I. INTRODUCTION

The year 2012 was one of the busiest in recent history for the Appellate Body, both in the number of cases decided and pending and the sheer magnitude of the work accomplished. As this case review indicates, the Dispute Settlement Body adopted seven reports from the Appellate Body (excluding Article 21.5 reports, none of which were issued in 2012). Moreover, 27 new requests for consultations were lodged with the WTO's Dispute Settlement Body, bringing the aggregate total since 1995 to 453.[1] While this does not meet the average of 37 per year from 1995-1999, it approximates the 27.8 average from 2000-2004 and far exceeds the 15.6 average from 2005-2009 and 12.5 from 2010-2011.[2] It also constitutes a 200 percent increase from 2011, when only eight new requests for consultation were filed.[3] It is unclear whether this represents an upward trend or simply a temporary spike. The fact that eight of the complaints were against Argentina is unusual, and probably not likely to be replicated, but ten actions involving China is a volume not inconsistent with recent experience.[4]

The result, according to observers, is severe pressure on the WTO Rules and Legal Affairs Divisions, which is reportedly planning to reallocate personnel from other divisions, and is seeking at least one additional attorney.[5] The complexities of cases before panels and the Appellate Body, as *US—Aircraft* and several cases involving the *TBT Agreement* reviewed in this article confirm, have also dramatically increased, as have the length of reports, discussed elsewhere in this case review. For example, the compliance panel in *US—Aircraft* will not be completed until the first half of 2014;[6] it will almost certainly be appealed.

The fluctuations in the number of appeals continue. As of December 20, 2012, no appeals were pending before the Appellate Body.[7] Given the level of activity undertaken in 2012, particularly with another blockbuster case, *US—Aircraft,* a short and temporary respite is probably welcome both for the members

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[1] *Chronological List of Disputes Cases*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited July 15, 2013).

[2] Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2011—A Statistical Analysis*, 15 J. INT'L ECON. L. 315, 315–16 (2012).

[3] *See* Simon Lester, *Can the WTO Handle All These Disputes?*, INT'L ECON. LAW & POLICY BLOG (Dec. 17, 2012, 8:41 AM), http://worldtradelaw.typepad.com/ielpblog/2012/12/can-the-wto-handles-all-these-disputes.html (discussing the shortage of legal staff).

[4] *See* Simon Lester, *The Increase in WTO Disputes*, INT'L ECON. LAW & POLICY BLOG (Jan. 11, 2013, 10:19 AM), http://worldtradelaw.typepad.com/ielpblog/.

[5] *Id.*

[6] *See Compliance Panel Ruling in Boeing Subsidies Case Not Likely Until 2014*, WORLD TRADE ONLINE (July 15, 2013), http://insidetrade.com/201301182421967/WTO-Daily-News/Daily-News/compliance-panel-ruling-in-boeing-subsidies-case-not-likely-until-2014/menu-id-948.html (subscription required).

[7] *See Ongoing WTO Dispute Settlement Proceedings Under the DSU: Appeals*, WORLD TRADE LAW (July 11, 2013), http://worldtradelaw.net.ezproxy.law.arizona.edu/dsc/currentcases.htm (subscription required).

of the Appellate Body and its secretariat. With the number of new cases lodged, the heavy workload of the Appellate Body will undoubtedly return; historically, approximately 67 percent of Panel reports during the period 1996-2011 have been appealed.[8] Through 2012, 118 notices of appeal to the Appellate Body had been filed.[9] Thus, one can reasonably expect that a majority of the 27 complaints lodged in 2012 that reach the Panel stage will eventually end before the Appellate Body in 2013 or 2014.

The challenges for the Appellate Body are many. As former member Jennifer Hillman observed:

> For the Appellate Body, the struggle lies between the rule that decisions must be issued, in 3 languages, within 90 days of the date an appeal is filed and the mandate that the Appellate Body address every issue raised on appeal. In today's increasingly legal system, more issues are being raised in every dispute, the issues themselves are increasingly complex, and the parties' submissions are growing longer and longer, while the manpower available to address the increased load has remained fundamentally unchanged. Certainly it is clear to me that writing shorter, crisper and easier to read opinions takes much more time than writing long and occasionally hard-to-follow opinions.[10]

Ms. Hillman has made a number of suggestions for improving the process, including limiting the length of Members' submissions and reducing or eliminating the practice of summarizing the arguments made by all parties at the beginning of the report, as well as seeking more time so that the quality of the reports increases. She has also suggested, probably as a result of her own experience,[11] that because four years is too short for a member to function most efficiently and because Member governments may not reappoint their designated member, a single longer term might be substituted for the current two four-year term approach.[12] Unfortunately, efforts to review and update the Dispute

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8 World Trade Org., Appellate Body Annual Report for 2011, Annex 4, at 83 (June 2011), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=((%20@Symbol=%20wt/ab/*%20and%20@Title=%20annual%20report))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#.

9 *Id.* Annex 3, at 82 (adding the four appeals filed during calendar year 2012).

10 *Farewell Remarks of Jennifer Hillman to the Dispute Settlement Body of the WTO*, *8 December 2011*, *in* Appellate Body Annual Report for 2011, *supra* note 8, Annex 1B, at 76-77.

11 Appellate Body Annual Report for 2011, *supra* note 8, at 8 ("On 21 April 2011, Ms. Hillman informed the Chair of the DSB that, while she was willing to serve a second term, it was her understanding that there would be an objection from a Member country [the United States] to her reappointment. Ms. Hillman considered that, as long as that objection stood, she would not ask the DSB to consider her potential reappointment.").

12 *Farewell Remarks of Jennifer Hillman*, *supra* note 10, Annex 1B, at 77.

Settlement Understanding mandated by the Ministers to occur before 1999 and again as part of the Doha Round,[13] based on experience gained, largely disappeared with the effective demise of the Doha Round. (A cryptic note in the 2005 Ministerial Declaration takes note of the progress made in the Dispute Settlement Understanding negotiations and directs the Special Session to continue to work towards a rapid conclusion of the negotiations.[14] No further progress is reported.)

2012 effectively saw the initiation of three new members. Ujal Singh Bhatia (India) and Thomas R. Graham (United States) both took office on December 11, 2011, and Seung Wha Chang (Korea) became a member on June 1, 2012, the first Korean to sit on the Appellate Body.[15] The current chairperson, serving a six-month term that began January 1, 2013, is Mexican lawyer and law professor Ricardo Ramírez.[16] (The normal term is one year; assuming that Ramírez is reappointed to the Appellate Body when his current term expires June 30, 2013, he will likely be asked to serve as chairperson through 2013.)

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[13] *See Dispute Settlement: New Negotiations on the Dispute Settlement Understanding*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations (last visited July 15, 2013).

[14] World Trade Organization, Ministerial Declaration of 22 December 2005, ¶ 34, WT/MIN(05)DEC (2005), *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm#dsu.

[15] *See Dispute Settlement: Appellate Body Members*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited July 15, 2013).

[16] *Id.*

II. DISCUSSION OF THE 2012 CASE LAW FROM THE APPELLATE BODY

A. GATT Obligations: *Philippines—Distilled Spirits*

1. Citation

Appellate Body Report, *Philippines—Taxes on Distilled Spirits*, WT/DS396/AB/R, WT/DS403/AB/R (December 21, 2011) (*adopted* January 20, 2012).[17]

2. Facts and Panel Rulings

Most governments eye alcoholic beverages as a potentially rich source of tax revenue. The Philippine government is no exception. The Philippine National Internal Revenue Code (NIRC) of 1997 sets out criteria in Section 141 for the collection of excise taxes on distilled spirits.[18] Under NIRC Section 141(a), a specific flat tax rate of 14.68 Philippine pesos (PHP) per proof liter (ppl) applies to distilled spirits if:

> (i) [T]he distilled spirits are produced from any one or more of certain designated raw materials (sap of the *nipa*, coconut, cassava, *camote*, *buri* palm, or from juice, syrup, or caned sugar); and
> (ii) [T]he aforementioned designated raw materials are commercially produced in the country where they are processed into distilled spirits.[19]

NIRC Section 141(b) subjects all distilled spirits that do not meet the requirements in Section 141(a) to three different tax rates.

The NIRC Section 141(b) rates are based on the net retail price of a 750-milliliter bottle of the spirit.[20] A distilled spirit covered by Section 141(b) is subject to a tax if:

> (i) PHP 158.73 ppl, if its net retail price (NRP) is less than PHP 250;
> (ii) PHP 317.44 ppl, if its NRP is between PHP 250 and PHP 675; or
> (iii) PHP 634.90 ppl, if its NRP is more than PHP 675.[21]

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[17] Hereinafter Appellate Body Report, *Philippines—Distilled Spirits*. The Panel report in this case is *Philippines—Taxes on Distilled Spirits*, WT/DS396/R, WT/DS403/R (Aug. 15, 2011) [hereinafter Panel Report, *Philippines—Distilled Spirits*].

[18] Appellate Body Report, *Philippines—Distilled Spirits*, ¶ 98.

[19] *Id.*

[20] *Id.*

In other words, Section 141(b) established a three-tiered tax structure in which there is a direct relationship between the retail value of the alcoholic beverage and the tax on it; the pricier the spirit, the higher the tax.

Of considerable importance in the 2011 case, *Philippines—Distilled Spirits,* was the fact the Philippine tax rules effectively segregated domestic versus foreign-produced spirits into separate categories. All distilled spirits produced in the Philippines were made from sugar cane, a designated raw material. Hence, all Philippine alcoholic beverages were subject to the flat tax rate set out in NIRC Section 141(a).[22]

In contrast, the majority of distilled spirits imported into the Philippines were not processed from any one of the designated raw materials. Thus, the imported distilled spirits were subject to one of the Section 141(b) tax rates.[23] In effect, the Philippines concocted the list of designated raw materials to serve as the segregating device. The lower rate of taxation applied to alcoholic beverages made from certain materials that, in turn, typically are made in the Philippines. The higher rate applied to a wide range of imported spirits—brandy, gin, tequila, vodka, and whisky—that are not made from those specified ingredients.

The difference between the levels of taxation was considerable.[24] For example, in 2009, for distilled spirits made from certain materials typically produced in the Philippines, such as palm and sugar, the lower rate of 13.59 pesos (about U.S. $0.30 applied). In contrast, for imported distilled spirits, the tax was substantially higher, from roughly 10 to 40 times higher than the rate levied on domestically produced alcoholic beverages.

The Philippine Bureau of Internal Revenue (PBIR) oversaw the classification and taxation of different brands of distilled spirits.[25] Once the PBIR classified a particular brand under either one of the mutually exclusive categories of NIRC Section 141(a) or (b), then it could not re-classify it without an act of the Philippine Congress.[26] If a taxpayer disagreed with a classification, it could seek a request for ruling from the Commissioner of Internal Revenue, and thereafter a review by the Secretary of Finance.[27] Manifestly, such requests and rulings provided opportunities for corruption, that is, the offering or receipt of bribery to influence decision-making.

Not surprisingly, given their status as major exporters of alcoholic beverages, the European Union (EU) and United States chafed at the Philippine excise tax regime. They lodged with the WTO a complaint concerning the consistency of the Philippine excise tax regime as applied to distilled spirits. The

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21 *Id.* ¶ 99.

22 *Id.* ¶ 100.

23 Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 100.

24 *See WTO Appellate Body Upholds U.S., EU Complaint Against Philippines Spirits Taxes*, 29 INT'L TRADE REP. 22 (Jan. 5, 2012).

25 Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 101.

26 *Id.*

27 *Id.*

complainants maintained the excise tax regime ran afoul of Article III:2, first and second sentences, of the General Agreement on Tariffs and Trade 1994 (GATT).[28]

The seven products at issue were distilled spirits: gin, brandy, rum, vodka, whisky, tequila, and tequila-flavored spirits. All such products fell under Heading 2208 of the Harmonized Commodity Description and Coding System of the World Customs Organization (WCO).

Ruling on the European and American complaints, the Panel held the excise tax regime inconsistent with the obligations of the Philippines under GATT Article III:2, first sentence. This sentence states, "The products of the territory of any Member imported into the territory of any other Member 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."[29]

The Panel reasoned that because imported distilled spirits are made from non-designated raw materials, and thus shunted into NIRC Section 141(b), they are subjected to higher rates than the like domestic spirits made from designated raw materials.

In respect of the American complaint, the Panel further held that the excise tax regime to be inconsistent with the obligations of the Philippines under Article III:2, second sentence, which states, "Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1."

