, said the United States, to impose the EBR even if there is less than substantial certainty as to this increase. Indeed, the standard of the Panel was too high, demanding knowledge that is impossible to have when the EBR is imposed. For the United States, the correct benchmark should be whether the risk of default is “significant.”¹⁸⁸ The Appellate Body replied that the United States misread the Panel Report. That Report did not introduce a standard of “substantial certainty” to gauge the likelihood of an increase in the dumping margin and AD duty rate. Rather, the Panel stuck to the phrase “likely to increase,” and—if anything—did not go far enough in establishing a methodology, like the two-step test, to determine “reasonableness.”

Yet, the Appellate Body was not pleased with, and reversed, the Panel finding that the AD Article to GATT Article VI:2-3 imposes no obligation to assess the risk of default of individual importers. The Panel agreed with the American position that “reasonableness” does not connote such an obligation.

186. *See id.* ¶ 266.

187. *Id.* ¶ 250.

188. *Id.* ¶ 250. *See also id.* ¶¶ 251-52 (recounting the arguments of Thailand and India on the matter).

But, thought the Appellate Body, it made sense to impose additional security requirements on an importer only if a greater risk of default were proven for that importer. Thus, Thailand and India successfully appealed the finding of the Panel that in the context of applying the EBR, there is no obligation under the *Ad Article* to study individual default risks.¹⁸⁹ Not only is there such an obligation, but it is the second step of the two-step process outlined above—namely, an evaluation of the default risk of the relevant importers. Just because significant additional liability may arise does not mean there is a risk of default as to that liability. Rather, the financial condition (e.g., balance sheet and income statement strength), credit worthiness (i.e., ability to pay), and payment history (i.e., record of compliance) are “important factors” in a default risk analysis.¹⁹⁰

7. Justification of the EBR as Administratively Necessary

As to the final key issue, the Appellate Body focused on the meaning of “necessary” in the administrative law exception of GATT Article XX(d).¹⁹¹ The Panel held that unless a WTO Member shows the rates in an AD duty order are likely to increase, no additional security requirement can be considered “necessary” under this Article. For the United States, the Article XX(d) defense was its final fall-back position. The United States sought an Appellate Body holding that both steps of the classic Article XX analysis were satisfied—the measure at issue fell within an itemized exception (here, paragraph (d)), and it met the requirements of the *chapeau* (to Article XX). It was not successful.¹⁹² Indeed, the EBR did not even qualify as “necessary” under the first step.

Given its considerable jurisprudence on GATT Article XX, the Appellate Body proceeded in a predictable fashion. Under the first step of the two-step test, the Appellate Body looked to the elements of the itemized exception being invoked. Paragraph (d) had two key elements:

- (1) The measure in dispute (the EBR) must be “designed” to secure compliance with a law that itself is not WTO-inconsistent, and

189. *See id.* ¶¶ 253-54.

190. *See id.* ¶ 263.

191. *See id.* ¶¶ 304-19.

192. The United States was successful, in an indirect sense, in beating back the argument by India that the defense of Article XX(d) was unavailable. India argued Article VI and the *Ad Article* were *lex specialis* (law governing specific subject matter), which thus over-ruled the *lex generalis* of Article XX. (The principle India invoked is known as “*lex specialis derogat legi generali*,” which means that if two laws contradict, then the more specific law takes precedence over the general one.) The Appellate Body expressed no view on the issue. The success, then, was the Appellate Body assumed *arguendo* that the Article XX(d) defense was available. *See id.* ¶¶ 306-10, 319.

(2) The disputed measure must be “necessary” to secure that compliance.

As to the first element, what was the underlying law in the case? It was the rules of the United States governing the assessment and collection of duties in AD and CVD cases. None of them were contested as being WTO-inconsistent. Further, the EBR was “designed” to secure compliance with these rules and regulations. That was the clearly stated goal of the EBR and Amended CBD. The CBP was able to collect less than 50 percent of the AD duties and CVDs from cash deposits and the BBR.¹⁹³ The additional security measures took aim at the problem of under-collection. Thus, the critical problem was “necessity.”

“Necessary” does not mean “indispensable.” But, it means something more than merely “making a contribution” to securing compliance. It means something in between these extremes. To ascertain whether an administrative measure is “necessary” under GATT Article XX(d), three inquiries must be considered:

(1) *Relative Importance* –

What is the relative importance of the value or objectives of the underlying law that the measure is designed to protect?

(2) *Contribution* –

To what extent does the measure contribute to the end pursued, namely, securing compliance with the underlying law?

(3) *Restrictive Impact* –

To what degree does the measure restrict imports?

This three-pronged inquiry was developed through precedents like the 2001 Appellate Body Report in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*.¹⁹⁴

The United States could not persuade the Appellate Body, any more than it could the Panel, that the EBR was “necessary” to secure compliance with its rules on collecting and assessing duties in trade remedy cases. The United States urged that the EBR is “necessary” because it secures the potential additional liability arising from AD duties or CVDs an importer might owe in excess of cash

193. See Rossella Brevetti, *Sen. Vitter Criticizes WTO Ruling Against Continuous Bond Program*, 25 INT’L TRADE REP. 1244, 1244 (2008) (citing testimony before the Senate Finance Committee by former Deputy Assistant Secretary of the Treasury Timothy Skud).

194. See Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 161, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (adopted Jan. 10, 2001). This case is covered in Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT’L & COMP. L. 457, 472-505 (2002).

deposits. In other words, the EBR is a “necessary” buffer against a “significant potential unsecured liability” and “significant risk of default” connected with subject shrimp.¹⁹⁵ The United States accused the Panel of setting an erroneously high standard for “necessity,” namely “substantial certainty.” Thailand and India countered that the United States failed to show the likelihood of an increase in dumping margins, or a heightened risk of default among subject shrimp importers relative to importers of other merchandise. They also claimed to identify less trade-restrictive measures, which were reasonable alternatives, to the EBR, that would ensure compliance with the underlying American rules.

Thus, for the most part, the arguments on appeal over “necessity” tracked those at the earlier stage of the litigation, and those from the “reasonableness” issue under the GATT Article VI Interpretative Note. Not surprisingly, then, for the United States, the result was unchanged. The Appellate Body said:

The EBR is intended to secure potential additional liability that might arise from significant increases in the amount of dumping after the imposition of an anti-dumping duty order. The United States has not demonstrated that the margins of dumping for subject shrimp were likely to increase significantly so as to result in significant additional liability over and above the cash deposit rates. Like the Panel, we do not, therefore, see how taking security, such as the EBR, can be viewed as being “necessary” in the sense of it contributing to the realization of the objective of ensuring the final collection of anti-dumping or countervailing duties in the event of default by importers.¹⁹⁶

Notably, in upholding the ruling of the Panel that the EBR is unnecessary under Paragraph (d), and thus fails the first step of the two-step GATT Article XX test, the Appellate Body took care to distinguish between “necessity” under Article XX and “reasonableness” under the Interpretative Note to Article VI.¹⁹⁷ The two are not the same. Also of significance was a mild encomium from the Appellate Body to the Panel for properly interpreting and applying the previous jurisprudence of the (as it were) higher court.¹⁹⁸

195. See Appellate Body Report, *Customs Bond Directive*, ¶ 312.

196. *Id.* ¶ 317.

197. See *id.* ¶ 316.

198. See *id.*

8. Commentary

a. Excessive Length

Previous *WTO Case Reviews* have remarked that Appellate Body Reports tend to be unnecessarily long. Regrettably, the *Customs Bond Directive* is no exception. To be fair, the Appellate Body must get credit for consolidating the appeals in the case and issuing just one report. Yet, the principal cause for its dilation of the *Customs Bond Directive* Report also must be spotlighted and questioned: regurgitation of third party arguments. This portion of the 126-page Report (Part II) occupies about 57 pages (from pages 9–66), or 45 percent of the entire document.

It is no secret that the WTO faces a crisis of relevance. With the death, or at least moribund status, of the Doha Round, and with its resurrection in question, Members inclined toward trade liberalization have searched for alternatives. Free trade agreements (FTAs) top the list of their options. The Director-General, Pascal Lamy, energetically tries to keep the attention of Members focused on the Round, and holds all sorts of conferences and symposia, to boot, to keep the WTO in the headlines. But, a daily search of major news databases—Reuters, Bloomberg, and the BBC, for example—makes plain how little the impact is of these efforts, not only on average, everyday citizens, but also on major international businesses. Might the Appellate Body lend the Director-General a helping hand?

Every time the Appellate Body issues a report that is excessively long, it contributes to the perceived irrelevance of the WTO. To be sure, the average citizen non-lawyer is not expected to read Appellate Body reports, any more than she is likely to read a decision of the International Court of Justice (ICJ). But, leading news journalists ought to find these reports accessible to read, digest, and summarize. Evidently, they do not. One reason, probably, is that their eyes glaze over a document the front half of which is about what third parties in the case said. Why bother with all that, when much of it has little to do with the final outcome, anyway. (The link between subsequent parts of most Appellate Body reports, i.e., the holdings and rationale, on the one hand, and third party arguments, on the other hand, typically is tenuous at best.)

As is widely appreciated, the key argument for putting third party arguments in reports is—bluntly stated—to assuage the egos of the third parties, and assure them the Appellate Body “gets” their points. Other arguments include the tradition of international decision-writing, including arbitral reports, and the educational function for Members. There are two distinct issues—should the Appellate Body bother recounting the third party arguments at all, and if so, then where should it place that account. Let the first issue be conceded, for the present purpose.

Placement of a protracted discussion of third-party arguments at the forefront of reports no longer makes any sense, if it ever did, and is counter-

productive to the broader goal of the WTO to be relevant in today's world. Placement of third-party arguments in an annex ought to suffice. Indeed, the Appellate Body would save itself (and the WTO translation division) time if it simply required an abstract from third parties of their arguments, limited to 10 pages, and published them in an Annex. Every third party would have its say, and it would appear with the Report. If the WTO wants to "matter" more to citizens and enterprises in the global economy, then Appellate Body ought to consider taking a modest step of re-organizing its reports to make them more user-friendly.

b. A GATT Case and an Implicit Defense of Sovereignty

Customs Bond Directive is very much a case about GATT. It arises in the context of AD law, but the provisions of the WTO *Antidumping Agreement* are not the focus of the attention of the Appellate Body. Rather, its concentration is on the Interpretative Note to GATT Article VI:2-3, and Article XX(d). On these provisions, the Appellate Body adds to, or reinforces, some useful, practical jurisprudence.

For example, one such finding concerned the relationship between GATT and the *Antidumping Agreement*. In one paragraph, the Appellate Body helpfully explained:

We agree with Thailand and India that there is some overlap between the *Ad Note* [to GATT Article VI:2-3] and Article 7 [of the *Agreement*]. The *Ad Note* allows security in the form of provisional measures during the original investigation period, the disciplines of which are implemented through Article 7. At the same time, in our view, the *Ad Note* allows the taking of a reasonable security for payment of the final liability of anti-dumping duties after an anti-dumping duty order has been imposed where such security may be needed to ensure that the difference between the duty collected on import entries and the final duty liability is collected. We therefore do not agree with Thailand and India that the *Ad Note* is completely subsumed under Article 7 so that the taking of a reasonable security is not allowed after a definitive anti-dumping duty is imposed. As the Appellate Body clarified in *Brazil – Desiccated Coconut* [at p. 14], *the Anti-Dumping Agreement does not supersede the provisions of the GATT 1994*, including the Notes and Supplementary Provisions of Annex I to the GATT 1994. Rather, *Article VI of the GATT 1994 (including the Ad Note) and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines*. Our interpretation of the

Ad Note is consistent with this approach as it gives meaning and effect to both.¹⁹⁹

This point ought to have been clear enough to Thailand and India, if for no other reason than the placement of GATT, along with the *Antidumping Agreement*, as a text in Annex 1A to the *Agreement Establishing the World Trade Organization (WTO Agreement)*. The two documents comprise a package, and in the AD context, Article 18:1 and its footnote in the *Agreement* makes clear that GATT matters.