Why? The Panel said the excise tax applied dissimilar internal taxes on:

(1) Domestic distilled spirits made from designated raw materials vis-à-vis; and
(2) Directly competitive or substitutable imported distilled spirits made from non-designated raw materials.

The Panel found the tax differential afforded protection to the Philippine domestic production of distilled spirits, thus acting inconsistently with Article III:2, second sentence, as interpreted in light of Article III:1 and Ad Article III, Paragraph 2.

3. Appellate Issues and Holdings Under Article III:2, First Sentence

The Philippines appealed its loss at the Panel stage.[30] Predictably on appeal, the national treatment obligation for fiscal measures, GATT Article III:2, were at stake.

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[28] *Id.* ¶ 1.

[29] General Agreement on Tariffs and Trade 1994 art. III:2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

[30] Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 44. Additionally on appeal, the EU claimed that the Philippines overstated the importance of physical characteristics in the analysis of "likeness."

The Philippines based its appeal on the interpretation by the Panel of "likeness" under Article III:2, first sentence.[31] The Panel identified two broad categories of "likeness":

(1) Category #1 of "Like" Products

> The Panel held imported distilled spirits made from non-designated raw materials, and domestic distilled spirits made from designated raw materials, are like products. This holding was a generic one, comparing two broad categories of goods and intimating the irrelevance of raw materials. This holding confirmed alcoholic beverages are "like" products, whether they are imported into the Philippines and made from non-designated raw materials, or made in the Philippines from designated raw materials. For example, imported whisky is "like" Philippine made whisky, even though they are made from different raw materials.

(2) Category #2 of "Like" Products

> Each type of imported distilled spirit at issue made from non-designated raw materials, and any other type of domestic distilled spirit at issue in the case made from designated raw materials, are "like" products. This holding also is general, and involves comparing spirits across all seven categories of alcoholic beverages involved in the case (gin, brandy, rum, vodka, whisky, tequila, and tequila-flavored spirits). For example, all sugar-based brandy is "like" all non-sugar based whisky.

To be sure, the Panel did not spell out two separate categories as such. Yet, analytically, its work was tantamount to identifying "likeness" in two senses.

Reaching these "likeness" determinations meant GATT Article III:2, first sentence, applied to the facts. In turn, the Panel held the Philippines violated Article III:2, first sentence. How so? By subjecting imported distilled spirits made from non-designated raw materials to internal taxes in excess of those applied to "like" domestic distilled spirits made from designated raw materials.[32] This holding followed logically from the expansive approach the Panel took to the "likeness" of imported and domestic products. At issue on appeal was this holding.

First, following the Panel, the Appellate Body considered imported distilled spirits made from non-designated raw materials and domestic distilled spirits made from designated raw materials—that is, Category #1 of "like"

[31] Fratini Vergano, *Appellate Body Report Issues in the WTO Dispute on Philippines—Distilled Spirits*, 1 TRADE PERSPECTIVES 1 (2012).

[32] Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 109.

products. The Panel considered five types of evidence to make its "like products" determination: physical characteristics, consumer tastes and habits, end uses, tariff classification, and regulatory regimes.[33] The first three evidentiary categories were standard, used throughout GATT-WTO jurisprudence. Adjudicators occasionally use the fourth category. The fifth category was a bit unusual. The Appellate Body addressed four of the five types of evidence. (It did not consider end uses, because it was not disputed that distilled spirits, no matter the origin or type of raw materials in them, had the same end-uses in the Philippines.)[34]

a. Article III:2, First Sentence and Physical Characteristics

The Philippines challenged with the interpretation of the Panel of "like products" in respect to the physical characteristics of the products. The Philippines argued "like products" has a narrow meaning, making any significant physical difference sufficient to prevent a product from being "like" another product.[35] The Appellate Body disagreed with this narrow interpretation, affirming the determination of the Panel that "like products" under the first sentence of GATT Article III:2 is not limited to identical products.[36] "Identical" is a subset that does not exhaust the universe of "like" products.

That is, the Appellate Body said the determination of the Panel provided a partial, but not necessarily a perfect definition of "likeness." The Panel considered whether there are "perceptible differences" among alcoholic beverages only in the context of physical characteristics.[37] That is too narrow a context. There can be perceptible difference with respect to the other factors that influence "likeness," such as consumer tastes and preferences. In a key section of its report, the Appellate Body states:

> 131. We observe that the criteria to establish "likeness" under Article III:2, first sentence, of the GATT 1994 are not exhaustive and are not set forth in Article III:2, nor in any other provision of the covered agreements. Rather, these criteria are tools available to panels for organizing and assessing the evidence relating to the competitive relationship between and among the products in order to establish "likeness" under Article III:2, first sentence. *While distinct, these criteria are not*

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[33] *Id.* ¶ 113.
[34] *Id.*
[35] *Id.* ¶ 122.
[36] *Id.* ¶ 121.
[37] The Philippines offered gas chromatography evidence, which the Panel accepted (yet found that this evidence did not show "perceptible differences" among alcoholic beverages), but the Appellate Body rejected. *See* Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 129 (quoting Panel Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 7.75).

> *mutually exclusive. Certain evidence, such as that relating to the perceptibility of differences, may well fall under more than one criterion.*
>
> 132. By finding that there was no evidence of "perceptible differences" in the physical characteristics of the products, the Panel appears to have focused on how the products are perceived by users in its analysis of the products' physical characteristics. While consumer perception of products is highly relevant to the overall determination of "likeness" under Article III:2, we believe that this element may reach beyond the products' properties, nature, and qualities, which concern the objective physical characteristics of the products. Indeed, consumer perception of products may be more concerned with consumers' tastes and habits than with physical characteristics.
>
> 133. However, in light of the above, *while the Panel refers to "perceptible" differences only in the context of the physical characteristics of the products, we do not consider that the Panel committed an error in its analysis of the products' physical characteristics by finding that, within each type, there is physical similarity between imported and domestic distilled spirits, irrespective of whether they are made from designated raw materials or from non-designated raw materials*.[38]

Nevertheless, the approach of the Panel in considering "perceptible differences" only in the context of physical characteristics did not amount to reversible error. The definition of the Panel remained faithful to the overall principle that certain differences are capable of being "like," if the "nature and extent of their competitive relationship justifies such a determination."[39]

The Philippines also claimed the raw materials used to create distilled spirits affected their chemical composition and characteristics.[40] The Appellate Body held that in spite of differences in the raw materials used to make the alcoholic beverages, if these differences do not affect the final products, these products still can be "like" within the meaning of Article III:2. In brief, the report is a reminder that Article III:2, first sentence, refers to "like products," not to the raw material base of the "like products."

As just intimated, the Appellate Body explained a "like products" determination under Article III:2 is not singularly focused on physical characteristics, but also includes the nature and extent of the competitive relationship between imported and domestic products.[41] If the competitive

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[38] *Id.* ¶¶ 131-33 (emphasis added).

[39] *Id.* ¶ 121.

[40] *Id.* ¶ 123.

[41] *Id.* ¶ 125.

relationship between final products is essentially unchanged, then differences in raw materials embedded in those products do not always lead to a negative "like products" determination.[42] Those products still can be "like," in spite of their different components, because they compete head-to-head in the marketplace. Accordingly, the Appellate Body found the consideration by the Panel of these factors to be accurate.[43]

In sum, the Appellate Body reached four key conclusions. First, "like" does not mean "identical." Second, perceptible differences between imported merchandise and a purported domestic "like" product are an indicator of divergent physical characteristics, but not the only indicator of them. Third, perceptible differences are an indicator of "likeness" that can be used when assessing criteria other than physical characteristics. Fourth, raw materials used to make (i.e., the composition of) a finished good are not dispositive as to the question of "likeness." What is more important is the competitive playing field between finished goods. If imported merchandise and a purported "like" domestic product compete in the same markets, then they are "like."

The de-emphasis by the Appellate Body of the importance of inputs into a finished product in *Philippines—Distilled Spirits* is redolent of the distinction between production processes and finished products. That distinction arises, *inter alia*, in environmental cases raising the GATT Article XX(b) and (g) exceptions to obligations, such as the Article III national treatment principle. Speaking generally, the thrust of that jurisprudence is that GATT-WTO rules do not regulate production methods. (The 1992 and 1994 *Tuna—Dolphin I and II* and 1998 *Turtle-Shrimp* disputes illustrate the point.) In the *Philippines—Distilled Spirits* case, the Appellate Body is offering a loosely analogous proposition, namely, that composition (which, of course, is an aspect of production process) does not drive inexorably the determination of whether finished products are "like."

b. Article III:2, First Sentence and Consumer Tastes and Habits

The Appellate Body found that the Panel adequately reviewed the Philippine evidence about its distilled spirits market, price levels, and expendable income of Filipinos.[44] The Philippines claimed that the Panel should have given the evidence more weight. Not so, said the Appellate Body, affirming that the Panel had discretion when weighing evidence.[45]

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42 *See* Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 125 (quoting Panel Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 7.75).

43 *Id.*

44 *Id.* ¶ 157.

45 *Id.*

c. Article III:2, First Sentence and Tariff Classification

The Philippines claimed that Heading 2208 of WCO evidences the similarity between domestic distilled spirits made from designated raw materials and imported distilled spirits made from non-designated raw materials.[46] The Philippines said this broad heading was insufficient to serve as evidence for "like products" determinations.[47] Thus, argued the Philippines, the Panel drew an unreasonably broad inference from Heading 2208: the Panel held it is proof of "likeness," whereas the Philippines contended it is no more than a suggestion of similarity.

On previous occasions, notably in the 1996 case, *Japan—Alcoholic Beverages,* the Appellate Body stated that tariff classification could be helpful in "like" product determinations. But it said that the tariff classification must be sufficiently detailed.[48] In *Philippines—Distilled Spirits,* the Appellate Body agreed with the Philippines, finding Heading 2208 too broad to prove a "like products" determination.[49] However, tariff classification was only one of the criteria the Panel used in its analysis. The Appellate Body had already affirmed the determination of the Panel that the product physical characteristics and the consumer tastes and habits supported a finding that the products at issue are "like products" under Article III:2.[50] Thus, on these two criteria, "likeness" existed, so the error of the Panel concerning tariff classification was irrelevant.

d. Article III:2, First Sentence and Regulatory Regimes

The Philippines claimed the Panel should have considered the regulatory regimes of the EU and United States, in addition to the Philippine regime. Why? Because, urged the Philippines, domestic regulatory regimes can be used to identify physical differences in products.[51] The Appellate Body emphasized that "like products" determinations are made case-by-case because "like products" in one market may not be "like products" in another market. To establish "like products," a panel must examine the nature and extent of the competitive relationship within the market in which products compete. The Panel was correct in analyzing the competitive relationship in the Philippine market, as that is where the competition of the distilled spirits occurred.[52]

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46 *Id.* ¶ 160.

47 *See* Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 160 (quoting Panel Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 7.75).

48 Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 114, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (*adopted* Nov. 1, 1996) [hereinafter Appellate Body Report, *Japan—Alcoholic Beverages*].

49 Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 161.

50 *Id.* ¶ 164.

51 *Id.* ¶ 166.

52 *Id.* ¶ 169.

e. Conclusion on "Likeness" Under Article III:2, First Sentence

The Appellate Body affirmed the determination of the Panel concerning "like products" under Article III:2, first sentence. Through its review of physical characteristics, end-uses, consumers' tastes and habits, tariff classification, and relevant internal regulations, the Panel determined the distilled spirits were "like products." The Appellate Body held there was no error.[53] Interestingly, it did so in spite of its rhetoric about these criteria. Rather, the Appellate Body was impressed by the nature and extent of the competitive relationship between imported and domestic distilled spirits.

Having reached this conclusion, the Appellate Body moved to Category #2 of "like" products. As explained above, the Panel considered, and found to be "like," each type of imported distilled spirit at issue made from non-designated raw materials and the same type of domestic distilled spirit made from designated raw materials. On appeal, the Philippines claimed that the Panel erred in finding all distilled spirits in the dispute to be "like." The Appellate Body agreed with this claim. It reversed the finding of the Panel that all distilled spirits are "like," regardless of types.[54] Briefly put, the Appellate Body reasoned that the Panel was excessively broad in reaching this finding. There were *bona fide* differences, based on the aforementioned four factors, between different types of alcoholic beverages.