However, the most important elaboration of GATT principles in the Appellate Body Report is on the temporal scope of the Interpretative Note to GATT Article VI:2-3. The American victory on this issue alone was more than worth the price of defeat on the other issues. The United States rightly went to battle to protect its retrospective assessment system, and smartly pointed out the errors in the arguments of Thailand and India. The Appellate Body seemed to appreciate what was at stake – nothing less than the sovereign right of a WTO Member to employ a retrospective assessment system in imposing and collecting AD and CVD duties. Perhaps the Appellate Body was aware of the tremendous controversy its *Foreign Sales Corporation* decision had created—was it infringing on the United States world wide tax methodology, and trying to nudge America toward a European-style value added tax (VAT) system? Certainly, the Appellate Body had no mandate to depart from neutrality as between prospective and retrospective assessment systems. The *Antidumping Agreement* itself (e.g., in Article 9) was neutral.

Suppose the Appellate Body had ruled against the United States on the meaning of the Interpretative Note. Then, it might have had to rule in favor of the Indian claim that the Amended CBD, through which the EBR is imposed, is inconsistent as such with Articles 1 and 18:1 of the *Antidumping Agreement*. (That is because if a security taken after imposition of an AD order in an original investigation is not within the temporal scope of the Interpretative Note, then the security is not authorized by the *Ad Article*. There might be no other GATT or *Agreement* provision to justify the security.) In turn, such a ruling might have impeded the effective operation of retrospective systems. Collection of estimated duties at the cash deposit rate could have been imperiled by subsequent litigation seeking to build on the Thai-Indian victory against the EBR.

Exercising wisdom perhaps like that of King Solomon, the Appellate Body rendered a split decision. The United States lost the battle to defend the EBR in an as applied sense. It was excessive, after all, maybe even a little paranoid, to demand so much security on one kind of merchandise, with so little apparent reason for doing so. But, the United States won the war to defend the linchpin of retrospective assessment systems, namely, the calculation and

199. *See id.* ¶ 233 (emphasis added) (citation omitted).

collection of estimated AD duty deposit rates following issuance of an AD order.²⁰⁰

c. Technical Error

AD and CVD law is a highly technical field, and even experienced practitioners (and, it is hoped, teachers!) can be forgiven for occasional mistakes. The Appellate Body made one in the Customs Bond Directive Report. In its description of the American retrospective duty assessment system, the Appellate Body stated:

The first stage of the United States' anti-dumping duty system is the original investigation for the imposition of anti-dumping duties. The USDOC conducts an investigation to determine whether dumping by an exporter occurred during the period of investigation. The USDOC communicates its determination of the existence and level of dumping to the United States International Trade Commission ("USITC"), which conducts its own investigation to determine whether the relevant United States industry is materially injured or threatened with material injury by reason of the dumped imports. If the USDOC makes an affirmative determination that dumping occurred during the period of investigation, and the USITC makes an affirmative determination that the domestic industry was materially injured or threatened with material injury by reason of dumped imports, the USDOC issues a Notice of Antidumping Duty

200. Notably, the Appellate Body opined on the question of whether the EBR was "specific action against dumping" under the Interpretative Note. It eschewed the definitive affirmative response the Panel gave in favor of Thailand and India, saying that a security taking to guarantee a lawfully computed AD duty or CVD is not necessarily "specific action against dumping." Whether it constitutes such action depends on the nature and characteristics of the security, and the particular circumstances in which it is demanded. The Appellate Body linked this observation to a broader point – permissible remedies.

Because taking a security is not necessarily "specific action against dumping," the security is not automatically deemed an autonomous, illegal fourth response to dumping (beyond provisional remedies, final AD duties or CVDs, and price undertakings). Rather, security is a component of the imposition and collection of AD duties or CVDs. *See id.* ¶¶ 229-31.

The Appellate Body had little choice but to say that whether a security is "specific action against dumping," and thereby an impermissible response to dumping, depends on the facts and circumstances. Otherwise, retrospective assessment systems would be in peril. They need the flexibility to collect security to secure expected future final assessments.

Order and imposes an “estimated anti-dumping duty deposit rate” (also referred to as a “cash deposit rate”) equivalent to the “overall weighted average dumping margin” for each exporter individually examined. In addition, the Notice of Antidumping Duty Order sets out an “all-others” rate applicable to exporters that were not individually examined.²⁰¹

Part of the information in the italicized sentences is technically incorrect, or at least misleading.

In fact, the first stage of an AD (or CVD) case is the filing of a petition, followed by an examination by the DOC as to whether the petitioner has standing. The third step is a preliminary injury determination by the International Trade Commission (ITC)—not a preliminary dumping margin calculation by the DOC.²⁰² The preliminary dumping margin calculation is the fourth step. To be sure, the two preliminary determinations may occur roughly contemporaneously. But, the technical sequence and time deadlines are set in such a manner for a preliminary injury determination to occur first. That makes sense, because only injurious dumping is actionable. If the ITC renders a negative preliminary injury determination, then the case is over—and it simply is irrelevant whether non-injurious dumping occurs. Hence, the DOC need not bother itself with a dumping margin calculation.

d. Take Heart

The United States can take comfort from the case that the Appellate Body did not issue a ruling against the concept of an EBR in general. Its decision is based on the facts initially presented to the Appellate Body. An additional bond can be demanded, if there is a rational basis, with sufficient evidence, for that demand. In particular, each step in the two-step approach must be met *ex ante*, that is, before insisting on additional security.

First, the United States (or any other Member seeking additional security) needs to explain the likelihood of an increase in the dumping margin. Concomitantly, it needs to establish the amount of significant additional liability. If the likelihood is low, or there is merely a possibility of increase, or if the amount of increase is trivial, there is no need for an additional bond. Second, it is essential to determine the likelihood of default on the part of importers, in respect

201. *Id.* ¶ 184 (emphasis added).

202. *See* COMM. ON WAYS AND MEANS, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, 109TH CONG., pt. I, at 108-10 (1st Sess. Comm. Print 2005); RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE 902-15 (3d ed. 2008); RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 494-500, 521-23, 543-73 (1998).

of which the additional liability likely will arise. If the default risk is low, then there is no need for an additional bond. In sum, the Appellate Body did not eliminate the policy space in which to require additional security. It simply established some parameters for WTO Members to ensure they use that space reasonably—just as the Interpretative Note to GATT Article VI requires.

III. OTHER WTO AGREEMENTS

DSU AND SPS AGREEMENT

A. Citation

Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (adopted Nov. 10, 2008); Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R (Oct. 16, 2008) (adopted Nov. 10, 2008).²⁰³

B. Introduction and Background

Despite the title, these parallel proceedings before the Dispute Settlement Body are not limited to the procedural and substantive issues arising under or similar to those under the more than a decade old *EU – Beef Hormones* proceeding,²⁰⁴ in providing panels with significant additional guidance in conducting reviews of compliance with Members' measures with the SPS Agreement.²⁰⁵ Of equal or greater importance is the guidance provided to Members in the not uncommon situation in which there is a disagreement as to whether a Member's alleged compliance with a DSB determination requires the lifting of trade sanctions imposed earlier as a result of non-compliance, and the applicability of the Dispute Settlement Understanding²⁰⁶ in those circumstances.

203. Referred to herein as Appellate Body Report, *Canada/United States – Continued Suspension*. The two proceedings are fully parallel; identical Appellate Body Reports were issued in each.

204. 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) [hereinafter Appellate Body Report, *EC – Hormones*].

205. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994) [hereinafter SPS Agreement], available at http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm.

206. DSU, *supra* note 1, arts. 21-22.

If, as here, sanctions are being applied when the responding Member allegedly acts to bring itself into compliance, but the complaining Members disagree, are the complaining Members required to lift their sanctions unless and until a subsequent DSB determination confirms a continuing lack of compliance (or conversely determines compliance)? Given the multi-year time periods commonly required for complaints, particularly controversial ones, to wind their way through the panel and appellate body processes, this is a vital issue.

According to U.S. Trade Representative Susan Schwab, the Appellate Body report “is significant for the WTO dispute settlement system as a whole.” The report “confirms that WTO Members that are subject to additional duties for failing to bring themselves into compliance with the WTO’s rulings and recommendations must do more than simply claim compliance in order to obtain relief from such duties.”²⁰⁷

Also, although it was not an issue on appeal, a procedural ruling in the case represents a significant step toward greater transparency of Appellate Body procedures. Here, all three of the participants (Canada, United States and the European Communities) and four of the eight third participants (Australia, New Zealand, Norway, Chinese Taipei) asked that the hearing be opened to the public under conditions designed by the Appellate Body to protect any confidential information and the confidentiality of the hearing participation of the third participants (Brazil, China, Mexico, India) that remained steadfastly opposed to sunshine.²⁰⁸

In the original dispute, both Canada and the United States challenged EC restrictions²⁰⁹ on imports of beef grown with hormones as inconsistent with WTO rules, particularly Article 5.1 of the SPS Agreement, which permits such import restrictions only on the basis of a “risk assessment” and Article 3.1, which requires that sanitary and phytosanitary standards be based on international standards.²¹⁰ The Appellate Body essentially agreed,²¹¹ and recommended that the EC bring its practices into conformity with the SPS Agreement. After the EC failed to do so within a reasonable period of time, the United States and Canada sought to impose sanctions, determined by an arbitrator under DSU Article 22.6 to be US\$116.8 in the case of the United States and CDN\$11.3 in the case of Canada. Both were authorized by the DSB to suspend concessions in July

207. Press Release, U.S. Trade Representative, WTO’s Appellate Body Vindicates Continued U.S. Imposition of Sanctions After the EU Claimed Compliance in the *EU – Hormones* Dispute, at 1 (Oct. 16, 2008), available at http://www.ustr.gov/assets/Document_Library/Press_Releases/2008/October/asset_upload_file626_15173.pdf.

208. Appellate Body Report, *Canada/United States – Continued Suspension*, Annex IV, Procedural Ruling of 10 July to Allow Public Observation of the Oral Hearing (July 10, 2008).

209. Council Directive 96/22/EC, 1996 O.J. (L 125).

210. SPS Agreement, *supra* note 204, arts. 3.1, 5.1.

211. Appellate Body Report, *EC – Hormones*, ¶¶ 174-77, 193.

1999.²¹² The two Members duly applied 100% duties to selected EC imports,²¹³ which sanctions remain in force nearly a decade later.

In September 2003, the offending EC Directive 96/22/EC was replaced with a new Directive, again making meat treated with a variety of hormones subject to prohibitions.²¹⁴ Directive 2003/74/EC followed and, allegedly, was justified by the completion of a new set of seventeen “scientific” studies ordered by the Commission and performed by SCVPA.²¹⁵ This new directive purported to comply with the DSB recommendations of 1998.²¹⁶ It extended the ban permanently on beef treated with hormone oestradiol-17 β and provisionally for testosterone, progesterone, trenbolone acetate, zeranol and MGA (“the other five hormones”) pending the acquisition by the Community of the “more complete scientific information” that would remove the alleged “uncertainties” of then existing scientific data.²¹⁷

The DSB was notified, with the EC claiming (unilaterally) that it had fully implemented the DSB’s 1998 determination. However, the United States and Canada declined to lift the sanctions. The EU then sought consultations, the failure of which ultimately resulted in the establishment of a panel in the present action in February 2005.²¹⁸ After more than three and a half years of proceedings, and a 310 page Appellate Body Report, the sanctions remain in place. Based on the results of this proceeding, they are likely to continue in force for at least another couple of years while a DSU Article 21.5 compliance proceeding is pursued at Panel and Appellate Body levels.

212. Appellate Body Arbitration Decision, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS26/ARB (July 12, 1999) (complaint by United States); Appellate Body Arbitration Decision, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS48/ARB (Jul. 12, 1999) (complaint by Canada). The DSP authorized both Canada and the United States to suspend concessions Jul. 26, 1999) World Trade Organization, Dispute Settlement – The Disputes – DS26, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (last visited Apr. 2, 2009); World Trade Organization, Dispute Settlement – The Disputes – DS48, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds48_e.htm (last visited Apr. 2, 2009).

213. Office of the United States Trade Representative, Implementation of WTO Recommendation Concerning Meat and Meat Products (Hormones), 64 Fed. Reg. 40638 (Jul. 27, 1999); European Union Surtax Order, 133 C. Gaz. 17 (July. 28, 1999), available at <http://canadagazette.gc.ca/archives/p2/1999/1999-08-18/html/sor-dors317-eng.html>.

214. Council Directive 2003/74/EC, 2003 O.J. (L 262).

215. Scientific Committee on Veterinary Measures relating to Public Health of the European Communities.

216. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 267.

217. *Id.* ¶ 11.

218. *Id.* ¶ 12.

C. Major Issues on Appeal

The larger number of issues and sub-issues fall primarily into two categories:

- a) those relating to the application of the DSU in what the Appellate Body characterizes as the “post-suspension stage of a dispute;” in particular, the legality of WTO Members (Canada and the United States) continuing to apply sanctions after the responding Member (the EC) has purportedly complied with the DSB’s recommendations, and whether the onus was on Canada and the United States or on the EU to have recourse to DSB review of the purported compliance as the basis for removing sanctions; and
- b) whether the Panel’s analysis (some would argue second-guessing) of a Member’s “risk assessment” was consistent with the requirements of the SPS Agreement for review of such governmental actions.²¹⁹

Thus, in the first category,

1. For the EC, were the United States and Canada obliged to initiate proceedings under Article 21.5 of the DSU (disagreement over the consistency of measures taken with the DSB’s recommendations and rulings) in their efforts to seek redress for violations inconsistently with their obligations under DSU Articles 23.1 and 23.2(a) (requiring such recourse to be consistent with the DSU)?
2. Again for the EC, did the Panel err by failing to suggest to the United States and Canada that the latter cease their suspension of concessions and resort to Article 21.5 proceedings?
3. For the United States and Canada, did the Panel err by finding that the United States and Canada were erroneously seeking redress for a violation inconsistently with DSU Article 23.1?
4. Again for the United States and Canada, did the Panel err by concluding that the United States and Canada had made a

219. *Id.* ¶ 262.

unilateral determination that Directive 2003/74/EC was inconsistent with the WTO Agreements, without proper recourse to the rules and procedures of the DSU, as required by DSU Article 32.2(a)?

In the second category,

1. As alleged by the EC, did the Panel violate standards of due process required under DSU Article 11 by relying on the advice of several experts that were not “independent and impartial” as required by the *Rules of Conduct*?

2. Did the Panel, as asserted by the EC, err in interpreting and applying Article 5.1 of the SPS Agreement, *inter alia*, by adopting an overly narrow definition of “risk assessment,” imposing a quantitative method of risk assessment and incorrectly allocating the burden of proof?

3. Did the Panel, as asserted by the EC, apply an incorrect legal test and misallocate the burden of proof in reviewing the EC’s adoption of provisional measures based on the EC’s analysis of whether the relevant scientific evidence is “insufficient” under the SPS Agreement, Article 5.7?

D. Holdings and Rationale

1. Applicability of the DSU in the Post-Suspension Stage of the Dispute

a. Propriety of a Unilateral Determination of Compliance by the Implementing Party

As noted earlier, the EC, having commissioned additional studies and issued Directive 2003/74/EC, claimed that it had fully complied with the DSB’s recommendations in *EC – Hormones*, sought “a presumption of good faith compliance”²²⁰ and asserted that the suspension of concessions by the United

220. Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 7.310, WT/DS320/R, (Mar. 21, 2008) [hereinafter Panel Report, *United States – Continued Suspension*]. The Panel issued a second Report for this dispute. Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R, (Mar. 21, 2008). The two Panel Reports contain essentially identical language, albeit with differing paragraph numbers in parts of the reports; thus, parallel citations to the Canada report are omitted.

States and Canada were thus no longer justified. The United States and Canada disagreed with the EC's conclusion that the EC had achieved compliance, and declined to lift the sanctions.²²¹ The EC brought the action alleging that the United States and Canada had failed to comply with DSU Article 23.1, which provides:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

Ultimately, the Panel agreed that a rebuttable presumption of good faith was appropriate, but the Panel concluded that the presumption applied to all Members (not just to the EC) in the proceeding, and thus could be rebutted before the Panel, not just in an Article 21.5 proceeding.²²²

The EC had also argued that the new directive, which replaced the earlier directive that was the focus of *EC – Hormones*, effectively “removed” the offending measure (the original directive), thus requiring a cessation of the suspension of concessions under Article 22.8 of the DSU.²²³ Article 22.8 provides in pertinent part:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been *removed*, or the Member that must implement recommendations or rulings *provides a solution to the nullification or impairment of benefits*, or a *mutually satisfactory solution is reached*.²²⁴

The Appellate Body refused to accept the EC's contention that simple removal of the measure was sufficient under Article 22.8, given the other two applicable conditions: a solution to the nullification or impairment or a mutually satisfactory solution. Thus, “Article 22.8 cannot be understood as requiring the termination of the suspension of concessions merely on the basis of a formal repeal of the measure”²²⁵ However, the onus is not entirely on the EC. The suspension of benefits is “an abnormal state of affairs that is not to remain indefinitely.” Thus, Members are expected to act “in a cooperative manner” so as

221. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 268.

222. Panel Report, *Canada/United States – Continued Suspension*, ¶ 7.357(f).

223. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 300.

224. DSU, *supra* note 1, art. 22.8 (emphasis added).

225. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 304.

to restore the normal state of affairs “as quickly as possible.” Both the suspending and the implementing Members thus share this responsibility.²²⁶

At the same time, the implementing Member cannot be permitted to force the end of an authorization to suspend concessions “upon the adoption of an implementing measure and a mere unilateral declaration of the implementing Member that it removed the inconsistent measure.”²²⁷ Such authorization is granted only after “a long process of multilateral dispute settlement.”²²⁸ Allowing the expiration of the suspension as a result of a “unilateral declaration of compliance would create an imbalance between the rights and obligations of the complainants and the respondents enshrined in the DSU and would undermine the effectiveness of the dispute settlement mechanism in providing security and predictability.”²²⁹ Clearly, once substantive compliance is achieved the sanctions can no longer be applied, “but this does not answer the question regarding the procedures to be followed in the event a disagreement arises as to whether substantive compliance has been achieved”²³⁰

For the Appellate Body, notwithstanding the EC’s objection, the consistency of new Directive 2003/74/EC with the DSB’s recommendations for compliance in *EC – Hormones* was part of the matter to be examined by the Panel in determining the validity of the EC’s claim. Thus, addressing the Directive’s consistency with articles 5.1 and 5.7 of the SPS Agreement was properly within the Panel’s jurisdiction.²³¹

Is a DSU Article 21.5 proceeding the proper forum for addressing a disagreement as to whether “the measure found to be inconsistent with a covered agreement has been removed” under DSU Article 22.8? Yes, according to the Appellate Body, concurring with the EC. This leaves open the question of which party may initiate such proceedings.²³² The Panel had found that the EC could have brought such proceedings; the EC disagreed and appealed. The Appellate Body confirmed the Panel’s determination. Even if normally a Member acting under the DSU would be objecting to a measure taken by another Member, “[i]n the post-suspension stages of a dispute, however, an original respondent would initiate Article 21.5 panel proceedings for a specific reason: to obtain a multilateral confirmation that its implementing measure has achieved substantive compliance”²³³

The Appellate Body discounted the likelihood that the other Members (Canada and the United States) will decline to participate, as suggested by the EC as partial justification for failing to bring its own Article 21.5 proceeding. After

226. *Id.* ¶ 310.

227. *Id.* ¶ 317.

228. *Id.*

229. *Id.*

230. *Id.* ¶ 321.

231. *Id.* ¶ 332.

232. *Id.* ¶ 345.

233. *Id.* ¶ 352.

all, the DSU has no means to compel any Member to participate in any proceeding. A Member that fails to participate “will lose the opportunity to defend its position and will risk a finding in favour of the complaining party that has established a *prima facie* case” or to explain why the measures are insufficient and the continued suspension of benefits remains justified.²³⁴ In such a proceeding, the burden of proof remains with the respondent (implementing) Member to demonstrate to the Panel that the “resolutive condition has been fulfilled.”²³⁵ Otherwise, the burden of showing that the “implementing measure is otherwise inconsistent with the covered agreements or that the implementing measure remains wanting” is with the original complainant.²³⁶

Nevertheless, the Appellate Body reiterated its view that the responsibility of initiating such procedures is not solely with the implementing Member:

The suspending Member and the implementing Member share the responsibility to ensure that the suspension of concessions is applied only insofar as none of the conditions laid down in Article 22.8 are met. Thus, both Members have an obligation to engage in a cooperative manner in WTO dispute settlement to establish whether the suspension of concessions can continue or must be discontinued pursuant to Article 22.8.²³⁷

The EC and the United States and Canada are effectively directed to institute Article 21.5 proceedings without delay.²³⁸

b. Unilateral Determination of Non-compliance by the Complaining Parties?

According to the United States and Canada, the Panel erred by finding that by continuing the suspension of concessions after the EC’s issuance of Directive 2003/74/EC the United States and Canada were seeking the redress of a violation without seeking recourse under the DSU, thus acting inconsistently with DSU Article 23.1. The basis for this result was the Panel’s conclusion that Directive 2003/74/EC was a new measure that “has never been as such subject to recourse to the rules and procedures of the DSU.”²³⁹

234. *Id.* ¶ 358.

235. *Id.* ¶ 363.

236. *Id.* ¶ 364.

237. *Id.* ¶ 355.

238. *Id.*

239. Panel Report, *United States – Continued Suspension*, ¶ 7.206.

The Appellate Body disagreed. It noted that the initial authorization to suspend concessions had not lapsed; there had been no finding under DSU Article 22.8 that the measure found to be inconsistent had been removed, or recourse to Article 21.5. Because Article 22.8 requires the DSB to keep implementation of adopted recommendations under surveillance, “Article 22.8 therefore clearly contemplates an ongoing role of the DSB in reviewing the implementation of recommendations and rulings, thus confirming that a dispute concerning implementation should be subject to multilateral resolution and not be decided on the basis of a unilateral declaration of compliance or non-compliance.”²⁴⁰ The legal basis for maintaining the suspension of concessions was not the new measure but the fact that the United States considered that the EC had failed to implement the DSB’s recommendations.²⁴¹

The Panel had also concluded that the United States and Canada had made a “more or less final decision” that the new directive was not consistent with the DSB’s ruling in *EC – Hormones*.²⁴² Again, the Appellate Body disagreed. It discounted the effect of United States and Canadian statements in the meetings of the DSB, adopting the U.S. view that such statements are diplomatic or political in nature and “generally have no legal effect or status in and of themselves.”²⁴³ Rather,

Until the removal of the European Communities’ inconsistent measure was determined through WTO dispute settlement, the United States’ and Canada’s authorization to suspend concessions did not lapse. Under these circumstances, the suspension of concessions applied pursuant to the DSB’s authorization in respect of Directive 96/22/EC was maintained through recourse to, and abiding by, the rules and procedures of the DSU.²⁴⁴

Finally, the Appellate Body issued a caveat (double negative and all):

This does not mean that the United States and Canada do not have an obligation to engage in dispute settlement procedures in a cooperative manner. Rather, the United States, Canada and the European Communities have an obligation to engage in

240. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶¶ 388-89.

241. *Id.* ¶ 392.

242. Panel Report, *United States – Continued Suspension*, ¶ 7.222.

243. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 398 & n.817 (quoting United States’ Other Appellant’s Submission, ¶ 93 (June 13, 2008)).

244. *Id.* ¶ 403.

Article 21.5 proceedings in order to obtain objective ascertainment of whether substantive compliance has been achieved in this case and whether the resolute condition in Article 22.8 has been met.²⁴⁵

2. The Risk Assessment Process and Other Deficiencies Under the SPS Agreement

a. Denial of Due Process in the Panel's Consultation with the Scientific Experts?

The crux of the EC's objection to the Panel's process for selecting individual experts (having rejected the EC's suggestion of a panel of experts instead) was the inclusion, among the six chosen by the Panel, of two experts who had participated in the Joint FAO/WHO Expert Committee on Food Additives ("JECFA"). According to the EC, because the "scientific controversy over the JECFA reports is at the heart of this case," such experts "cannot be considered to be objective and impartial in these circumstances, because this would amount to asking them to review and criticize their proper work."²⁴⁶ Efforts by the EC to have those experts removed were rejected by the Panel for various reasons.²⁴⁷ On appeal the EC argued that the inclusion of these JECFA related experts conflicted with general principles of law and due process.²⁴⁸ In addition, the EC criticized the Panel for "relying overwhelmingly" on the suspect opinions of the two experts and failing to ensure that they had complied with the self-disclosure requirement of the DSB's *Rules of Conduct*.²⁴⁹

The United States defended the expert selection process as transparent and consultative, with the three parties having been given various notice and opportunities to respond, along with full disclosure. The United States also asserted that the Panel operated within the bounds of its discretion as fact-finder.²⁵⁰ Canada asserted that the conflict rules limited the requirements to being independent and impartial, and to avoiding direct conflicts of interest; since the

245. *Id.* ¶ 409.

246. Letter from the European Commission to the Panel (Jan. 16, 2006) (*quoted in* Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 417 (internal citation omitted)).

247. Panel Report, *United States – Continued Suspension*, ¶¶ 6.22-6.23, 6.62-6.63.

248. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 63 & n.132 (citing European Communities' Appellant's Submission, ¶ 188 (June 5, 2008)).

249. *Id.* ¶ 67 & nn.142-43 (citing European Communities' Appellant's Submission, paras. 192, 212).

250. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 428 (citing United States' Appellee's Submission, ¶¶ 88-90 (June 26, 2008)).

two experts met the disclosure requirements, it was up to the Panel to evaluate if their associations with JECFA affected their independence and impartiality.²⁵¹

The Appellate Body effectively sided with the EC. It observed that “the obligation to afford due process is ‘inherent in the WTO dispute settlement system’”²⁵² and “an essential feature of a rules-based system of adjudication.”²⁵³ Moreover, because “scientific experts and the manner in which their opinions are solicited and evaluated can have a significant bearing on a panel’s consideration of the evidence and its review of a domestic measure . . . [f]airness and impartiality in the decision-making process are fundamental guarantees of due process.” Under the circumstances, the Appellate Body agreed with the EC that due process protections apply to a panel’s consultation with experts.²⁵⁴ (The EC did not challenge the resort to experts *per se*.)

The Appellate Body went further, strongly criticizing the Panel’s insensitivity: “[W]e fail to see on what basis a panel, presented with information likely to affect or give rise to justifiable doubts as to the independence or impartiality of an expert, could choose to consult such an expert.”²⁵⁵ That being said, disclosure of possibly questionable information does not lead to “automatic exclusion” of an expert. Rather, the panel should “assess the disclosed information against information submitted by the parties or other information that may be available,” and then “determine whether, on the correct facts, there is a likelihood that the expert’s independence and impartiality may be affected”²⁵⁶

In the case of one expert, Dr. Boisseau, the Appellate Body also faulted the disclosure statement for being conclusory rather than stating relevant facts, such as whether he has worked for, been funded by, or provided advice to the industries concerned or domestic regulatory bodies. In particular, Dr. Boisseau did not disclose in his statement his relationship with JECFA. (The other challenged expert, Dr. Boobis, had links with various pharmaceutical firms but there was no evidence that any of them produced veterinary drugs or the hormones at issue; he also had links with JECFA.)²⁵⁷ Moreover, Dr. Boisseau, in particular, viewed the JECFA analyses as the benchmarks against which to evaluate the EC’s own risk assessment process.²⁵⁸ Because the JECFA operates

251. *Id.* ¶ 429 (quoting Canada’s Appellee’s Submission, paras. 47, 49 (June 26, 2008)).

252. *Id.* ¶ 433 (quoting Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, ¶ 176, WT/DS207/AB/R (Sept. 23, 2002) (*adopted* May 22, 2007)).

253. *Id.* ¶ 433.

254. *Id.* ¶ 436.

255. *Id.* ¶ 445.

256. *Id.* ¶ 446.

257. *Id.* ¶¶ 455, 459.

258. *Id.* ¶ 466.

on a consensus basis, the Appellate Body reasoned that “joint outcome of the process can[not] be disconnected from the experts that participated in the process.”²⁵⁹

On these grounds, the Appellate Body concluded that “it was improper for the Panel to consult Drs. Boisseau and Boobis,” not because of their qualifications, but because of their “direct involvement in the risk assessments performed by JECFA for the hormones at issue in this dispute and from the particular role that JECFA’s risk assessments, and the Codex standards adopted on the basis of those risk assessments, had in this case.”²⁶⁰ Accordingly, the Panel failed to make an “objective assessment of the matter” as required by DSU Article 11.²⁶¹ However, this conclusion by itself does not invalidate the Panel’s findings under Articles 5.1 and 5.7 of the SPS Agreement.²⁶²

b. Consistency of EC Ban on Meat Treated with Oestradiol-17 β and other Hormones with the SPS Agreement Article 5.1

Articles 5.1 and 5.7 of the SPS Agreement were addressed by the Panel because the EC’s arguments were premised, in substantial part, on their assertion that Directive 2003/74/EC was consistent with the SPS Agreement.²⁶³ The Appellate Body in *EC – Hormones* reviewed in detail not only the basis for the original determinations but the subsequent scientific studies initiated and funded by the EC to evaluate the potential for adverse effects of hormones on human health, which were considered by EC scientific authorities to confirm the dangers identified in the earlier studies.²⁶⁴ Based on this evaluation of the risk assessment in *EC – Hormones*, the EC replaced Directive 96/22/EC with Directive 2003/74/EC. The new directive permanently banned imports of meat from animals treated with Oestradiol-17 β and provisionally banned imports of meats treated with the other hormones.²⁶⁵

The Panel found, based on a presumption of good faith, that the EC had met its initial burden of showing a *prima facie* case of compliance with DSU Article 22.8 as discussed earlier, but that the United States and Canada also met their initial burden of proof in refuting with positive evidence the EC contentions that the new directive complied with the SPS Agreement.²⁶⁶ The Panel concluded that the evidence from both sides neutralized each other in reaching its findings.

259. *Id.* ¶ 472.

260. *Id.* ¶ 479.

261. *Id.* ¶ 482.

262. *Id.* ¶ 484.

263. *Id.* ¶ 486.

264. *Id.* ¶¶ 487-92.

265. *Id.* ¶ 493.

266. *Id.* ¶ 497.

The Appellate Body's attention was engaged by methodology used by the Panel to review the evidence before it. The Panel's review was neither *de novo* or based on total deference (as discussed in Part III(D)(2)(a), *infra*), but focused on the required "objective assessment of the facts."²⁶⁷ In the process the Panel consulted six experts, including Drs. Boisseau and Boobis as discussed earlier, deciding to eschew simply following the views of the majority of experts in favor of supporting the views most specific or best supported by the evidence, taking into account the comments of the parties where appropriate. Where the evidence was similar, Oestradiol-17 β and the other five hormones were addressed collectively.²⁶⁸

The Panel also concluded that Directive 2003/74/EC was a measure as defined in the SPS Agreement and proceeded to decide whether the permanent ban on imports of meat grown with Oestradiol-17 β was consistent with Article 5.1 of the SPS Agreement. This analysis was initially based on a determination as to whether the EC's SCVPH, in reaching its conclusions, took into account risk evaluation techniques of relevant international organizations and the factors listed in Article 5.2 of the SPS Agreement; satisfied the definition of "risk assessment" in the SPS Agreement; and whether the conclusions were supported by the scientific evidence evaluated.²⁶⁹ The key conclusion of the Panel was that the EC despite general studies as to the adverse effects of hormones had not sufficiently evaluated the possibilities that such effects could result from the consumption of meat containing residues of Oestradiol-17 β from their treatment for growth promotion purposes.²⁷⁰

The Appellate Body began its analysis by recalling the approach of the SPS Agreement, observing that:

The SPS Agreement recognizes the right of WTO Members to take measures necessary to protect human, animal or plant life or health. The right to take a protective measure must be exercised consistently with a series of obligations that are set forth in that Agreement, and that seek to assure that such measures are properly justified.²⁷¹

The Appellate Body further observed that, under the SPS Agreement, it is the prerogative of a Member to determine the level of protection that it deems appropriate, noting that "appropriate level of protection" is defined as the level of protection by the member establishing a sanitary or phytosanitary measure. Determining the appropriate level of protection "precedes and is separate from the

267. Panel Report, *United States – Continued Suspension*, ¶ 7.414.

268. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 500.

269. *Id.* ¶ 502.

270. Panel Report, *United States – Continued Suspension*, ¶ 7.537.

271. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 522.

establishment and maintenance of the SPS measure;” the SPS Agreement “contains an implicit obligation to determine the level of protection.”²⁷² The required “risk assessment,” as the Appellate Body observed, is based on Article 5.1 of the SPS Agreement, which provides:

Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.²⁷³

The SPS Agreement defines “risk assessment” as:

The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.²⁷⁴

Further, the Appellate Body noted that Article 5.1 is a “specific application” of Article 2.2, which provides:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

Articles 2.2 and 5.1 must be read together, along with the list of factors in Article 5.2:

In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production

272. *Id.* ¶ 523 (citing Agreement on the Application of Sanitary and Phytosanitary Measures, Annex A ¶ 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement]). See also *id.* (quoting Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶¶ 203, 206, WT/DS18/AB/R (Oct. 20, 1998) (adopted Nov. 6, 1998)).

273. *Id.* ¶ 524 (quoting SPS Agreement art. 5.1).