At least one practitioner-commentator, Paolo Vergano, argues the Appellate Body decision in *Philippines—Distilled Spirits* marks a shift from the classical determination of "likeness" to an economic analysis of the fundamental competitive relationship between products.[55] Initially, this economic approach toward "likeness" appeared in the *EC—Asbestos* case, in the context of GATT Article III:4.[56] In *Philippines—Distilled Spirits*, the Appellate Body clearly extended this approach to its interpretation of "likeness" under Article III:2.[57] In brief, Mr. Vergano explains that the adjudicatory criteria to assess "likeness" must include an analysis of the economic competitiveness of both products, when litigating a national treatment dispute, whether under Article III:2 or III:4.[58]

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[53] *Id.* ¶ 169.

[54] Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 183.

[55] Vergano, *supra* note 31, at 1.

[56] *Id.*; *see also* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (*adopted* Apr. 5, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*].

[57] Vergano, *supra* note 31, at 1.

[58] *Id.*

4. Appellate Issues and Holdings Under Article III:2, Second Sentence

GATT Article III:2, second sentence, contains a general prohibition against "internal taxes or other internal charges" applied to "imported or domestic products in a manner contrary to the principles set forth in paragraph 1." Article III:1 provides that internal taxes and other internal charges "should not be applied to imported or domestic products so as to afford protection to domestic production." Ad Article III:2, Paragraph 2, expressly refers to the second sentence of Article III:2, explaining that "directly competitive or substitutable products" are within the ambit of that sentence, but not the first sentence.

The Panel relied on a three-part test to assess the consistency of the Philippine internal tax measure with Article III:2, second sentence:

> Step 1: Whether the imported and domestic products are "directly competitive or substitutable";
> Step 2: Whether such directly competitive or substitutable imported and domestic products are "not similarly taxed"; and
> Step 3: Whether dissimilar taxation of the directly competitive or substitutable imported products is "applied . . . so as to afford protection to domestic production."[59]

In so doing, the Panel tracked the key language of Ad Article III, Paragraph 2, in Step 1 and of Article III:1 in Step 3. In Step 2, the Panel quoted the 1996 *Japan—Alcoholic Beverages* precedent set by the Appellate Body.

As regards to Step 2, it is worth recalling that in an Article III:2, first sentence, dispute, even a *de minimis* difference in taxation is unacceptable. But in an Article III:2, second sentence, case, the difference (if any) in taxation must be non-*de minimis* to be actionable. That is because second sentence cases cover "directly competitive or substitutable products," which are a larger universe than exists for first sentence cases and which are restricted to "like products."

The Philippines appealed the assessment of the Panel of two elements in the three-part test.[60] First, the Philippines claimed that the Panel erred in finding all distilled spirits at issue in this dispute, whether imported or domestic, and irrespective of the raw material from which they are made, are "directly competitive or substitutable" products within the meaning of Article III:2, second

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[59] Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 72 (quoting Appellate Body Report, *Japan—Alcoholic Beverages*, *supra* note 48).

[60] *Id.* ¶ 185. The EU claimed that the Panel should not have characterized its claim under Article III:2, second sentence, of the GATT 1994 as made in the "alternative" to its claim under the first sentence of Article III:2. The EU argued the failure of the Panel to address its claim under Article III:2, second sentence, was inconsistent with Articles 7.1, 7.2, and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter *DSU*].

sentence. In other words, the Philippines argued that the Panel should have respected the product category distinctions (#1 and #2) created by its domestic law and erred by lumping dissimilar alcoholic beverages together as competing directly against one another or substituting for one another.

Second, the Philippines railed against the holding by the Panel concerning protection. The Panel said the Philippines applied dissimilar taxation of the imported and domestic distilled spirits at issue "so as to afford protection" to Philippine production of distilled spirits, thus violating Article III:2, second sentence. That holding, said the Philippines, was wrong. The Appellate Body took the two Philippine claims in order.

a. Article III:2, Second Sentence and "Directly Competitive or Substitutable Products"

First, were the spirits at stake "directly competitive or substitutable" products within the meaning of the second sentence of GATT Article III:2?[61] Yes, responded the Appellate Body, upholding the assessment by the Panel of the competitive relationship between imported and domestic distilled spirits.

The Appellate Body relied on studies showing a significant degree of substitutability in the Philippine market between imported and domestic distilled spirits. It also was comforted by evidence of many instances of price competition and of actual and potential competition between imported and domestic distilled spirits in the Philippine market. Based on this evidence, the Appellate Body supported the conclusion of the Panel that there is "a direct competitive relationship between domestic and imported distilled spirits, made from different raw materials."[62] This evidence, combined with other factors the Panel considered, supported the conclusion that all imported and domestic distilled spirits at issue are "directly competitive or substitutable" within the meaning of Article III:2, second sentence.

What were those other factors the Panel considered, but which the Philippines did not challenge on appeal? Those factors were similarities in terms of channels of distribution, physical characteristics, end uses and marketing, tariff classification, and internal regulation.[63] Here, then, is a vital point: some of the same evidentiary factors used to assess whether products are "like" also are used to assess whether they are, if not "like," then "directly competitive or substitutable." Put differently, the test for "direct competition or substitution" is wider than that for "likeness," in that it includes more factors than the test for "likeness." But the test for "direct competition or substitution" embraces the test for "likeness"—it has those same factors. That makes sense, because "directly

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[61] Vergano, *supra* note 31, at 1.
[62] Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 258.
[63] *See id.* ¶ 198.

competitive products" include "like products," but also more than just "like products."

In sum, *Philippines—Distilled Spirits* illustrates, *inter alia*, that WTO adjudicators are willing to accept a wide range of evidence when determining whether imported and domestic merchandise are, in fact, "directly competitive or substitutable" within the meaning of GATT Ad Article III, Paragraph 2. That evidence includes the "like product" test factors, which the Philippines did not challenge. That evidence also includes what the Philippines did challenge, but without success: the actual degree of competition between imported and domestic merchandise in the importing country, substitutability between the merchandise, and potential competition between the merchandise.[64]

b. Article III:2, Second Sentence and Affording Protection to Domestic Production

The Philippines claimed the Panel erred in determining that it applied its excise tax in a manner "so as to afford protection to domestic production" within the meaning of Article III:2, second sentence. The Appellate Body affirmed the holding of the Panel that the structure of the tax measure and the large difference in taxes between imported and domestic products were protective.[65]

The key point to appreciate concerns the evidence on which the Appellate Body relied to draw the inference of protective effect. Obviously, GATT Article III does not instruct adjudicators about the factors they should or must use to decide whether an importing country applies a dissimilar tax "so as to afford protection to domestic production." Judicial interpretation, and interstitial law making, is essential.

In *Philippines—Distilled Spirits*, the Appellate Body reviewed the arguments of the two sides as follows:

> 248. The Philippines claims that the Panel's finding is in error for two reasons. First, the facts "simply do not support" the Panel's conclusion that "the vast majority of imported spirits are subject to higher taxes" because approximately 50 percent of the domestic production of distilled spirits is made from imported ethyl alcohol, a "significant quantity" of which is, in turn, subject to the lower flat tax rate under Section 141(a) of the NIRC. Second, the Philippines submits that the Panel erroneously rejected its argument that the excise tax could have no protectionist intent given that the vast majority of Philippine households cannot afford imported distilled spirits. In particular, by merely "transferring the reasoning" applied by the Appellate

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[64] *See id.* ¶ 200.

[65] *See id.* ¶ 257.

> Body to the facts in *Korea—Alcoholic Beverages* and dismissing the Philippines' argument "for the same reasons," the Panel engaged in a "legally deficient" inquiry and fell short of the case-by-case, "comprehensive and objective analysis" that is required under Article III:2, second sentence, of the GATT 1994.
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> 249. The European Union and the United States respond that the Panel was correct in finding that the excise tax is applied "so as to afford protection to domestic production." In particular, the European Union stresses that ethyl alcohol is merely an input used in the production of distilled spirits and is therefore of no relevance to the current dispute. It further submits that, at this stage of its analysis, the Panel rightly refrained from re-addressing the question of whether domestic and imported spirits are "directly competitive or substitutable." The United States argues that the Panel correctly focused on the "magnitude of the difference in taxation, the design, structure and application" of the measure at issue. Likewise, the Panel appropriately focused on the final products at issue, rather than on inputs used by domestic producers. The United States maintains further that it was not necessary for the Panel to inquire into the motivations for the measure, and emphasizes that the Philippines does not dispute the fact that imported distilled spirits are subject to higher taxes than all domestic distilled spirits.[66]

Thereafter, the Appellate Body reviewed the work of the Panel and affirmed its conclusion. The key section is worth quoting at length because it displays the factors the Appellate Body examines to evaluate in practice the "so as to afford protection" language of GATT Article III:1 in an Article III:2, second sentence, case:

> 251. . . . . The Philippines claims that the Panel erred in finding that the "vast majority of imported spirits are subject to higher taxes," because approximately 50 percent of domestic production is made from imported ethyl alcohol, which is taxed at the lower rate.
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> 252. We do not find merit in the Philippines' argument . . . . In our view, the question before the Panel . . . was whether the *design, architecture, and structure* of the excise tax indicates that such measure affords protection to the Philippine production of the "directly competitive or substitutable" distilled spirits at

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66 *Id.* ¶¶ 248-49 (citation omitted).

issue in this dispute. Ethyl alcohol, as such, does not fall within the category of the "directly competitive or substitutable" distilled spirits at issue, but, rather, is an input used in the production of these distilled spirits. Therefore, the fact that imported ethyl alcohol is subject to taxation similar to that imposed on domestic distilled spirits had no bearing on the Panel's assessment of whether the excise tax affords protection to domestic production of the directly competitive or substitutable distilled spirits at issue.

253. We now turn to the Philippines' claim that the Panel fell short of the required "case-by-case, comprehensive analysis" when it dismissed its argument that the excise tax could not afford protection to domestic production because of the competitive conditions in the Philippine market, where the majority of the population cannot afford imported distilled spirits.

254. We agree with the Philippines that, read in isolation, the portion of the Panel's reasoning at which the Philippines' claim is directed was too cursory. Had the Panel found that the excise tax regime affords protection to domestic production solely by referring to the reasoning articulated by the Appellate Body in *Korea—Alcoholic Beverages*, it would have fallen short of a comprehensive and objective analysis of the case at hand.

255. However, the Panel's analysis of whether the measure at issue is applied so as to afford protection to Philippine production was not as limited as the Philippines suggests. Indeed, the Panel reviewed "the *design, architecture and structure*" of the measure in some detail and observed that, while "*[a]ll* designated raw materials are grown in the Philippines and *all* domestic distilled spirits are produced from designated raw materials," the vast majority of imported distilled spirits "are *not* made from designated raw materials. It therefore concluded that, *de facto*, the application of the measure resulted in all domestic spirits enjoying the lower flat tax rate, while the vast majority of imported spirits are subject to higher taxes. The Panel stressed further that the more burdensome tax treatment applied to imported spirits can be quantified in the order of *"10 to 40 times that applicable to all domestic spirits," thus making the difference in taxation "nominally large."* In our view, these findings by the Panel, taken as a whole, constitute an adequate analysis of the specific facts of this dispute . . . .

> 256. . . . . [T]he Panel went on to dismiss the Philippines' argument regarding the lack of protective application on the basis of *market segmentation*. We agree with the Panel that the assessment of *whether the excise tax could affect the competitive relationship between domestic and imported distilled spirits* in the Philippine market pertains to the prong of analysis directed at determining whether the products are "directly competitive or substitutable." Having addressed—and rejected—the Philippines' arguments concerning pre-tax price differentials when determining whether the products at issue are "directly competitive or substitutable" in the Philippine market, it was not necessary for the Panel to revisit this argument in its assessment of whether the dissimilar taxation of such products afforded protection to domestic production. Moreover, the passage of the Appellate Body report in *Korea—Alcoholic Beverages* quoted by the Panel explained that a finding that a tax measure affords protection to domestic production does not depend upon showing "some identifiable trade effect." Thus, the *question of whether or not the excise tax negatively impacts trade in imported distilled spirits is not determinative of the question of whether the measure affords protection to domestic production.*
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> 257. In light of the above, we do not consider that the Panel erred in its application of the term "so as to afford protection to domestic production" when it found . . . that "the design, architecture, and structure of the measure, including the magnitude of the tax differential applicable to imported and domestic products, reveal the protective nature of the measure." Accordingly, we *uphold* the Panel's finding . . . that dissimilar taxation imposed by the Philippine excise tax on imported distilled spirits and on directly competitive or substitutable domestic spirits is applied "so as to afford protection" to Philippine production of distilled spirits.[67]

The bottom line as to the factors the Appellate Body uses to gauge whether a non-*de minimis* differential tax affords protection to domestic production is this: a negative impact on trade, such as diminished imports, is insufficient to support a finding of domestic protection.