274. SPS Agreement, *supra* note 204, Annex A ¶ 4.

methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

In *EC – Hormones*, the Appellate Body understood the Panel to refer to “a process characterized by systematic, disciplined and objective enquiry and analysis, that is a mode of studying and sorting out facts and opinions.”²⁷⁵ Yet, while “[s]cience therefore plays a central role in risk assessment,” the Appellate Body in the earlier case cautioned the panel against “taking too narrow an approach.” In particular, the assessment “is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist”²⁷⁶ The Appellate Body in the instant case further noted that the assessment can be performed by a relevant international organization or another WTO Member as well as by the Member directly involved and quantitative or qualitative in nature, but must have the “requisite degree of specificity.”²⁷⁷ While the use of international standards is encouraged, WTO Members are permitted to maintain a higher level of protection, as long as that determination is consistent with the SPS Agreement.²⁷⁸

In the present case, the relationship between the appropriate level of protection and the risk assessment was at issue. The EC considered that the former can properly be taken into account in the latter and may “be reflected in the mandate and parameters given to the risk assessors.” The United States and Canada recognized that while the acceptable level of risk may play a role in risk assessment, they are concerned about the need to maintain the risk assessment process as an objective one and they reject the role of “subjective policy choices.”²⁷⁹ The Appellate Body agreed that risk assessment cannot be “entirely isolated from the appropriate level of protection.” It noted, “[h]owever, the chosen level of protection must not affect the rigor or objective nature of the risk assessment, which must remain in its essence a process in which possible adverse effects are evaluated using scientific methods.”²⁸⁰

As to the specific facts of this case, the Appellate Body observed that the Codex Alimentarius Commission [Codex]²⁸¹ had adopted an international

275. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 527 (quoting Appellate Body Report, *EC – Hormones*, ¶ 187).

276. *Id.*

277. *Id.* ¶ 530.

278. *Id.* ¶ 532.

279. *Id.* ¶ 533.

280. *Id.* ¶ 534.

281. “The Codex Alimentarius Commission was created in 1963 by FAO and WHO to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. The main purposes of this Programme are protecting health of the consumers and ensuring fair trade practices in the food trade, and

standard for oestradiol-17 β based on evaluations made by JEFCA. The EC's "higher standard" is a "level of protection that does not allow any unnecessary addition from exposure to genotoxic chemical substances that are intended to be added deliberately to food."²⁸² The Panel focused on asking its experts whether the SCVPH [EC] opinions "identified the potential for adverse effects on human health of residues of oestradiol-17 β in the meat of cattle treated with this hormone when applied in accordance with good veterinary practice."²⁸³

Where did the Panel go wrong? According to the Appellate Body, the Panel in its analysis erroneously applied a "restrictive notion of risk assessment," a "rigid distinction" between "risk assumption" and "risk management" that the Appellate Body had previously faulted in *EC – Hormones*.²⁸⁴ According to the Appellate Body, "risks arising from the abuse or misuse in the administration of hormones can properly be considered as part of a risk assessment." If a Member "has taken such risks into account, they must be considered" by the reviewing Panel; failure to do so is legal error.²⁸⁵

In the present case, the Panel had dismissed the relevance of evidence of misuse or abuse of the hormones, stating that it was not necessary to address the question in its analysis, despite the fact that some of the scientific experts had indicated that their conclusions (as to the safety of the use of oestradiol-17 β) had been predicated on the use of good veterinary practices by those providing the hormones. Under the circumstances, the Panel erred,²⁸⁶ failing to treat the available evidence adequately. The fact that there are no economic incentives for U.S. beef producers to depart from good veterinary practices, as by giving higher doses of hormones (the position argued by the United States), does not excuse the Panel's failure to apply properly Article 5.1 of the SPS Agreement with regard to risks of misuse and abuse.²⁸⁷ The Appellate Body appears to believe that a risk of such overdosing of hormones may, nevertheless, exist.

The EC had also alleged that the Panel failed to specifically evaluate the risks arising in residues of oestradiol-17 β in cattle that had been treated with the hormone. Rather, the Panel had, in the view of the EC, "improperly required demonstration of *actual* effects while the Appellate Body [in *EC – Hormones*] had required mere demonstration of the *possibility of adverse effects*."²⁸⁸ However,

promoting coordination of all food standards work undertaken by international governmental and non-governmental organizations." FAO/WHO Food Standards, Codex Alimentarius, available at http://www.codexalimentarius.net/web/index_en.jsp (last visited Dec. 23, 2008).

282. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 536 (quoting Panel Report, *US – Continued Suspension*, ¶ 7.607).

283. Panel Report, *US – Continued Suspension*, ¶ 7.521.

284. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 542.

285. *Id.* ¶ 545.

286. *Id.* ¶ 547.

287. *See id.* ¶ 555.

288. *Id.* ¶¶ 558 (quoting European Communities' Appellant's Submission, para. 261).

the Appellate Body disagreed. The Panel was correct in requiring the EC to demonstrate that the adverse effects *could* arise even if the EC was not required to demonstrate that they had *actually* arisen.²⁸⁹

The Appellate Body, nevertheless, had some sympathy for the daunting scientific challenges facing the EC. The EC was required to evaluate whether a “causal connection exists between the consumption of meat from cattle treated with oestradiol-17 β and the possibility of adverse health effects.” But the EC did not have to “establish a *direct causal relationship* between the possibility of adverse health effects and the residues of oestradiol-17 β in bovine meat.” It was sufficient under Article 5.1 and Annex A of the SPS Agreement to show that “the additional human exposure to residues of oestradiol-17 β in meat from treated cattle is *one of the factors* contributing to the possible adverse health effects.” Still, the risk assessor must evaluate “whether there is a *connection* between the particular substance being evaluated [oestradiol-17 β here] and the possibility that adverse health effects may arise.”²⁹⁰ The precise meanings of the italicized terms are not, unfortunately, explained fully by the Appellate Body.

Was it inappropriate, as the EC asserted on appeal, for the Panel to require a quantification of risks arising from consumption of meat produced with oestradiol-17 β , by referring to a “potential occurrence” of adverse effects? In *EC – Hormones*, the Appellate Body had criticized the Panel for appearing to require the demonstration of a certain magnitude of risk, a showing of “probability” of risk which, in its view, was a higher standard than “potentiality.”²⁹¹ However, while the definition of risk assessment does not require Members to show a “minimum magnitude of risk,” the Appellate Body suggested that “it is nevertheless difficult to understand the concept of risk as being devoid of any indication of potentiality.”²⁹² That being said, risk does not have to be expressed in numerical terms or as a minimum quantification.

In this instance, the Appellate Body believed that the Panel acted properly. It could, and did, look at the “potential occurrence of adverse effects” without “necessarily requiring that this be expressed in numerical terms.” Other evidence confirms this conclusion.²⁹³ Under the circumstances, the Panel’s reference to “potential occurrence” was consistent with the SPS Agreement.²⁹⁴

289. *Id.* ¶ 559.

290. *Id.* ¶ 562 (emphasis added).

291. *Id.* ¶ 566-67.

292. *Id.* ¶ 569.

293. *Id.* ¶¶ 572-73.

294. *Id.* ¶ 575.

c. Burden of Proof

The allocation of the burden of proof and the time at which the burden of proof shifted was important in this proceeding given the uncertainties inherent in the scientific evidence and levels of proof required. The EC had argued the fact that it was the complaining party did not justify the Panel's shifting the burden to the EC before the Panel had determined that "the arguments of the United States and Canada had sufficient merits to shift the burden of proof back to the European Communities."²⁹⁵ The United States (with Canada's concurrence), in contrast, contended that the Panel was correct in initially requiring the EC to demonstrate that the United States had acted inconsistently with Article 22 of the DSU. It was the EC's responsibility to demonstrate that it has brought itself into conformity with the SPS Agreement by enacting Directive 2003/74/EC.²⁹⁶

The Panel had determined that it was the responsibility of the EC in the first instance to demonstrate that the United States and Canada had breached DSU Article 22.8 by failing to lift the sanctions. However, the Panel recognized that the case was complicated by the fact that the EC's contention was premised on its assertion that Directive 2003/74/EC was in conformity with its obligations under the SPS Agreement. Because of the presumption that the EC was acting in good faith, the burden shifted to the United States and Canada to rebut that presumption. In the Panel's view, the United States and Canada met this burden by showing that the EC's allegations of compliance with the SPS Agreement were suspect. At that time the burden again shifted to the EC. According to the Panel, these competing burdens "neutralized" each other since each party had to prove its specific allegations in response to evidence adduced by the other.²⁹⁷

The Appellate Body found fault with the Panel's approach, believing that the EC initially met its obligation to provide a clear description of the implementing measure, as it would have had to do in a DSU Article 21.5 proceeding. However, the EC could not properly rely alone on the presumption of good faith; this does not "respond to the question as to whether Directive 2003/74/EC achieved substantive compliance."²⁹⁸ Nor is the Appellate Body accepting of the "neutralized" argument, because of its ambiguity.²⁹⁹ Moreover, the Panel jumped the gun by concluding that the United States and Canada had sufficiently refuted the EC's allegations of compliance before the Panel had undertaken any analysis. Since this was premature, the Appellate Body concludes that the initial allocation of burden of proof was faulty.³⁰⁰

295. *Id.* ¶ 576 & n.1187 (quoting European Communities' Appellant's Submission, para. 286).

296. *Id.* ¶ 127 & n.277 (citing United States' Appellee's Submission, para. 94).

297. Panel Report, *United States – Continued Suspension*, ¶¶ 7.383-7.386.

298. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 580-81.

299. *Id.* ¶ 582.

300. *Id.* ¶ 583-84.

d. The Panel's Review of the EC's Risk Assessment

In what was perhaps its most damning critique, the EC claimed that the Panel erred in the standard under which it reviewed Directive 2003/74/EC for conformity with the SPS Agreement. In particular, the EC argued that the Panel should not have sought to determine whether "there was any reputable support within the relevant scientific community for the determination made by the European Communities in the light of its chosen level of protection." Here, the Panel erred by deciding "to become the jury on the correct science . . . by picking and choosing between conflicting and contradictory opinions of the experts in an arbitrary manner."³⁰¹ The United States and Canada, of course, disagreed, alleging that the Panel applied the correct standard of review and acted within its proper discretion.³⁰² The EC asserted that a panel's mandate is limited to determining if there is a "reasonable scientific basis" for the SPS measure, while the United States and Canada objected.³⁰³

The Appellate Body noted that, under prior jurisprudence, the DSU Article 11 requirement of an "objective assessment" is "neither a de novo review as such, nor 'total deference,' but rather the 'objective assessment of facts.'"³⁰⁴ Where the SPS Agreement is concerned, a panel is required to determine whether the SPS measure is "based on" a risk assessment. The risk assessment is accomplished by the Member and the panel's task is to review it:

Where a panel goes beyond this limited mandate and acts as a risk assessor, it would be substituting its own scientific judgment for that of the risk assessor and making a de novo review and, consequently, would exceed its functions under Article 11 of the DSU. Therefore, the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether the risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.³⁰⁵

This means in practice that the Member retains some discretion and the review by the Panel is circumscribed. For example, according to the Appellate Body, a "WTO Member may properly base an SPS measure on divergent or minority [scientific] views, as long as these views are from qualified and

301. *Id.* ¶ 585 (quoting European Communities' Appellant's Submission, ¶¶ 239, 240).

302. *Id.* ¶ 586.

303. *Id.* ¶ 587.

304. *Id.* ¶¶ 588-89 (quoting Appellate Body Report, *EC – Hormones*, ¶ 117).