Moreover, the aims or intent of the tax are irrelevant. Protective effect is what matters. To discern whether there is such an effect, following the 1999

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[67] Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶¶ 251-57 (emphasis added).

Korea—Alcoholic Beverages case,[68] each case must be treated as *sui generis*, and a full range of factors must be examined. Among the key factors are three: design, architecture, and structure of the disputed tax; magnitude of the difference in taxation between the imported directly competitive or substitutable product and domestic product; and gradient (level or un-level) of the competitive playing field in the market of the importing country.

5. Commentary

Despite the fact that this is at least the third Appellate Body report involving the taxation of alcoholic beverages, after *Japan—Alcoholic Beverages II,*[69] *Korea—Alcoholic Beverages* and *Chile—Alcoholic Beverages*,[70] it is evident as noted immediately above that the Appellate Body will continue to treat each case as *sui generis*, despite the overwhelming similarity of the approaches taken by the Members to protect their domestic alcoholic beverage industries. Still, the Appellate Body in *Philippines—Distilled Spirits,* as in *Korea—Alcoholic Beverages*, has declined to place upon the Claimant the burden of demonstrating negative trade effects. Rather, where dissimilar taxation between domestic and imported spirits that are directly competitive or substitutable exists, it is probably not going to be overly difficult to convince panels and the Appellate Body that the measures are inconsistent with Article III:2. At the same time, given history, the Philippines will be the last WTO Member to seek protection for its alcoholic beverage industry through discriminatory taxation measures.

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68 Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999) (*adopted* Feb. 17, 1999) [hereinafter Appellate Body Report, *Korea—Alcoholic Beverages*].

69 Appellate Body Report, *Japan—Alcoholic Beverages*, *supra* note 48.

70 Panel Report, *Chile—Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R (Dec. 13, 1999) (*adopted as modified* Jan. 12, 2000).

B. GATT Obligations: *China—Raw Materials*

1. Citation

Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (January 30, 2012) (*adopted* February 22, 2012).[71]

2. Facts

This case concerns export restraints imposed by China on raw materials. The Chinese measures (63 in total) were part of a larger trend of restraints imposed by several countries on commodity exports.[72] In the present era of globalization, much attention is focused on global value-added chains. This is for good reason because multinational companies (MNCs) do source inputs from multiple jurisdictions, making a "Made in the World" label appropriate. But that is only part of the story. Export restraints as a deliberate effort to disengage, or disconnect from, global value-added chains is another part of the story. Some countries seek to create a domestic value-added chain and establish vertically integrated production of a high value-added product with as little dependence on imported inputs as possible. They do so for a medley of reasons, including national security.

So, before launching this WTO dispute, it is not surprising the EU claimed it found "restrictions on the export of metals, wood, leather, ceramics, chemicals, textiles, and energy, everything from high-volume products to highly

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[71] Hereinafter Appellate Body Report, *China—Raw Materials*. The Panel report in this case is Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011) (*adopted as modified* Feb. 22, 2012) [hereinafter Panel Report, *China—Raw Materials*].

The Panel combined the complaints from the United States, European Union, and Mexico into a single report with separate findings and conclusions. The third-party participants were: Argentina, Brazil, Canada, Chile, Columbia, India, Japan, Korea, Norway, Chinese Taipei, Turkey, and the Kingdom of Saudi Arabia. The United States, European Union, and Mexico reserved third-party rights with respect to each report. *Id.* ¶ 1.6.

On appeal, the following WTO Members were third-party participants: Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Saudi Arabia, Taiwan, and Turkey. At the Panel stage, these same Members were third-party participants, plus: the European Union, with respect to WT/DS394 and WT/DS398; Mexico, with respect to WT/DS394 and WT/DS395; and the United States, with respect to WT/DS395 and WT/DS398.

[72] Daniel Pruzin, *EU Starts Campaign to End Export Curbs on Raw Materials, May Initiate WTO Case*, 25 INT'L TRADE REP. (BNA) 1406 (Oct. 2, 2008); *see also* Daniel Pruzin, *Survey Sees G-20 Warding off Protectionism, as Limits on Exports, Bailouts Cause Concern*, 27 INT'L TRADE REP. (BNA) 886 (June 17, 2010).

specialized rare materials . . . and that at least 450 export restrictions are now in place worldwide."[73]

One restriction at issue in the present case was a Chinese export quota on refractory-grade bauxite. Refractory-grade bauxite is often used in the iron, steel, glass, and cement kiln industries. Countries that lack raw materials like bauxite have a significant economic incentive to gain access to inexpensive manufacturing inputs. They use these inputs to produce hybrid cars, semiconductors, and other products high up on the value chain. Low-cost imported inputs obviously help reduce the cost of the finished product, and thus enhancing its price competitiveness.

The European Union was particularly keen to arrest the global increase of export restraints on commodities. According to the EU:

> Our competitive advantage is already acutely sensitive to the supply and the costs of these inputs . . . . On average, raw material costs make up around a sixth of the costs of manufactured goods in the EU. In industries like plastics, chemicals, and paper, the costs of raw materials can be easily as much as a third or more.[74]

Export restraints on raw material inputs drive up the price of these inputs for European countries, which in turn increases the cost of the finished product. According to the EU, the resulting higher price tag it suffers reduces its competitive advantage.[75]

At the same time, the price of these inputs decrease in the country imposing the export restraints. That is precisely the point: the exporting nation seeks to assure domestic users of those inputs a low-cost source of supply of them, to ensure those users produce an internationally price-competitive product. To be sure, neither GATT nor other WTO agreements ban all export restraints. An export tax imposed on a most-favored nation (MFN) basis, in keeping with Article I:1, would be lawful.

For example, suppose South Africa seeks to assure its jewelry producers have a low-cost source of supply of rough, uncut, and unpolished diamonds. South Africa seeks to assist in the development of a vertically integrated jewelry industry, from mining of diamonds and other precious gems to designing and producing world-class finish jewelry. So, South Africa imposes a 50 percent export tax on unfinished diamonds. If it does so only with respect to exports to the European Union, then its measure would violate the MFN clause. But if it imposes the measure in regards of all export destinations, then its measure comports with Article I:1. (Note that under MFN jurisprudence, the aim, purpose, or intent of South Africa in resorting to the measure in the first place is irrelevant.)

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[73] Pruzin, *EU Starts Campaign to End Export Curbs, supra* note 72.
[74] *Id.*
[75] *Id.*

However, as the *China—Raw Materials* case suggests, export restraints other than taxes, i.e., the mirror image of non-tariff barriers (NTBs), raise problems under the GATT-WTO regime. Most obviously, there is the prophylactic ban on quantitative restrictions under GATT Article XI, a ban that the Chinese measure tested.

In *China—Raw Materials*, the United States, European Union, and Mexico accused China of imposing unfair export restraints on various forms of nine raw materials.[76] The raw materials at issue included forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc.[77] These raw materials "either occur naturally or have undergone initial processing,"[78] i.e., the forms differed as to whether they were extracted without processing, or whether they underwent processing.

The disputed export restraints China imposed on these raw materials fell into four broad categories:

(1) Export Duties;
(2) Export Quotas;
(3) Export Licensing; and
(4) Minimum Export Price Requirements.[79]

The EU, United States, and Mexico also disputed the allocation and administration of export quotas, export licensing, and the minimum export price requirements.[80] The complainants "collectively identified 40 specific measures in connection with their claims concerning [these export restraints]."[81] China admitted to 23 additional measures concerning the imposition of export duties and the imposition, administration, and allocation of export quotas.[82]

The appeals concerned the export quota on refractory-grade bauxite imposed by China. China allocated this export quota through a bidding process overseen by the Ministry of Commerce (MOFCOM) of the People's Republic of China (PRC). A document called *Export Quota Bidding Measures* established the rules for quota bidding. It described quota bidding as "the procedure through which 'an export enterprise may obtain with certain compensation the quotas' through 'voluntary bidding.'"[83] MOFCOM determined which products are

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[76] *See* Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 1.1.

[77] *See id.* ¶¶ 1.1, 2.1. A complete chart of Chinese HS Numbers for each product at issue is reproduced in the Panel report. *See id.* ¶ 2.2.

[78] *Id.* ¶¶ 1.1, 2.1.

[79] *See id.* ¶ 2.1.

[80] *See id.*

[81] Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 2.3.

[82] *See id.* ¶ 2.5.

[83] *Id.* ¶ 7.188 (quoting Measures of Quota Bidding for Export Commodities art. 2, Jan. 1, 2002, Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11 (adopted at the 9th ministerial office meeting)).

eligible for export bidding and how many export quotas are eligible to be bid upon.[84]

MOFCOM also oversaw the Bidding Committee. The Bidding Committee "shall, according to the types of commodities subject to bidding, establish the corresponding offices of quota bidding for export commodities under the relevant chambers of commerce for import and export."[85] An enterprise (including any foreign company) interested in bidding must meet preliminary eligibility criteria and is subject to approval by MOFCOM.[86] Bidders must submit a "bidding price and bidding quantity to China's Bidding Office."[87]

An enterprise must "win" a quota allocation through the bidding process to export bauxite.[88] The Bidding Office derived the winning bid price from the multiplication of the bidding price and bidding quantity.[89] The bidding price "represents the amount per metric ton that a bidding enterprise is willing to pay for the right to export."[90] The bidding quantity represents "the amount of the relevant material the enterprise seeks to export."[91]

The Bidding Office sorted the bids in descending order according to bidding price.[92] Then, the Office added the bidding quantities on this list, until the total equaled the total amount of quota available.[93] Consequently, the Bidding Office awarded export quotas to enterprises with the highest bid prices.[94] For example, if the Bidding Office received four bids, it would arrange them as such in Table 1:

Table 1: Hypothetical Example of Bidding Office Arrangement of Bids

Bidding Enterprise	**Bidding Price** Per metric ton, in Chinese *Yuan* (CNY)	**Bidding Quantity** In metric tons
Enterprise A	10 CNY	20
Enterprise B	8 CNY	15
Enterprise C	7 CNY	12
Enterprise D	6 CNY	11

84 *See id.* ¶ 175.

85 *Id.* ¶ 7.191 (quoting Measures of Quota Bidding for Export Commodities art. 9).

86 *See* Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 155.

87 *Id.* ¶ 7.198.

88 *See id.*

89 *See id.*

90 *Id.*

91 Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 7.198.

92 *See id.* ¶ 7.199.

93 *See id.* The 2009 quota allocation for bauxite was 930,000 metric tons. *See id.* ¶ 7.201.

94 *See id.* ¶ 7.199.

Note that an enterprise must submit a bid as to both price and quantity, and the example in Table 1 assumes a decreasing monotonic sequence as to both variables. However, in practice, some bidders with low prices might have low quantities, and some with higher prices might have high quantities. Nonetheless, the Bidding Office would sort the bids by price, and then make the ultimate decision about quota-quantity allocations.

Suppose in the above example the total quota allocation is 30 metric tons, then, the Bidding Office would award export quota allocations to Enterprises A and B. After Enterprise A is awarded an allocation, it may choose to export a quantity equivalent to or less than the amount specified in the bid.[95] To illustrate, suppose Enterprise A, having bid for 20 metric tons, is awarded this quantity. Enterprise A could choose to export any amount up to this figure, and cannot exceed it. But it could export less than 20 tons. Why might it not fulfill its quota allocation?

One reason is a slump in overseas demand for the item, owing to changed market conditions. Such conditions could include an increase in the international supply of the product. (In fact, Chinese export constraints created an incentive for new suppliers in other countries, from Australia to Brazil, to come "on line." The United States has encouraged diversification of supply of key inputs, for national security reasons, namely, avoiding excessive dependence on China.) Another reason is a robust domestic Chinese market, into which it decides to sell a portion of its quota.

The winning bidders "must pay the balance of the bid-winning price and a security deposit."[96] A bid-winning enterprise "may pay the full award price where it wishes to export the full allocation or a proportionate amount where it wishes to export less than the full allocation."[97] So, in the above example, if Enterprise A chooses to export 15 of its metric ton allocation, then the Chinese government may refunded it with a portion of the award price.[98] However, security deposits are non-refundable.[99]

The Bidding Office awards the winning bidders a certificate of quota.[100] Exporters must have a certificate of quota to apply "for an export license within the quota's validity period."[101] The enterprise must present its export license to Chinese customs officials for clearance before it exports its goods.[102]

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95 *See id.* ¶ 7.200.
96 Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 7.200.
97 *Id.* ¶ 7.
98 *See id.* ¶ 7.200.
99 *See id.*
100 *See id.*
101 Panel Report, *China—Raw Materials*, *supra* note 71, ¶¶ 7.189, 7.200.
102 *See id.* ¶ 7.200.

3. Overview of Three Appellate Issues

China raised three key issues on appeal.[103] First, China asserted it may utilize GATT Article XX "to justify a violation of China's export duty commitments contained in Paragraph 11:3 of the Chinese *Accession Protocol of the People's Republic of China* (*Accession Protocol*)." [104] China lost this appeal. The Appellate Body applied the 1969 *Vienna Convention on the Law of Treaties* (*VCLT*) guidelines for treaty interpretation. It held the GATT Article XX exceptions are not available to justify violations to Paragraph 11:3 of the *Accession Protocol*. [105]

Second, China argued its export quota on refractory-grade bauxite is "'temporarily applied' to prevent or relieve a 'critical shortage,'" and thus does not violate GATT Article XI:2(a).[106] Here again, China lost. The Appellate Body said the export quota was not temporarily applied and refractory-grade bauxite was not in critical shortage. Therefore, the export restraint violated Article XI:2(a).

Finally, China successfully appealed a panel interpretation of the GATT Article XX(g) phrase, "made effective in conjunction with." China disagreed with the Panel statement that the "purpose of the export restriction [must] be to ensure the effectiveness of restriction on domestic production and consumption."[107] The Appellate Body decided the Panel incorrectly interpreted Article XX(g) and reversed the Panel interpretation.[108]

4. Issue 1: GATT Article XX Defense for Non-GATT Obligations?

As indicated in *China—Raw Materials*, the United States, European Union, and Mexico accused China of imposing unfair export restraints on various forms of nine raw materials.[109] The four categories of export restraints at issue

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[103] A number of other appeals were argued by China, the United States, European Union, and Mexico. *See id.* ¶¶ 207-10. The United States, European Union, and Mexico made several conditional appeals. *See id*. ¶¶ 267-68. However, those preconditions were not met, and, consequently, the Appellate Body did not address any of them. *See id*. ¶ 269. China accused the Panel of violating Articles 6:2, 7:1, 11, and 19:1 of the *DSU*. *See id*. ¶ 207. The Appellate Body found the Panel violated Article 6:2 and declared several Panel findings moot. *See id.* ¶ 235. The Appellate Body also held the Panel did not violate Article 7:1, and it dismissed the Article 11 and 19:1 claims. *See id*. ¶ 266.

[104] Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 207 (referencing World Trade Organization, Accession Protocol of the People's Republic of China, WT/L/432 (Nov. 23, 2001) (decision date Nov. 10, 2001)).

[105] *Id.* ¶ 207.

[106] *Id.*

[107] *Id.*

[108] *Id.* ¶ 360.

[109] *See* Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 1.1. The Panel combined the complaints from the United States, European Union, and Mexico into a single

were export duties, export quotas, export licensing, and minimum export price requirements.[110] Additionally, the complainants disputed the way in which China allocated and administered restraints in three of the categories: export quotas, export licensing, and minimum export price requirements.[111] The complainants presented 40 Chinese measures related to these export constraints, while China noted an additional 23 measures.[112] China raised three key issues before the Appellate Body, including this GATT Article XX appeal.

GATT Article XX provides a general (or "laundry") list of exceptions to GATT disciplines. On appeal, China argued the Article XX exceptions extend not only to provisions of GATT, but also to certain provisions of its *Accession Protocol*, namely Paragraph 11:3. Stated generally, could a provision in GATT be used to excuse the breach of an obligation under a WTO text other than GATT? The general answer is "maybe" because it depends largely on whether that other text references GATT in some way. If not, i.e., if there is no language linking the non-GATT text to the GATT provision, then the latter cannot be used as a defense to a violation of the former.

So, in the *China—Raw Materials* case, the Appellate Body disagreed with China. It upheld the Panel holding that GATT Article XX cannot be used to justify violations of Paragraph 11:3 of the *Accession Protocol* of China.[113] Notably, this appeal concerned only whether Article XX defenses are available to Paragraph 11:3 of the *Accession Protocol*, not whether "China failed to demonstrate that the export duties . . . are justified under Article XX."[114]

China admitted the absence of an explicit reference to Article XX defenses in Paragraph 11:3 of its *Accession Protocol*.[115] However, argued China, this omission did not mean the WTO Members intended to prevent China from invoking Article XX in the context of its *Accession Protocol*.[116] China also argued that the "WTO Members have an 'inherent right' to regulate trade, 'including using export duties to promote non-trade interests.'"[117]

For their part, the United States and Mexico acknowledged the Appellate Body had previously found GATT Article XX defenses may apply to Paragraph 5:1 of the *Accession Protocol*.[118] But they pointed out the language in Paragraph

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report with separate findings and conclusions. The third-party participants were: Argentina, Brazil, Canada, Chile, Columbia, India, Japan, Korea, Norway, Chinese Taipei, Turkey, and the Kingdom of Saudi Arabia. The United States, European Union, and Mexico reserved third-party rights with respect to each report. *Id.* ¶ 1.6.

110 *See id.* ¶ 2.1.

111 *See id.*

112 *Id.* ¶¶ 2.3, 2.5. The Panel listed all 63 measures in its report. *See id.* ¶¶ 2.4-2.5.

113 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 307.

114 *Id.* ¶ 275.

115 *See id.* ¶ 274.

116 *See id.*

117 *Id.* ¶ 274 (quoting China's appellant's submission, ¶ 208).

118 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 276 (referring to Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*,

11:3 is quite distinct. They argued the commitments of Paragraph 11:3 are more specific than those in Paragraph 5:1.[119] The European Union noted Article XX is explicitly limited to provisions in the GATT, and other WTO agreements may include Article XX defenses in them through explicit invocation and incorporation.[120] The European Union agreed with the Panel that China already "exercised its inherent and sovereign right to regulate trade by negotiating the terms of its accession to the WTO such that this inherent right to regulate trade, without more, does not permit recourse to Article XX."[121] Predictably, the Appellate Body relied upon Articles 31 and 32 of the *VCLT* to interpret Paragraph 11:3 of the *Accession Protocol*.[122]

So, the Appellate Body looked at the text of Paragraph 11:3 before turning to Paragraphs 11:1 and 11:2 for context. Paragraph 11:3 of the *Accession Protocol* states, with emphasis added, "China *shall eliminate all taxes and charges applied to exports unless* specifically provided for in Annex 6 of this *Protocol* or applied in conformity with the provisions of Article VIII of the GATT 1994."

Annex 6 identifies 84 products and their maximum export duty rate, including the following "Note to Annex 6" text:

> China confirmed that the tariff levels in this Annex are maximum levels, which will not be exceeded. China confirmed *furthermore* that it would not increase the presently applied rates, *except under exceptional circumstances*. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.[123]

Yellow phosphorus is the only product that is in the set of products listed in Annex 6 and in the set of the disputed raw materials to which export restraints apply.[124] (That is, the intersection of the two sets contains one element—yellow phosphorus.) Export duties on yellow phosphorus were not at issue on appeal, not only for this reason, but also because the duty on it was well below the level set in the list.[125] All other raw materials at issue on appeal were not itemized on the list.

WT/DS363/AB/R (Dec. 21, 2009) (*adopted* Jan. 19, 2010) [hereinafter Appellate Body Report, *China—Publications*]).

[119] *See id.* ¶ 276.

[120] *See id.*

[121] *Id.*

[122] *See id.* ¶ 278.

[123] *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 281 (emphasis added).

[124] *See id.* ¶ 282.

[125] *See id*. ¶ 282 n.553.

China asserted the phrase "exceptional circumstances" demonstrates "a substantive overlap between the scope of the exceptions set forth, respectively, in Annex 6 and [GATT] Article XX."[126] According to China, inclusion of this exception by WTO Members indicates "China is permitted to have recourse—whether directly or indirectly—to the 'exceptional circumstances' set forth in Article XX to justify such duties."[127] China argued "exceptional circumstances" applies not only to the 84 products listed in Annex 6, but also to products not explicitly mentioned therein.[128]

China also claimed the Panel found that based upon an argument by the European Union: "China has acted inconsistently with its obligations under Annex 6 because it failed to consult with other affected WTO Members prior to imposing export duties on the raw materials at issue."[129] According to China, this Panel finding, and the European Union argument based upon it, bolstered the Chinese contention that the GATT Article XX exception applies to all products, "provided that there are 'exceptional circumstances,' and that China consults with the affected Members."[130]

The United States and Mexico disagreed. According to these complainants, "the Note to Annex 6 does not provide 'any basis' for China to impose export duties on the 84 listed products above the maximum rates specified in Annex 6, or 'to impose any export duties at all with respect to the products not listed in Annex 6.'"[131] The Appellate Body also disagreed with China.

According to the Appellate Body, the Note to Annex 6 allows China to raise export duties only with respect to the 84 products listed in Annex 6 to the maximum levels set forth therein.[132] The Appellate Body said there is "nothing in the Note to Annex 6 that would allow China to: (i) impose export duties on products not listed in Annex 6; or (ii) increase the applied export duties on the 84 products listed in Annex 6, in a situation where 'exceptional circumstances' have not 'occurred.'"[133] The raw materials at issue in the *China—Raw Materials* dispute were not included in the Annex 6 product list. So, "the consultation requirements contained in the Note to Annex 6 are not applicable."[134]

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[126] *Id.* ¶ 282.
[127] *See id.*
[128] *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 282.
[129] *Id.* ¶ 286 (quoting China's appellant's submission, ¶ 214 (referring to Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 7.104)).
[130] *Id.*
[131] *Id.* ¶ 284 (citation omitted).
[132] *See id.*
[133] *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 287.
[134] *Id.*

China also argued GATT XX exceptions apply because of the explicit reference to GATT Article VIII in Paragraph 11:3 of its *Accession Protocol*. Article VIII and its Ad Article state:

> Article VIII*
> Fees and Formalities Connected with Importation and Exportation
>
> 1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
>
> (b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).
>
> (c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*
>
> 2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.
>
> 3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
>
> 4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:
>
> (a) [C]onsular transactions, such as consular invoices and certificates;

> (b) [Q]uantitative restrictions;
> (c) [L]icensing;
> (d) [E]xchange control;
> (e) [S]tatistical services;
> (f) [D]ocuments, documentation and certification;
> (g) [A]nalysis and inspection; and
> (h) [Q]uarantine, sanitation and fumigation.
>
> *Ad Article VIII*
>
> 1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9(a) of Article XV fully safeguard its position.
>
> 2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.[135]

According to China, its export duties must comply with Paragraph 11:3 and Article VIII. If China violates Paragraph 11:3, it likewise violates GATT Article VIII, and vice versa. China asserted: "China is not deprived of its right to justify a measure that violates Article VIII through recourse to Article XX simply because a complainant chooses to bring a claim under Paragraph 11:3 of China's *Accession Protocol*."[136] Basically, China argued that because Article VIII violations may be exempt under Article XX, likewise, GATT Article XX is available to justify a Paragraph 11:3 violation, and in this way, Article XX exceptions are available to justify violations under Paragraph 11:3 of the *Accession Protocol*.[137]

Simply put, China linked Article XX to Paragraph 11:3 through a chain in which the intermediary was Article VIII. Understood that way, it is easy to see the weakness in the argument. Its logical consequence would be that the express mention in a text of just one GATT Article is enough to bring into that text the entirety of GATT. To import all of GATT into the text when only one Article is mentioned in it would be to ride roughshod over the intent of the drafters of the

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[135] GATT art. III (alteration in original).
[136] Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 289.
[137] *Id.*

text. If they expressly mentioned just one Article, then surely they meant to exclude the others.