305. *Id.* ¶ 590.

respected sources.” This discretion is not unlimited; “while the correctness of the [minority] views need not have been accepted by the broader scientific community, the views must be considered to be legitimate science according to the standards of the relevant scientific community.”³⁰⁶

Further, a Panel may rely on experts, but the Appellate Body reminded the Panel that it must respect the parties’ due process rights and “not rely on the experts to go beyond its limited mandate of review.” It is acceptable for the Panel to rely on experts to identify and verify the scientific basis of a measure and to review whether the reasoning is “objective and coherent” and the Member’s conclusions in assessing the risk have sufficient support in the evidence. The expert may assist the panel in determining whether the risk assessment “sufficiently warrants” the SPS measure, but the Panel’s consultations with the experts does not appropriately extend to testing “whether the experts would have done a risk assessment in the same way and would have reached the same conclusions as the risk assessor.”³⁰⁷

For the Appellate Body, the Panel in the instant case started out right but then went astray. It recognized that it was not carrying out its own risk assessment and professed to follow the views of the majority of its experts in some circumstances, while in others to accept the most specific views or those best supported by the arguments and evidence.³⁰⁸ The EC had also objected to the use by the Panel of a majority of experts’ view as not being probative. The Appellate Body agreed, also faulting the Panel’s methodology of summarizing the various experts’ views as “a significant portion of the Panel’s reasoning.” Instead, the Panel should have looked first at the EC’s own risk assessment and then “determined whether the scientific basis relied upon in that risk assessment came from a respected and qualified source.”³⁰⁹

What was the proper role of the experts and their reports in the Panel’s analysis? The Panel should have sought their assistance in confirming that the Panel had properly “identified the scientific basis” and whether it reflected a respected and qualified source. The experts could have helped the Panel in determining whether the EC’s reasoning was objective and coherent so that “the conclusions reached in the risk assessment sufficiently warrant the SPS measure.”³¹⁰ The survey approach, where the experts’ reports were compared with the conclusion drawn by the EC, was not consistent with the standard of review under the SPS Agreement.³¹¹

The Appellate Body further faulted the Panel for acting:

306. *Id.* ¶ 591 (quoting Appellate Body Report, *EC – Hormones*, ¶ 194).

307. *Id.* ¶ 592.

308. Panel Report, *United States – Continued Suspension*, ¶ 7.420.

309. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 598.

310. *Id.*

311. *Id.* See also *id.*, ¶¶ 599-611 for the Appellate Body’s discussion of the Panel’s flawed approach in reviewing the EC’s determinations regarding the genotoxicity of oestradiol-17β.

without proper regard to the standard of review and the limitations this places upon the appraisal of expert testimony. Ultimately, the Panel reviewed the scientific experts' opinions and somewhat peremptorily decided what it considered to be the best science, rather than following the more limited exercise that its mandate required.³¹²

As the Appellate Body further stated, it was neither the Panel's task nor that of the experts to determine whether there is "an appreciable risk of cancer arising from the consumption of meat from cattle treated with oestradiol-17 β . Instead, the Panel was called upon to review the European Communities' risk assessment."³¹³

Clearly, for the Appellate Body, the Panel has no business setting itself up as the arbitrator of what is the best science or otherwise second-guessing the WTO Member. In doing so, and by "merely reproducing testimony of some experts that would appear to be favourable to the European Communities' position, without addressing its significance, the Panel effectively disregarded evidence that was potentially relevant for the European Communities' case." By doing so, the Panel acted inconsistently with its responsibilities under DSU Article 11.³¹⁴

Because of the Panel's failure to conduct this objective assessment, its misallocation of the burden of proof, and violations of the EC's due process rights, the Panel's findings—that the EC failed to satisfy the requirements of Article 5.1 and Annex A, paragraph 4 of the SPS Agreement, and that Directive 2003/74/EC was not based on a risk assessment—were reversed by the Appellate Body. However, the Appellate Body predictably determined, because of the "numerous flaws we have found in the Panel's analysis," that it was not possible for it to complete the analysis with the facts before it on appeal.³¹⁵

e. Consistency of the Provisional Import Ban with Article 5.7 of the SPS Agreement

It will be recalled that the EC, in its Directive 2003/74/EC, imposed a permanent ban on imports of meat from cattle treated with oestradiol-17 β .³¹⁶ At the same time, the Directive imposed a "provisional" ban on imports of meat from cattle treated with the five other hormones under consideration—testosterone,

312. *Id.* ¶ 612.

313. *Id.* ¶ 614.

314. *Id.* ¶ 615.

315. *Id.* ¶¶ 617-20.

316. *See supra* Part III(B).

progesterone, trenbolone acetate, zeranol, and MGA. This ban was imposed purportedly under the authority of Article 5.7 of the SPS Agreement, which provides:

In cases where relevant scientific evidence is *insufficient*, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.³¹⁷

The issue before the Panel and the Appellate Body was thus whether the provisional ban, as renewed in Directive 2003/74/EC, was justified under Article 5.7 because, as the EC concluded, “the currently available information for testosterone, progesterone and the synthetic hormones zeranol, trenbolone, and particularly MGA has been considered inadequate to complete [a risk] assessment.”³¹⁸ This 1999 conclusion of “insufficiency” was reviewed and effectively extended by the EC in both 2000 and 2002 without change, and ultimately continued in the new directive. Much of the discussion turned therefore on the scope and meaning of “insufficiency” in the context of Article 5.7.

The Panel limited its review to the conformity of the ban with Article 5.7, relying on the Appellate Body’s decision in *Japan – Apples*.³¹⁹ Insufficiency under that test exists “if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate risk assessment.”³²⁰ However, this examination was also heavily flawed in the eyes of the Appellate Body.

317. SPS Agreement, *supra* note 205, art. 5.7 (emphasis added).

318. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 622 (alteration in original) (quoting European Commission, Opinion of the Scientific Committee on Veterinary Measures Relating to Public Health: Assessment of Potential Risks to Human Health from Hormone Residues in Bovine Meat and Meat Products, at 75 (Apr. 30, 1999)).

319. Panel Report, *United States – Continued Suspension*, ¶ 7.608; Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R (Nov. 26, 2003) (adopted Dec. 10, 2003) [hereinafter Appellate Body Report, *Japan – Apples*]. See also Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT’L & COMP. L. 317, 422-39 (2004).

320. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 627.

First, the Panel declined to address issues relating to possible misuse or abuse in the administration of hormones (i.e., non-compliance with proper veterinary practices.)³²¹ Instead, it confined the review to proper use. The Panel conceded, however, that scientific evidence earlier deemed to be sufficient could become insufficient for risk assessment subsequently.³²²

Secondly, the Panel decided that in order for new evidence to render the existing evidence no longer sufficient for a risk assessment, there had to be a “critical mass of new evidence and information that calls into question the fundamental precepts of previous knowledge and evidence so as to make relevant, previously sufficient evidence now insufficient.”³²³ Finally, the Panel determined that while the burden of proof was with the parties challenging the applicability of Article 5.7 (Canada and the United States), “it is also for the European Communities, in application of the principle that it is for each party to provide its allegations, to support its own allegations with appropriate evidence.”³²⁴

It was critical to the Panel’s conclusions that the new studies on which the JECFA assessments were based related only to oestradiol, even though they were being used by the JECFA and the EC authorities as a basis for the insufficiency of evidence relating to the other five hormones.³²⁵ After an exhaustive analysis of the evidence as it related individually and collectively to the five other hormones,³²⁶ the Panel concluded that the requirements of SPS Agreement Article 5.7 had not been met, in that the scientific data was not “insufficient,” without prejudice to the EC’s deciding to complete its risk assessments under Article 5.1.³²⁷

The Appellate Body began its analysis by referring to its own standard for insufficiency under Article 5.7, from *Japan – Apples*.³²⁸ Where the scientific evidence is sufficient, measures may be applied only based on a risk assessment under Articles 5.12 and 2.2. If the evidence is insufficient, the requirements of Article 5.7 apply.³²⁹ However, demonstrating insufficiency requires more than “scientific controversy in itself.” Rather, “[w]here there is, among other opinions, a qualified and respected scientific view that puts into question the relationship between the relevant scientific evidence and the conclusions in relation to risk . . . a Member may adopt provisional measures”³³⁰

321. Panel Report, *United States – Continued Suspension*, ¶ 7.603.

322. *Id.* ¶ 7.620.

323. *Id.* ¶ 7.648.

324. *Id.* ¶ 7.652.

325. *Id.* ¶¶ 7.670-7.671.

326. The Appellate Body reviews the Panel’s analysis of the technical and scientific issues in detail in Appellate Body Report, *Canada/United States – Continued Suspension*, ¶¶ 639-52.

327. Panel Report, *United States – Continued Suspension*, ¶¶ 7.834-7.837.

328. Appellate Body Report, *Japan – Apples*, ¶ 179.

329. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 674.

330. *Id.* ¶ 677.

According to the Appellate Body, Article 5.7 provides a “temporary ‘safety valve’” in those situations where “some evidence of risk exists but not enough to complete a full risk assessment”³³¹ What is the meaning of the “reasonable period of time” language in Article 5.7? This means, said the Appellate Body, that a WTO Member must make its

best efforts to remedy the insufficiencies in the relevant scientific evidence with additional scientific research or by gathering information from relevant international organizations or other sources . . . the ‘insufficiency’ of scientific evidence is not a perennial state, but rather a transitory one, which lasts only until such time as the imposing Member procures the additional scientific evidence which allows the performance of a more objective assessment of risk.³³²

This obligation goes only so far; the member must seek the additional information, but “is not expected to guarantee specific results.”³³³

Moreover, the Appellate Body reminds us that Article 5.7 “must be interpreted keeping in mind that the precautionary principle finds reflection in this provision.”³³⁴ In particular, as noted in *EC – Hormones*, “responsible, representative governments commonly act from the perspectives of prudence and precaution where risks of irreversible, e.g., life-terminating, damage to human health are concerned.”³³⁵ Still, the Appellate Body observes that notwithstanding the arguments of the EC, there may be sufficient evidence for a risk assessment demonstrating that SPS measures are not permitted because the assessment did not confirm the risk or indicate that the risk exceeded the Member’s chosen level of protection. Conversely, there may be such an absence of pertinent scientific evidence that SPS measures would be unwarranted.³³⁶

Canada and Mexico agreed with the EC that the level of protection chosen by the Member “may have a role to play in framing the scope and methods of a risk assessment.”³³⁷ Where the Member adopts a higher level of protection than those based on international standards the measures must comply with SPS Agreement Article 5, including the requirement of a risk assessment. At the same time, according to the Appellate Body, for the risk assessment “a WTO Member may need scientific information that was not examined in the process leading to the adoption of the international standard.”³³⁸ The Member may thus be required

331. *Id.* ¶ 678 (quoting Canada’s Appellee’s Submission, ¶ 114).

332. *Id.* ¶ 679.

333. *Id.*

334. *Id.* ¶ 680 (citing Appellate Body Report, *EC – Hormones*, ¶ 124).

335. Appellate Body Report, *EC – Hormones*, ¶ 124.

336. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 681.

337. *Id.* ¶ 683.