Not surprisingly then, the Appellate Body rejected the Chinese argument. Export duties and fees are outside the scope of GATT Article VIII because they are not explicitly mentioned in that provision.[138] According to the Appellate Body, it is quite telling that Paragraph 11:3 does not explicitly reference GATT Article XX.[139] The language in Paragraph 11:3 is distinct from that of Paragraph 5:1 of the *Accession Protocol*.[140] Consequently, the Appellate Body finding in the 2010 *China—Publications* case was not applicable.[141] The Appellate Body determined the text of Paragraph 11:3 "suggests that China may not have recourse to Article XX to justify a breach of its commitment . . . under Paragraph 11:3."[142]

To buttress its holding, the Appellate Body applied the rules of the *VCLT*, namely, it looked at the context of Paragraph 11:3 of the *Accession Protocol* to China. Paragraphs 11:1 and 11:2 were that context. They mandate Chinese duties and fees conform to obligations in the GATT.[143] Both provisions also exclude any reference to GATT Article XX.[144] So, the Appellate Body said:

> [A]s China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have

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138 *See id.* ¶ 290.

139 *See id.*

140 Paragraph 5:1 of the Chinese *Accession Protocol* states:

> Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

141 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 291; Appellate Body Report, *China—Publications*, *supra* note 118, ¶ 222.

142 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 291.

143 *See id.* ¶ 293.

144 *See id.*

> been included in Paragraph 11:3 or elsewhere in China's Accession Protocol.[145]

Thus, the Appellate Body determined the context of Paragraph 11:3 does not support the Chinese assertion that GATT Article XX exceptions may be invoked to justify violations of Paragraph 11:3.

China tried another argument on appeal: Paragraph 170 of its *Accession Working Party Report*, incorporated by reference in its *Accession Protocol*, applies to export duties.[146] The relevant part of Paragraph 170 of the *Accession Working Party Report* states, "The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994[.]"

China argued that "any flexibilities that Paragraph 170 affords to China to adopt otherwise WTO-inconsistent export 'taxes' and 'charges' must extend equally to Paragraph 11:3."[147] The United States and Mexico countered:

> Paragraph 169 of China's Accession Working Party Report shows that some Members were concerned about China's internal policies, especially those of sub-national governments imposing discriminatory taxes and other charges that would affect trade in goods, and that China responded to this concern in Paragraph 170 by confirming that its laws relating to all fees, charges, or taxes levied on imports and exports would be in full conformity with its WTO obligations.[148]

Furthermore, they asserted Paragraph 155 of the *Accession Working Party Report* reflects concerns about Chinese export duties and "refers to the same specific exceptions as Paragraph 11:3 of the Chinese *Accession Protocol*."[149]

The Appellate Body said Paragraphs 155 and 156, not Paragraph 170, of the *Accession Working Party Report* are relevant to the issue at hand, and neither Paragraph references GATT Article XX exceptions.[150] The Appellate Body found this omission also supported its conclusion that GATT Article XX exceptions cannot justify violations under Paragraph 11:3 of the *Accession Protocol*.[151]

Finally, China argued it has an inherent right to "regulate trade in a manner that promotes conservation and public health."[152] At its core, this argument was about sovereignty. China acknowledged this right is limited for

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145 *Id.*
146 *See id.* ¶¶ 294-96.
147 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶¶ 294-96.
148 *Id.* ¶ 297.
149 *Id.* ¶¶ 294-96.
150 *See id.* ¶¶ 298-99.
151 *See id.* ¶ 299.
152 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 300.

WTO Members *qua* Members (i.e., joining the WTO, like any other international organization and attendant treaty regime, necessarily entails some ceding of sovereignty), which "agree to exercise their inherent right in conformity with disciplines set out in the covered agreements."[153] China asserted: "[T]he Panel distorted the balance of rights and obligations established in China's Accession Protocol by assuming that China had 'abandoned' its right to impose export duties 'to promote fundamental non-trade-related interests, such as conservation and public health.'"[154]

The United States and Mexico said the Panel never suggested Members must leave their inherent right to regulate trade at the door of the WTO in Geneva. They referenced *China—Publications*, which affirmed there is an inherent right to regulate trade, which, therefore, makes consensus among Members critical.[155] Furthermore, relying on the 1996 *Japan—Alcoholics Beverages II* case, Members willingly undertake restrictions on their own sovereignty in order to receive the benefits derived from WTO membership.[156]

The United States and Mexico explained that the language of Paragraphs 5:1 and 11:3 of the Chinese *Accession Protocol* are different.[157] True, in *China—Publications*, the Appellate Body found GATT Article XX exceptions applied to Paragraph 5:1 of the *Accession Protocol* because of the specific language of that Paragraph.[158] Furthermore, they asserted China has plenty of other options that allow it to "promote legitimate public health and conservation objectives."[159] China need not choose export duties that violate its *Accession Protocol*. The EU also contended China utilized its inherent right to regulate trade when it negotiated its *Protocol*, and "there is no contradiction between China's inherent right to regulate trade and the commitments undertaken by China in its Accession Protocol."[160]

The Appellate Body agreed with the American, Mexican, and European points. It stated that the WTO Agreement "reflect[s] the balance struck by WTO Members between trade and non-trade related concerns."[161] But this balance is irrelevant to the issue at hand, namely, "whether [GATT] Article XX is applicable to Paragraph 11:3 of the Chinese Accession Protocol."[162] Particularly given the explicit commitments China undertook in Paragraph 11:3, and the lack of reference to exceptions in GATT Article XX, the Appellate Body affirmed,

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153 *Id.*

154 *Id.* ¶ 305.

155 *See id.* ¶ 301; Appellate Body Report, *China—Publications*, *supra* note 118, ¶ 222.

156 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 301; Appellate Body Report, *Japan—Alcoholic Beverages*, *supra* note 48, ¶ 108.

157 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 301.

158 *See id.*

159 *Id.*

160 *See id.* ¶ 302.

161 *Id.* ¶ 306.

162 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 306.

pursuant to the *VCLT* guidelines on treaty interpretation, GATT Article XX is not available to justify violations of Paragraph 11:3 of the *Accession Protocol*.[163]

Consequently, the Appellate Body upheld the Panel holding in that "there is no basis in China's Accession Protocol to allow the application of [GATT] Article XX . . . to China's obligations in Paragraph 11:3 of the Accession Protocol."[164] The Appellate Body also upheld two other Panel holdings: "China may not seek to justify the application of export duties to certain forms of fluorspar pursuant to [GATT] Article XX(g)," and "China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to [GATT] Article XX(b)."[165]

5. Issue 2: GATT Article XI:2(a) Critical Shortage Defense?

The 2012 *China—Raw Materials* case concerned export restraints imposed by China on nine raw materials.[166] The disputed export restraints were export duties, export quotas, export licensing, and minimum export price requirements.[167] The complainants, the United States, European Union, and Mexico, also disputed the administration of the minimum export price requirements and the allocation of export quotas and licenses.[168] The complainants identified 40 Chinese measures related to these export constraints, and China submitted an additional 23 measures.[169]

China raised three key issues on appeal. The second one concerned GATT Article XI:2(a). (The first and third issues concerned the availability of Article XX as a defense to the Chinese *Accession Protocol* and the interpretation of Article XX(g), respectively.) China argued its export quota on refractory-grade bauxite was "'temporarily applied' to prevent or relieve a 'critical shortage.'"[170]

163 *See id.* ¶ 307.

164 *Id.*

165 *Id.*

166 *See* Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 1.1. The Panel combined the complaints from the United States, European Union, and Mexico into a single report with separate findings and conclusions. The third-party participants were: Argentina, Brazil, Canada, Chile, Columbia, India, Japan, Korea, Norway, Chinese Taipei, Turkey, and the Kingdom of Saudi Arabia. The United States, European Union, and Mexico reserved third-party rights with respect to each report. *Id.* ¶ 1.6.

167 *See id.* ¶ 2.1.

168 *See id.*

169 *Id.* ¶¶ 2.3, 2.5. The Panel listed all 63 measures in its report. *See id.* ¶¶ 2.4-2.5.

170 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 344. China also accused the Panel of violating Article 11 of the *DSU* in two respects. First, according to China, the Panel failed to make an objective assessment regarding the annual renewal of the Chinese export quota on refractory-grade bauxite. *See id.* ¶ 338. The Appellate Body quickly rejected this claim after a brief review of the record. *See id.* ¶¶ 339-41. Second, China said the Panel reasoning was too inconsistent and incoherent. *See id.* ¶ 342. The Appellate Body said it is possible for inconsistent reasoning to rise to the level of an Article

Therefore, China argued its measure does not violate Article XI:1 because Article XI:2(a) justified it. China lost its appeal.

GATT Article XI:1 states:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[171]

Moreover, Article XI:2(a) states, "The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions *temporarily applied to prevent or relieve critical shortages of foodstuffs or other products* essential to the exporting contracting party."[172]

The Panel determined that the Chinese export quota on refractory-grade bauxite violated the general prohibition on quantitative restrictions in GATT Article XI:1.[173] China asserted its quota falls within the scope of the Article XI:2(a), and therefore does not violate Article XI:1. In making this argument, China emphasized the temporal nature of its quota.[174] The Chinese argument was novel (or nearly so), as there have been no (or precious few) adopted decisions on the Article XI:2(a) exception to Article XI:1.

The Panel agreed that refractory-grade bauxite is "essential" within the meaning of Article XI:2(a).[175] However, the Article XI:2(a) exemption did not apply because China could not demonstrate the quota was applied "temporarily" or there was a "critical shortage" of refractory-grade bauxite.[176] The Panel emphasized the adjective "critical." The Panel claimed, "even if we were to accept China's assertion that natural reserves of refractory-grade bauxite would be depleted in 16 years, as contented by China, this would not demonstrate a situation 'of decisive importance,' or one that is 'grave,' rising to the level of a 'crisis.'"[177] Furthermore, the Panel said the Chinese export quota "had 'already been in place for at least a decade with no indication of when it will be withdrawn

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11 violation, but that was not the case here. *See id.* ¶ 343. The Appellate Body held the Panel did not violate Article 11. *See id.*

171 GATT art. X1:I.

172 GATT art. XI:2(a) (emphasis added).

173 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 309.

174 *See id.*

175 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 309.

176 *See id.*

177 *Id.* ¶ 313. It is interesting to note that before the Panel, the United States and Mexico asserted the "remaining lifespan [i.e., estimated Chinese reserves of refractory-grade bauxite] was 91 years;" a stark contrast to the Chinese contention of 16 years. *Id.* ¶ 313 n.610.

and every indication that it will remain in place until the reserves have been depleted.'"[178]

On appeal, China claimed the Panel incorrectly interpreted and applied the terms "temporarily applied" and "critical shortage" in GATT Article XI:2(a).[179] China argued the Panel should not have excluded "'long-term' export restrictions from the scope of Article XI:2(a)."[180] According to China, there is no bright line rule as to the length of time a measure may be "temporarily applied."[181] Rather, all that Article XI:2(a) requires is "that the duration of a restriction be limited and bound in relation to the achievement of the stated goal."[182]

China said the Panel erred in its application of "temporarily" because it did not consider the export quota at issue underwent annual reviews. China also said the Panel erred in finding "Article XI:2(a) and Article XX(g) are mutually exclusive," which China said the Panel used to bolster its interpretation of "temporarily applied."[183] With respect to the Panel interpretation of "critical shortage," China said the Panel mistakenly "exclude[d] shortages caused by the 'finite' nature or 'limited reserve' of a product."[184]

The European Union countered that a quota is not applied temporarily, regardless of how often it is reviewed, if it "has effectively been in place for more than ten years."[185] The United States and Mexico also argued, "[T]he existence of a limited amount of reserves constitutes only a degree of shortage, and a mere degree of shortage does not constitute a 'critical' shortage, which is one rising to the level of a crisis."[186]

The Appellate Body ultimately agreed with the Panel, and the European, American, and Mexican arguments, and it determined that China failed to prove its export quota was "temporarily applied" to "prevent or relieve a 'critical shortage.'"[187]

Before examining the issue at hand, the Appellate Body offered its interpretation of Article XI:2(a), which must be read together with Article XI:1.[188] The Appellate Body also noted the scope of Article XI:2 is no broader than the scope of Article XI:1.[189] The Appellate Body focused on the meaning of the Article XI:2(a) phrase: "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member."[190]

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178 *Id.* ¶ 311.
179 *Id.* ¶ 314.
180 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 314.
181 *Id.* ¶ 329.
182 *Id.*
183 *Id.*
184 *Id.* ¶ 314.
185 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 315.
186 *Id.* ¶ 316.
187 *Id.* ¶ 344.
188 *See id.* ¶ 319.
189 *See id.* ¶ 321.
190 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 322.