338. *Id.* ¶ 685.

to perform different or additional research. Nevertheless, the Appellate Body rejected the Panel's conclusion that the sufficiency of the evidence determination must be separated from the level of protection chosen by the Member, even though this does not pre-determine the outcome of the sufficiency of the evidence analysis. The latter must "remain, in essence, a rigorous and objective process."³³⁹

If there is an international standard for a particular hormone, does this prove that there was sufficient scientific evidence to perform a risk assessment? The Panel said "yes," but the EC and, ultimately, the Appellate Body, disagreed. One of the purposes of the SPS Agreement, as reflected in the Preamble as well as in Article 3.1, is to "further the use of harmonized sanitary and phytosanitary measures . . . on the basis of international standards."³⁴⁰ Here, Codex has adopted international standards for the hormones testosterone, progesterone, acetate and zeranol (as well as oestradiol), and is undertaking a standard-setting process for MGA.³⁴¹ JECFA has performed risk assessments for the six hormones and Codex has adopted standards for five of them.³⁴²

According to the Appellate Body, the relevant scientific evidence was sufficient for JECFA to perform risk assessments on the subject hormones; under Article 3.2 there is a presumption that measures adopted that conform to an international standard are consistent with the SPS Agreement and GATT 1994. This presumption, however, is rebuttable. It "does not apply where a member has *not* adopted a measure that conforms with an international standard."³⁴³ Moreover, the scientific evidence relied on may no longer be valid or may have become insufficient because of subsequent scientific developments.³⁴⁴ In other words, if the Member's standard is higher than the international standard, there can be no presumption that there is sufficient scientific evidence (for the higher level of protection) for a risk assessment.

It therefore followed, according to the Appellate Body, that under Article 5.7 there is no bar to a Member taking provisional SPS measures because a relevant international organization or another Member has performed a risk assessment.³⁴⁵ Such assessments have probative value, as the Panel recognized, but are not dispositive of the issue of insufficiency under Article 5.7.³⁴⁶

In rejecting the Panel's "critical mass" test attacked by the European Union, the Appellate Body noted that both the United States and Canada accepted the idea that evidence that was sufficient at one time could become insufficient later. The Panel also conceded that new studies and information could have the

339. *Id.* ¶ 686.

340. *Id.* ¶ 692 (quoting Appellate Body Report, *EC – Hormones*, ¶ 125).

341. *Id.* ¶ 693.

342. *Id.* ¶¶ 693-94.

343. *Id.* ¶ 694 (emphasis added).

344. *Id.* ¶ 695.

345. *Id.*

346. *Id.* ¶ 697.

same result.³⁴⁷ Whether new scientific evidence permits, or does not permit, a new scientific study that is sufficiently objective depends on the evidence; if it does not permit a new study meeting the criteria the situation would fall within the “insufficiency” scope of Article 5.7.³⁴⁸ In short, according to the Appellate Body, “WTO Members should be permitted to take a provisional measure where new evidence from a qualified and respected source puts into question the relationship between the pre-existing body of scientific evidence and the conclusions regarding the risks.”³⁴⁹

Under these circumstances, the Panel’s “critical mass” approach is too inflexible and is rejected; new evidence “must call into question the relationship between the body of scientific evidence and the conclusions concerning the shift . . . [but] it need not rise to the level of a paradigm shift.”³⁵⁰ This was an “excessively high threshold in relation to the new scientific evidence which is required to render previously sufficient scientific evidence ‘insufficient’ within the meaning of Article 5.7.”³⁵¹ Further, in the Appellate Body’s view it was incorrect of the Panel to use the JECFA’s risk assessment as a benchmark; where a Member adopts a higher level of protection the legal test applicable to “insufficiency” of the evidence under Article 5.7 is not made stricter.³⁵²

The Appellate Body also sided with the EC against the Panel, the United States, and Canada, with regard to the timing of the shift of the burden of proof, as discussed more fully in Part III(D)(2)(a), *supra*. Here, the Panel determined that the burden shifted to the EC once the United States and Canada “sufficiently refuted the European Communities’ allegation of compliance through positive evidence of a breach of Article 5.7.”³⁵³ The Appellate Body reiterated its earlier analysis as to allocation of the burden of proof in a “post-suspension situation” in terms of responsibilities under DSU Article 22.5 and SPS Agreement Articles 5.1 and 5.7.

Finally, in its critique of the Panel’s approach to Article 5.7, the Appellate Body faulted the Panel for not having explored sufficiently “the question of what relevance, if any, the study relied on by the European Communities examining endogenous levels of oestradiol could have in relation to potential adverse health effects relating to the other five hormones.”³⁵⁴

347. Panel Report, *United States – Continued Suspension*, ¶ 7.620.

348. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 701.

349. *Id.* ¶ 703.

350. *Id.* ¶¶ 705, 712.

351. *Id.* ¶ 725.

352. *Id.* ¶ 708.

353. *Id.* ¶ 715 & n.1449 (citing United States’ Appellee’s Submission, ¶ 93).

354. *Id.* ¶ 730.

f. Public Observation of the Oral Hearing

When the EC, Canada, and the United States requested the Appellate Body “allow public observation of the oral hearing” in the proceedings, they suggested the use of simultaneous, closed-circuit television transmissions to another room,³⁵⁵ likely foreseeing that certain of the third participants would have objected to simply opening the hearing room to the public. Four of the third participants (Australia, New Zealand, Norway and Taiwan) supported the request. However, the other four third participants (Brazil, China, India, and Mexico) objected to such transparency and argued that the Article 17.10 prohibition was “absolute and permits of no derogation.”³⁵⁶

After soliciting written comments from the third participants, comments on the comments and an oral hearing on the issues, the Appellate Body acceded to the unanimous request of the three participants, and permitted public observation of the hearings subject to certain conditions, explaining its rationale as set forth below.

The legal debate centered on DSU, Article 17.10, which provides that “[t]he proceedings of the Appellate Body shall be confidential” and initially on the scope of the term “proceedings.” The United States sought, unsuccessfully, to narrow the scope of the confidentiality requirement on the deliberations of the Appellate Body alone. No one supported the United States’ strained view of the SPS language; even Canada conceded that the oral hearings must be considered part of the proceedings. The assertion was not pursued.

The Appellate Body rejected the United States’ position on scope, but otherwise supported the proponents of open hearings. The Appellate Body pointed out that Article 17.10 necessarily must be read in conjunction with DSU Article 18.2, which in pertinent part provides that “[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public.” The Appellate Body reasoned that Article 18.2 thus permitted the parties to “forego confidentiality protection in respect of their statements of position.”³⁵⁷ It noted that except for India all participants and third parties agreed that the authorization to forego confidentiality extended to oral statements and to responses to the Appellate Body’s questions at the oral hearing.

The Appellate Body further noted that “[i]n practice, the confidentiality requirement in Article 17.10 has its limits,” pointing out that notices of appeal and Appellate Body reports are disclosed, and that the reports contain summaries and quote directly from participants and third participants.³⁵⁸ Further, “[p]ublic disclosure of Appellate Body reports is an inherent and necessary feature of our

355. *Id.* Annex IV, Procedural Ruling of 10 July to Allow Public Observation of the Oral Hearing, ¶ 1 n.1. (July 10, 2008)

356. *Id.* Annex IV ¶¶ 3-4.

357. *Id.* Annex IV ¶ 4.

358. *Id.* Annex IV ¶ 5.

rules-based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.”³⁵⁹

In light of this analysis, Appellate Body viewed the confidentiality requirement as “operating in a relational manner,” citing the two key relationships as participants and the Appellate Body, and third participants and the Appellate Body. Since the request of the participants does not extend to the second relationship, “the right to confidentiality of third participants vis-à-vis the Appellate Body is not implicated by the joint request.” The issue is whether the request “satisfies the requirements of fairness and integrity that are the essential attributes of the appellate process If the request meets these standards, then the Appellate Body would incline towards authorizing such a joint request.”³⁶⁰

The Appellate Body noted further that the oral hearing is based not directly on the DSU but on the Appellate Body’s Working Procedures,³⁶¹ and falls within the competence and authority of the Appellate Body in accordance with Rule 27 of the Working Procedures. Given this grant of authority, the Appellate Body “has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality . . . as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process.”³⁶² (As an example of the latter, the Appellate Body notes the requirement of Article 17.10 that the reports are to be drafted without the presence of the parties in light of the information provided and statements made.)

In further support of its position, the Appellate Body observed that while it has given full effect to the rights of third participants to participate in the oral hearings, “[t]hird participants are not the main parties to the dispute.”³⁶³ In order to sustain their objections to public participation in the hearings, they would have to “identify a specific interest in their relationship with the Appellate Body that would be adversely affected if we were to authorize the participants’ request – in this case, we can discern no such interests.”³⁶⁴ The Appellate Body thus avoided the ludicrous result of allowing four third participants with a penchant for secrecy to frustrate the requests of all parties and the remaining third party participants.

The mechanics of the public participation were set out by the Appellate Body in response both to the concerns of the objecting third participants and in light of ongoing requirements to protect confidential information. As such, they fall well short of the open hearings that are provided for disputes between Canada

359. *Id.*

360. *Id.* Annex IV ¶ 6.

361. Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/5 (Jan. 4, 2005), available at http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

362. Appellate Body Report, *Canada/United States – Continued Suspension*, Annex IV ¶ 7.

363. *Id.* Annex IV ¶ 9.

364. *Id.*

and the United States under NAFTA's Chapter 11 investment dispute settlement mechanism.³⁶⁵

In the instant proceeding, the participants' recommendation of a closed-circuit television broadcast of the hearing to a separate room available to the public was accepted. Oral presentations and questioning by the Appellate Body by the objecting third participants were kept confidential, i.e., the broadcast was suspended during these periods. Any third participants who had not requested authorization to disclose could do so until just before the hearing. Reflecting the fact that WTO Members who are not participants or third participants are normally excluded from the hearings, seats for interested Member representatives were reserved in the separate room. Public notice was provided with a requirement that interested members of the public register with the WTO Secretariat. Finally, the Appellate Body reserved the option of a public showing of a video recording of the hearing in lieu of simultaneous broadcasting.³⁶⁶

g. Commentary

i. Determining Compliance with DSU Rulings

What happens when the complaining party and the responding party are in disagreement over whether "new" actions by the responding party have put the responding party into compliance, requiring the removal of sanctions? The Appellate Body makes it quite clear that neither party is authorized to make this decision unilaterally. Rather, it is the responsibility of the Dispute Settlement Body. The initial authorization to apply sanctions does not lapse simply because the responding party alleges that it has taken new steps that bring it into compliance; there must be a finding by the DSB under DSU Article 21.5, or under its "ongoing role" of reviewing the implementation of its recommendations and rulings, under DSU Article 22.8. Substantive compliance is determined through multilateral dispute settlement proceedings; a unilateral declaration of compliance cannot have the same effect.³⁶⁷

Thus, the Appellate Body avoided a situation in which the responding Member could put forth possibly specious "compliance" actions and then decide unilaterally that it has complied with the original DSB ruling, thereby assuring itself of an absence of sanctions during the ensuing DSB process under Article

365. While NAFTA itself does not provide such transparency, the United States and Canada agreed to such procedures in 2003. See, e.g., Foreign Affairs and International Trade Canada, Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations (Oct. 7, 2003), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/celeb2.aspx?lang=en&menu_id=38&menu=R.

366. Appellate Body Report, *Canada/United States – Continued Suspension*, ¶ 11.

367. *Id.* ¶ 389.

21.5, which in complex cases like the present one is likely to be long and drawn out. (The instant proceeding required three-and-a-half years to complete.)

Interestingly, the Appellate Body to some extent side-stepped the issue of which party has the onus of seeking an Article 21.5 action. The EC, said the Appellate Body, was justified and by implication should have done so; the EC argument that the other parties, the United States and Canada would not cooperate, is essentially brushed aside. Still, those parties maintaining the sanctions are not excused. Canada and the United States have an *obligation* to cooperate to “engage in Article 21.5 proceedings” to determine whether substantive compliance has been achieved.

ii. Meeting the “Risk Assessment” Requirements of SPS Agreement Article 5.1

The mechanics of risk assessment remain a daunting challenge to panels. They are not only singularly ill-equipped to analyze complex scientific evidence, they must also use extreme care when choosing and relying on experts, weighing contrasting scientific views, and seeking generally to determine the efficacy of risk assessment and other requirements that WTO Members must meet if their SPS measures are to be held consistent with Article 5.1. The Panel must avoid being “jury” or setting itself as the arbitrator of what is the “best science.” The level of deference to Members remains somewhere between a *de novo* review and total deference, with the pendulum perhaps having swung somewhat more toward the deference side of the equation.

iii. Meeting the “Insufficiency” Requirements of SPS Agreement Article 5.7

A WTO Member’s decision to impose provisional SPS measures based on the insufficiency of the scientific evidence that are consistent with Article 5.7 remains a challenge, particularly when the measures are applied notwithstanding the weight of international standards adopted by Codex based on risk analysis performed by the Joint FAO/WHO Expert Committee. There remains a presumption that measures applied despite such expert risk assessments are inconsistent with the SPS Agreement.

However, the presumption is rebuttable; also, it no longer applies where a Member’s standards are higher than the international standards. The fact that the international agencies were able to perform a risk assessment is also unpersuasive if it can be shown that new data may call that assessment into question. In making that analysis, the Appellate Body disproved the Panel’s “critical mass” requirement for new scientific evidence utilized to undermine the existing evidence on which the international standards are based. The Panel may not

demand that there must be a “critical mass” of new scientific evidence to justify reversal of an earlier determination based on then-existing scientific evidence; that standard is “too inflexible.” Nor is the insufficiency test stricter in a situation in which the Member adopts a higher level of protection.

It can be argued that the Appellate Body has set out something of a road map for overcoming the presumption *if* there is supporting, new scientific evidence and, arguably, even if there is not.

This is important in the *Hormones* context. The EC’s approach since 1998 has been to attempt to develop additional scientific evidence (whether accepted by scientists outside the EC or not) calling into question the safety of the various hormones to support its greater than international standards, such as would meet the SPS requirements, particularly the rather imprecise requirement to demonstrate the “insufficiency” of evidence for risk assessment based on the higher standard, as is necessary to justify provisional bans under Article 5.7. Overall, the Appellate Body’s analysis, at least with regard to assessing and “insufficiency” issues and allocation of burden of proof under Article 5.7, is likely to make the EC’s road to satisfying the Article 5.7 standard somewhat easier.

More generally, Panels are admonished against second-guessing Members. Panels have a “limited mandate” in SPS and TBT³⁶⁸ matters, with Members having a right to base their conclusions on divergent or minority scientific views. Such divergent views arise most commonly in circumstances where scientific views generally may differ. Clearly, a careful, step-by-step examination of the scientific evidence and the expert opinions is the only way for a panel to proceed, and even that is by no means likely to satisfy the Appellate Body, if ever possible under the SPS Agreement.³⁶⁹

This proceeding also allows the Appellate Body to emphasize again that the precautionary principle underlies Article 5.7. The Panel may not abridge WTO Members’ right to protect their citizens from life-terminating damage to human health. From the outset, the SPS Agreement has attempted to achieve a delicate balance between protecting human, animal, and plant life and health and avoiding trade-distorting protectionist measures. The dichotomy continues.

368. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994), *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

369. When reading the Appellate Body report, with its unrelenting criticism of the Panel and its identification of multiple errors, particularly those in reviewing scientific data and expert reports on risk assessment, one wonders why any trade official in her right mind would want to serve as a panelist in a matter arising under the SPS Agreement.

iv. Burden of Proof Where Evidence is Unclear

Burden of proof issues, and when burdens shift, are critical in this proceeding to determinations under both Articles 5.1 and 5.7. Here, as in other SPS and TBT proceedings, the scientific evidence, or other evidence before the Panel, is incomplete and experts are not in full agreement. Under such circumstances, the complaining party with the initial burden to make a *prima facie* case, or the burden of rebuttal after the complaining party makes its case and the burden of proof has shifted, may determine who wins or loses.³⁷⁰ Perhaps most significantly, as noted in (1) above, where a Member's SPS measures have been found to be inconsistent with the SPS Agreement, the burden of proof is on the Member alleging that its revised measures are now consistent.

v. An Unhappy Winner?

The United States, the perceived winner in the proceeding, notwithstanding Ambassador Susan Schwab's optimistic assessment in December 2008,³⁷¹ quickly objected to various aspects of the Appellate Body's report. In a communiqué to the DSB, the United States noted that the finding of the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."³⁷² The United States accused the Appellate Body of proposing amendments and interpretations of the DSU, thus proposing to add to or diminish the rights and obligations of Members.

First, the Appellate Body not only correctly concluded that the United States was not required to initiate a compliance panel proceeding in response to the EC's claim of compliance, it improperly went further, and "opine[d] . . . on what process Members should follow in the situation where the DSB has authorized a Member to suspend concessions . . . and the Member concerned subsequently claims that it has complied with the DSB recommendations and rulings at issue . . ."³⁷³ For the United States, these procedures as suggested by the Appellate Body are "deeply troubling" both because of the textual basis and the problems with the procedures suggested. The United States rejects the suggestion that the *only* procedures available are in a compliance panel

370. See Gantz & Schropp, *supra* note 88 (discussing the Panel's approach to the burden of proof and responsibilities for providing evidence to the Panel).

371. See *supra* note 139 and accompanying text.

372. Communication from the United States on Concerns Regarding the Appellate Body's Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, ¶ 2, WT/DS320/16 (Nov. 12, 2008) [hereinafter *U.S. Communication*] (quoting Understanding on Rules and Procedures Governing the Settlement of Disputes art. 19.2, 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)).

373. *U.S. Communication*, ¶ 6.

proceeding under Article 21.5. It also faults the Appellate Body for implying that the only recourse is Article 21.5 panel proceedings, when everyone knows that appeals from such panel proceedings may be taken.³⁷⁴

In addition, the United States notes that an arbitrator in an Article 22.6 arbitration in *EC – Hormones* specifically indicated that both ordinary and Article 21.5 panel proceedings could be “legitimate avenues for the EC to challenge US suspension of concessions.”³⁷⁵ In other words, Article 21.5 proceedings are not exclusive. Up to now parties have been able to avoid the “jurisdictional limitation” of Article 21.5 by resorting to an ordinary panel proceeding. It was inappropriate for the Appellate Body to restrict this choice.³⁷⁶ The United States notes further that WTO Members have been seeking agreement on “what process Members should follow in a post-suspension situation, but have not yet achieved consensus”³⁷⁷ The Appellate Body approach has not been advocated by any Member in the negotiations; for the Appellate Body to so act is “rule-making, which is outside of the Appellate Body’s mandate.”³⁷⁸

The United States has additional objections. It believes the Appellate Body’s exclusion of the two Codex experts (as discussed above), was incorrect. The Appellate Body’s “standard for independence and impartiality of expert advisers is of great concern. It could result in disqualifying those who have the greatest expertise and familiarity with an issue, subject matter, or controversy.”³⁷⁹

Finally, the Appellate Body’s “recommendation” was legally defective. A recommendation may be made *only* when the Appellate Body concludes that a measure of a Member is inconsistent with a covered agreement. In the absence of such a finding in this proceeding, there is no basis for making a recommendation and, in particular, no basis for making a recommendation to the complaining party (United States). Nor is there a basis for specifying that such a “recommendation” be implemented “without delay.” DSU Article 19 provides no authority for setting a time period.³⁸⁰

By and large, the United States’ concerns seem well-founded, despite the obvious challenges the Appellate Body faced in deciding how to address a complex “sequencing” situation that is not resolved by the DSU as currently written. Even though the United States is left free to continue (and, perhaps, to change) its sanctions, United States officials are likely well aware that the long-running *EC – Hormones* dispute is far from over and that the procedures followed by all parties in subsequent stages may well determine the result as was the case in the instant proceeding.

374. *See id.* ¶ 12.

375. *Id.*

376. *Id.* ¶ 15.

377. *Id.* ¶ 18.

378. *Id.* ¶ 21.

379. *Id.* ¶ 24.

380. *Id.* ¶ 33.

vi. Significant Steps Toward Appellate Body
Transparency

For the first time in the Appellate Body's fourteen year history, the oral hearing of the Appellate Body was substantially opened to the public.³⁸¹ The three participants and the Appellate Body devised a sensible mechanism to protect those third participants still demanding secrecy by using closed circuit televisions to broadcast the proceeding to a separate room, a linkage that could be turned off when representatives of Brazil, China, India and Mexico were appearing before the Appellate Body. Similar public access was subsequently authorized by the Appellate Body in *EC – Bananas III*. Eighty-seven individuals registered to view the proceedings in *Canada/United States – Continued Suspension* and seventy-five in *EC – Bananas III*.³⁸²

In *United States – Zeroing*, even though the EC and the United States were the only parties, the closed circuit television in a separate room approach was again to be utilized.³⁸³ In both instances, because of limited seating capacity, advance registration, by one week prior to the hearing, was required and seats were to be allocated on a first-come, first-served basis. Passports were required for admission, and video or audio recordings were to be prohibited.³⁸⁴ The required written application form sought only basic information (name, address, profession, organization, phone, email, date of birth, nationality, and passport number).³⁸⁵

These procedures had an additional benefit to another group that in the past has been given short shrift by the system, WTO Members who were neither participants nor third participants but had an interest in the proceeding. Typically, such Members are not admitted to the Appellate Body's oral hearing. Here, perhaps because it would have been absurd to admit members of the public but not other Members (except in their status as members of the public), the Appellate Body directed the secretariat to reserve seats in the public television room for interested Members. Bravo!

381. U.S. Trade Representative, *supra* note 207, at 2.

382. Appellate Body Annual Report 2008, *supra* note 2, at 41.

383. See Appellate Body Hearing on "Zeroing" Dispute Opened to the Public, Dec. 1, 2008, http://www.wto.org/english/news_e/news08_e/dispu350_1dec08_e.htm (notice and registration requirements).

384. *Id.*

385. World Trade Organization, Application to Watch Closed-Circuit TV Broadcast of the Appellate Body Hearing in United States – Continued Existence and Application of Zeroing Methodology, on December 11 2008, http://www.wto.org/english/news_e/news08_e/dispu350_1dec08_e.doc (last visited Mar. 29, 2009).

vii. What Happens Next?

Since the Appellate Body could not complete the analysis due to “numerous” deficiencies in the Panel record, the substantive determinations are left for another day (and year). The DSB essentially ordered the three parties to cooperate in bringing an Article 21.5 proceeding, but as noted in Part (III)(D)(2)(g) above, the United States disputes the authority of the Appellate Body to issue such a directive.

In January 2009, before any Article 21.5 filings were made, the U.S. Trade Representative announced that the United States would change the list of EC products subject to penalty duties in retaliation for EC non-compliance. The United States proposed the addition of forty-five new products, targeting products from twenty-six of twenty-seven EC member states in comparison to the fourteen Members targeted in the original 1999 list. Among other changes, Roquefort cheese would be subject to 300% instead of 100% tariffs. Some items, such as tomatoes from France, Germany, and Italy and yarn from France and Germany were to be removed from the retaliation list. The United States asserted that the aggregate volume of trade covered remains at \$116.8 million. The EC pledged to challenge the changes in the retaliation list before the Dispute Settlement Body.³⁸⁶



386. Gary G. Yerkey, *U.S., EU Exchange New Blows in Beef Hormone Trade Dispute*, 26 INT'L TRADE REP. 97, 97 (2009).