The Appellate Body said the use of the adverb "temporarily" "suggests that Article XI:2(a) refers to measures that are applied in the interim."[191] (This point was yet another example, replete in recent Appellate Body jurisprudence, of a statement of the obvious.) The term "foodstuffs," said the Appellate Body, is merely an example of "what might be considered a product essential to the exporting Member."[192] However, the disputed measure need not be restricted to exported foodstuffs.[193]

With respect to the term "critical shortage," the Appellate Body looked not only at its ordinary meaning (*á propos* the *VCLT*), but also its context. The Appellate Body pointed out GATT Article XX(j) does not include the adjective "critical" or any similar qualifier.[194] The difference suggests, said the Appellate Body, "the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)."[195] The Appellate Body also said Article XI:2(a) applies to measures "adopted to alleviate or reduce an existing critical shortage, as well as for preventative or anticipatory measure adopted to pre-empt an imminent critical shortage."[196]

The Appellate Body stated the concepts in Article XI:2(a) give meaning to one another. So, for example, "whether a shortage is 'critical' may be informed by how 'essential' a particular product is," and furthermore, "inherent in the notion of criticality" is the temporal nature of a shortage.[197] The Appellate Body would have done well to put its points more directly for the benefit of WTO Members and their lawyers.

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191 *Id.* ¶ 323.
192 *Id.* ¶ 326.
193 *See id.*
194 *See id.* ¶ 325. Article XX(j) of GATT states, with emphasis added:

> 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:
> . . . .
> (j) essential to the acquisition or distribution of products *in general or local short supply*; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

195 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 325.
196 *Id.* ¶ 327.
197 *Id.* ¶ 328.

What it could and should have said is this: first, there is a direct relationship between "essential" and "critical." The more "essential" a product is, the more likely a shortage of it is "critical." Second, there is an inverse relationship between "critical" and time. A shortage is more likely to be "critical," and becomes more so, the longer it lasts (under the assumption of *ceteris paribus*, that is, all other factors are equal, and in particular, there are no substitutes developed for that product). Third, at some point, a shortage ceases to be critical (e.g., because alternative sources of supply are found), and a measure adopted to relieve the critical shortage becomes unnecessary.[198]

In any event, the Appellate Body determined that the Panel correctly interpreted "temporarily" within the meaning of GATT Article XI:2(a). Indeed (and obviously), "temporarily" refers to a measure applied for a "limited duration and not indefinite."[199] The Appellate Body said the phrases "long term" and "short term" are not the same as determining the meaning of "temporary."[200] The Appellate Body clarified the Panel did not assert the adverb "'temporarily' excludes "'long-term' application of export restrictions."[201] Additionally, the Appellate Body said China was incorrect in stating the Panel found Articles XI:2(a) and XX(g) are mutually exclusive. Instead, the Panel merely meant to confirm its interpretation was correct and aligned with "the principle of effective treaty interpretation."[202]

The Appellate Body also disagreed with China that the Panel "presumed that a shortage of an exhaustible non-renewable resource cannot be 'critical' within the meaning of Article XI:2(a)."[203] Instead, the Panel correctly determined "Articles XI:2(a) and XX(g) have different functions and contain different obligations."[204] However, the Appellate Body also acknowledged there may be some overlap because "a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to [Article XX:(g)]."[205] Furthermore, the Appellate Body said, "[A]n Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g)."[206]

In sum, the Appellate Body upheld the Panel finding that the Chinese export restraints on refractory-grade bauxite are not justified under GATT Article XI:2(a). That was because the export quotas were neither "temporarily applied" (lasting for over a decade), nor did they address a "critical shortage" within the meaning of Article XI:2(a) (as China failed to adduce evidence that it had such a shortage).

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198 *Id.*
199 *Id.* ¶ 330.
200 *See* Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 332.
201 *Id.*
202 *Id.* ¶ 334.
203 *Id.* ¶ 337.
204 *Id.*
205 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 337.
206 *Id.*

6. Issue 3: GATT Article XX(g) Conservation Defense?

In *China—Raw Materials*, the United States, European Union, and Mexico accused China of imposing unfair export restraints on nine various types and forms of raw materials.[207] The export restraints at issue were export duties, export quotas, export licensing, and minimum export price requirements.[208] The complainants also took issue with the way in which China administered the minimum price requirements and disputed its allocation of administration of export quotas and licensing.[209] The complainants identified 40 Chinese measures related to these export constraints, and China submitted an additional 23 measures.[210] China raised an appeal under GATT Article XX(g) (along with issues under Article XX and Article XI:2(a)).

China claimed the Panel misinterpreted the phrase in GATT Article XX(g): "made effective in conjunction with." China disagreed that the "purpose of the export restriction [was] to ensure the effectiveness of restriction on domestic production and consumption."[211] The Appellate Body said the Panel erred and reversed the interpretation by the Panel.

Article XX:(g) and its Chapeau state:

> 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:
>
> . . . .
>
> (g) [R]elating to the *conservation of exhaustible natural resources* if such measures are *made effective in conjunction with* restrictions on domestic production or consumption.[212]

The Panel found the Chinese export quota on refractory-grade bauxite violated Article XI:1, and the quota was not justified under Article XX(g).[213]

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[207] *See* Panel Report, *China—Raw Materials*, *supra* note 71, ¶ 1.1. The Panel combined the complaints from the United States, European Union, and Mexico into a single report with separate findings and conclusions. The third-party participants were: Argentina, Brazil, Canada, Chile, Columbia, India, Japan, Korea, Norway, Chinese Taipei, Turkey, and the Kingdom of Saudi Arabia. The United States, European Union, and Mexico reserved third-party rights with respect to each report. *Id.* ¶ 1.6.

[208] *See id.* ¶ 2.1.

[209] *See id.*

[210] *Id.* ¶¶ 2.3, 2.5. The Panel listed all 63 measures in its report. *See id.* ¶¶ 2.4-2.5.

[211] Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 207.

[212] GATT art. XX(g) (emphasis added).

[213] Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 346.

Relying on the 1996 Appellate Body report *US—Gasoline* and the 1988 GATT Panel report *Canada—Herring and Salmon*, the Panel said a measure must:

> (1) "[P]rimarily aim[]" to "preserving and maintaining the existing state of" an exhaustible natural resource;[214] and
> (2) "[B]e made effective in conjunction with restrictions on domestic production or consumption."[215]

The Panel interpretation of the second requirement was at issue on appeal. Does a controversial measure merely have to be put up along with an existing restriction on domestic transactions? Or, does that measure have to boost the efficacy of that restriction? The Panel opted for the latter interpretation. It determined: "[R]estrictions on domestic production or consumption must not only be applied jointly with the challenged export restrictions but in addition, the *purpose* of those export restrictions *must be to ensure the effectiveness of those domestic restrictions*."[216]

The Appellate Body disagreed with the Panel. Instead, it found that a challenged measure restricting trade (in the case at bar, an export restriction, namely, a quota) must simply "work together with restrictions on domestic production or consumption."[217]

In its only substantive appellate victory in the 2012 *China—Raw Materials* case, China successfully claimed the Panel incorrectly interpreted the phrase: "made effective in conjunction with."[218] According to China, "Article XX(g) does not require that each set of measures must have, as a separate and independent purpose, the goal of ensuring the effectiveness of the other set of measures."[219] China argued a measure is justified under Article XX(g) if it "is related to the conservation of a natural resource, and . . . [if] it operates together with domestic restrictions on the production or consumption of the same resource."[220] The complainants urged the Appellate Body to accept the Panel interpretation. The European Union argued that logically, "a measure can only be

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[214] *Id.* ¶ 348; *see also* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 17, WT/DS2/AB/R (Apr. 29, 1996) (*adopted* May 20, 1996) [hereinafter Appellate Body Report, *US—Gasoline*]; Report of the Panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.6, L/6268 (Nov. 27, 1987) (*adopted* Mar. 22, 1988) [hereinafter Report of the Panel, *Canada—Herring and Salmon*].

[215] Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶¶ 348-49; *see also* Appellate Body Report, *US—Gasoline*, *supra* note 214, ¶ 19; Report of the Panel, *Canada—Herring and Salmon*, *supra* note 214, ¶ 4.6.

[216] Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 349 (referring to Report of the Panel, *Canada—Herring and Salmon*, *supra* note 214, ¶ 4.6) (emphasis added).

[217] *Id.* ¶ 360.

[218] *See id.* ¶ 350.

[219] *Id.* ¶ 351.

[220] *Id.*

made effective 'in conjunction with' domestic restriction on production if it is primarily aimed at rendering effective these restrictions."[221]

The Appellate Body said for a challenged measure to fall within the scope of an Article XX(g) defense, it must closely relate to the "preservation of the environment, especially of natural resources."[222] The Appellate Body said Article XX(g):

> [P]ermits trade measures relating to the conservation of exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource. By its terms, Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption.[223]

Relying on its 1996 *US—Gasoline* report, the Appellate Body determined there is "no additional requirement that the conservation measure be primarily aimed at making effective certain restrictions on domestic production or consumption."[224] The mistake the Panel made in the *China—Raw Materials* case was finding Article XX(g) requires "two separate conditions have to be met for a measure to be considered 'made effective in conjunction with.'"[225] The Appellate Body said there is no requirement a challenged measure "must be aimed at ensuring the effectiveness of domestic restrictions."[226]

In sum, the Appellate Body found that "Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource."[227] So, the Panel incorrectly found Article XX(g) also requires a Member to prove the purpose of its challenged measure is "to make effective restrictions on domestic production or consumption."[228] Therefore, the Appellate Body reversed this Panel interpretation of Article XX(g).[229]

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221 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 352.

222 *Id.* ¶ 351 (quoting 1 SHORTER OXFORD ENGLISH DICTIONARY 492 (William R. Trumble & Angus Stevenson eds., 6th ed. 2007)); *see* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 136, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998).

223 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 356.

224 *See id.* ¶ 358; *see also* Appellate Body Report, *US—Gasoline*, *supra* note 214.

225 Appellate Body Report, *China—Raw Materials*, *supra* note 71, ¶ 359.

226 *Id.* ¶ 360.

227 *Id.*

228 *Id.* ¶ 361.

229 *See id.*

7. Commentary

a. Significant Victory on Issue 1

This case was a significant victory for countries with manufacturing and technology sectors that rely upon inexpensive imports for inputs. China produces more than 95 percent of rare earth minerals, but has been limiting exports on environmental grounds.[230] The purpose touted by China for imposing export restraints was environmental protection. Yet, ultimately China was unable to overcome the accusation its export restraints were "discriminatory."[231]

The Chinese explanation in this case is redolent of that in the 2010 *China—Publications* case.[232] There, China argued public morality under GATT Article XX(a) justified its impediments to market access for foreign (especially American) intellectual property products, such as books, journals, magazines, movies, and music. The true underlying purpose was censorship and steering profitable trading and distribution opportunities to favored domestic entities, including state owned enterprises (SOEs). If China wanted to censor such products, it had a less trade-restrictive means to monitor them for content than the complex web of restrictions it deployed.

b. Modestly Useful Ruling on Issue 2

This Appellate Body ruling was useful, but only in clarifying modestly the interpretation of Article XX(g) for future cases. The Appellate Body had already affirmed the Panel holding that the export restraints on raw materials violated the Chinese *Accession Protocol* and could not be justified by Article XI:2(a) as a lawful quantitative restriction to relieve a temporary shortage of a critical item.[233] Consequently, this reversal—while a victory for China—had no meaningful impact other than possibly as a precedent China one day could use in its favor in a future case. In the meantime, China still had to tear down its export restraints.

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[230] Daniel Pruzin, *WTO Affirms Chinese Export Restrictions on Raw Materials Violate Global Trade Rules*, 29 INT'L TRADE REP. (BNA) 164 (Feb. 2, 2012).

[231] Amy Tsui, *WTO Raw Materials Decision Could Affect All Export Restrictions, Trade Official Says*, 28 INT'L TRADE REP. (BNA) 1242 (July 28, 2011).

[232] *See generally* Appellate Body Report, *China—Publications, supra* note 118.

[233] *See* Pruzin, *WTO Affirms Chinese Export Restrictions, supra* note 230, at 164.

C. WTO *Agreement on Technical Barriers to Trade: United States—Clove Cigarettes*

1. Citation

Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (April 4, 2012) (*adopted* April 24, 2012).[234]

2. Facts

a. Section 907(a)(1)(A) Flavored Cigarettes Ban

Like many countries, the United States regulates tobacco and smoking in the interest of public health. America's *Family Smoking Prevention and Tobacco Control Act* (*FSPTCA*) seeks to "protect[] public health" and entered into force in 2009.[235] The *FSPTCA* gives the United States Food and Drug Administration (FDA) the "authority to regulate tobacco products."[236] The *FSPTCA* bans "the production and sale of cigarettes with certain characterizing flavors, . . . imposes significant restrictions and requirements on how tobacco products are manufactured, marketed, distributed and sold, and . . . empowers the FDA to adopt additional regulations as appropriate."[237]

Section 907(a)(1)(A) of the *Federal Food, Drug and Cosmetic Act* (*FFDCA*) added Section 101(b) to the *FSPTCA*.[238] Section 907(a)(1)(A), the technical regulation at issue in this case, bans the sale of flavored cigarettes. Simply put, the statute and its implementing regulation "prohibit[] the sale of all cigarettes with a characterizing flavor, including clove cigarettes, but exempts menthol cigarettes."[239] It was inclusion of flavored cigarettes, such as clove cigarettes, but the exclusion of menthol cigarettes in the American technical regulation that sparked a WTO dispute, culminating in the 2012 *US—Clove Cigarettes* report.[240]

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[234] Hereinafter Appellate Body Report, *US—Clove Cigarettes*. The Panel report in this case is Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011) (*adopted as modified* Apr. 24, 2012) [hereinafter Panel Report, *US—Clove Cigarettes*].

On appeal and at the Panel stage, the following WTO Members were third-party participants: Brazil, Colombia, Dominican Republic, European Union, Guatemala, Mexico, Norway, and Turkey.

[235] Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 2.19.

[236] *Id.*

[237] *See id.*

[238] *See id.* ¶ 2.4.

[239] Daniel Pruzin, *U.S. Given Until July 2013 to Comply with WTO Flavored Cigarette Ruling*, 29 INT'L TRADE REP. (BNA) 1110 (July 5, 2012).

[240] *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234.

The *FFDCA* defines "cigarettes" broadly.[241] Section 907(a)(1)(A) of this legislation seeks to "prevent children and adolescents from starting to smoke" in order to reduce the overall number of deaths caused by smoking.[242] Why did the United States distinguish flavored from non-flavored cigarettes and ban sale of the former type?

According to studies, young smokers are more "likely to use flavored cigarettes" than "smokers over the age of 25."[243] Evidence shows flavored tobacco products are more appealing to young and potential smokers because they have a more pleasant taste and aroma than unflavored tobacco products.[244] Furthermore, studies demonstrate "young people believe that flavored tobacco products are safer than unflavored tobacco products."[245] In essence, then, "the objective of the legislation is to discourage youth smoking by restricting access to flavored cigarettes, which are viewed as [a] precursor to an eventual lifetime smoking habit."[246]

Interestingly, however, in reality, flavored cigarettes are no less harmful or addictive than unflavored cigarettes.[247] (Both, of course, are deadly, as is second-hand and even third-hand smoke. The point is the evidence on a differential is lacking.) Nevertheless, the *FSPTCA* sought to improve overall public health in part by removing flavored cigarettes from the market through the technical regulation of Section 907(a)(1)(A).[248]

b. Cigarette Market in the United States

Between 20-26 percent of adults and 12-19 percent of youth in the United States are smokers.[249] In 2007, 360 billion units of cigarettes were sold in the United States.[250] That number dropped to 346 billion units in 2008 and fell further in 2009 to 317 billion units.[251] Most American smokers use unflavored cigarettes or menthol cigarettes with one-fourth of smokers using menthol cigarettes.[252]

Between 2000 and 2009, "clove cigarette consumption accounted for approximately 0.1 percent of the U.S. market."[253] Between 2007 and 2009,

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[241] *See* Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶¶ 2.9-2.11.
[242] *Id.* ¶ 2.8.
[243] *Id.*
[244] *See id.*
[245] *Id.*
[246] Pruzin, *U.S. Given Until July 2013 to Comply, supra* note 239.
[247] *See* Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 2.8.
[248] *See id.*
[249] *Id.* ¶ 2.24 (citations omitted).
[250] *Id.* (citing Indonesia's first written submission, ¶ 18; Exhibit IND-10; Exhibit US-100).
[251] *Id.* (citations omitted).
[252] Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 2.25 (citations omitted).
[253] *Id.* ¶ 2.24 (citations omitted).

"virtually all clove cigarettes were imported from Indonesia."[254] The total number of clove cigarette imports decreased from approximately 470 million cigarettes in 2007 to 220 million cigarettes in 2009.[255] The total value of clove cigarette imports was U.S. $16.2 million in 2007 and dropped to $7.5 million in 2009.[256] Despite the fact that the majority of clove cigarettes in the United States were imported, "there was at least one U.S. company . . . that manufactured a clove-flavored cigarette prior to the entry into force of the *FSPTCA*."[257] Other flavors of cigarettes prohibited by Section 907(a)(1)(A) did not hold any significant share of the overall American cigarette market before this regulation entered into force.[258]

Traditional tobacco flavored and menthol cigarettes are still admissible (i.e., imported or domestically produced, and sold) under this regulation. The *FSPTCA* created the Tobacco Products Scientific Advisory Committee (TPSAC).[259] The TPSAC was required "to deliver a report to FDA on the public health impact of menthol in cigarettes within a year of the committee's formation establishment."[260] The subsequent 2011 TPSAC report recommended a ban on menthol cigarettes, which the FDA took into consideration.[261]

c. International Anti-Smoking Efforts

The anti-tobacco, anti-smoking efforts of the United States are paralleled at the international level. In particular, the *Framework Convention on Tobacco Control* (*FCTC*) is "an international treaty administered by the World Health Organization (WHO)."[262] The *FCTC* seeks to curb smoking by "reduc[ing] demand and supply of tobacco" and "contains national reporting requirements and strategies to facilitate structural adjustment for people whose livelihoods depend on tobacco production."[263] One hundred and seventy-two countries are signatories to this treaty.[264] The Conference of Parties (COP) is held regularly, and parties "negotiate[] implementation of the articles of the *Convention* [*FCTC*] through the development of guidelines documents or additional Protocols."[265]

In 2010, an *FCTC* Working Group drafted the *Partial Guidelines for Implementation of Articles 9 and 10 of the Convention* (*Partial Guidelines*).[266]

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254 *Id.* ¶ 2.26 (citing Exhibits US-100 and IND-68).
255 *See id.*
256 *Id.* (citing Exhibits US-100 and US-134).
257 Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 2.27 (citing United States' first written submission, ¶ 35).
258 *Id.* ¶ 2.28 (citing Indonesia's response to Panel question No. 17).
259 *Id.* ¶ 2.23 (citation omitted).
260 *Id.* (citation omitted).
261 *Id.* (citations omitted).
262 Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 2.29 (citations omitted).
263 *Id.*
264 *See id.*
265 *Id.* ¶ 2.30.
266 *Id.*

Article 9 regulates "the contents of tobacco products," while Article 10 regulates "tobacco products disclosures."[267] The COP adopted these *Partial Guidelines*. The *Partial Guidelines*:

> Recommend . . . the "[p]arties should regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products." Targeted ingredients include those: (i) that are used to increase palatability; (ii) that have coloring properties; (iii) that are used to create the impression that products have health benefits; and (iv) those associated with energy and vitality. Among the ingredients that increase palatability listed in the WHO *Partial Guidelines* are . . . menthol . . . spices and herbs . . . .[268]

However, the *Partial Guidelines* are non-binding.

3. Overview of Two Appellate Issues

The United States raised two issues on appeal, both of which it lost. First, the United States disputed the finding by the Panel that Section 907(a)(1)(A) of the *FFDCA* violates Article 2:1 of the *Agreement on Technical Barriers to Trade* (*TBT Agreement*), which is the national treatment provision in that *Agreement* akin to GATT Article III:4. In particular, the United States argued the Panel incorrectly made "like product" and "treatment less favorable" determinations in reaching its conclusion.[269]

Second, the United States appealed the finding by the Panel that Section 907(a)(1)(A) of the *FFDCA* violates Article 2:12 of the *TBT Agreement*, which mandates a "reasonable" interval between the publication and effective date of a new regulation. The United States contested the Panel rationale that the United States published the regulation less than six months before the regulation entered into force.

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[267] Panel Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 2.30.

[268] *Id.* ¶ 2.32 (citation omitted).

[269] *See* Appellate Body Report, *US—Clove Cigarettes, supra* note 234, ¶ 76.

4. Issue 1: National Treatment?

Article 2:1 of the *TBT Agreement* states:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favorable* than that accorded to *like products* of national origin and to *like products* originating in any other country.[270]

The Panel found that Section 907(a)(1)(A) of the *FFDCA* violates Article 2:1 of the *TBT Agreement* because menthol and clove flavored cigarettes are "like products" and that the section affords clove cigarettes "treatment less favorable" than menthol cigarettes.[271] The United States appealed this finding.

The United States argued the Panel misinterpreted, and therefore misapplied, "like products" and "treatment less favorable" determinations within the meaning of Article 2:1 of the *TBT Agreement*. First, the Appellate Body examined the American arguments concerning the "like products" finding. Then, the Appellate Body examined the arguments by the United States regarding "treatment less favorable" determination. The Appellate Body ultimately upheld the holding that Section 907(a)(1)(A) violates Article 2:1 of the *TBT Agreement*.

a. "Likeness" under *TBT Agreement* Article 2:1

As intimated, the initial key logical step in respect of the first issue was a like product determination: were menthol cigarettes "like" flavored cigarettes? The United States claimed the Panel "erred in its interpretation and application of the 'likeness' criteria of end-use and consumer tastes and habits."[272] In making its "likeness" determination, the Panel looked at the physical characteristics and tariff classifications (neither of which was contested on appeal), as well as the end uses and consumer tastes and habits of the clove and menthol cigarettes.[273]

Essentially, the Panel merely applied the "like product" criteria identified by the Appellate Body in the 1996 *Japan—Alcoholic Beverages* case and subsequent precedents. The Panel noted Article 2:1 of the *TBT Agreement* is

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[270] Agreement on Technical Barriers to Trade art. 2:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 U.N.T.S. 120 [hereinafter *TBT Agreement*] (emphasis added).

[271] Appellate Body Report, *US—Clove Cigarettes, supra* note 234, ¶ 84.

[272] *Id.* ¶ 103. The United States also claimed the Panel violated Article 11 of the *DSU* in its analysis of consumer tastes and habits. The Appellate Body held that the Panel did not violate Article 11 of the *DSU*.

[273] *See id.* ¶ 104.

narrower in scope than GATT Article III:4 and lacks the general principle expressed in GATT Article III:1.[274]

According to the Panel, the "immediate context" to Article 2:1 of the *TBT Agreement* is "Article 2:1 itself and the *TBT Agreement as a whole, and to that Agreement's* object and purpose as set out in its Preamble."[275] The Panel did not use solely a "competition-oriented" approach to its interpretation of "likeness," as is customary under GATT Article III:4.[276] Instead, the Panel also "gave particular weight" to the public health objective of the technical measure at issue, specifically as it relates to prevention of youth smoking, in its assessment of "the products' physical characteristics and of consumer tastes and habits."[277]

The Appellate Body ultimately upheld the decision by the Panel that clove cigarettes and menthol cigarettes are "like: products, despite its opposition to the interpretation of "like" products by the Panel. The Appellate Body was unconvinced the "likeness" determination under Article 2:1 could not "be approached from a competition-oriented perspective."[278]

According to the Appellate Body, the Preamble to the *TBT Agreement* balances "the pursuit of trade liberalization" with "Members' right to regulate," which "is not, in principle, different from the balance that exists between the national treatment obligation of [GATT] Article III and the general exceptions

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274 *See* Appellate Body Report, *US—Clove Cigarettes, supra* note 234, ¶ 105. Article III:4 of GATT states, with emphasis added:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favorable* than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Article III:1 of GATT states:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

275 *Id.* ¶¶ 105-06 (emphasis added).
276 *Id.* ¶ 105.
277 *Id.* ¶¶ 106-07.
278 *Id.* ¶ 108.

provided under [GATT] Article XX."[279] So, the Appellate Body determined "likeness should not be based on the regulatory purposes of technical regulations," but rather on the competitive relationship between the products at issue.[280] The Appellate Body also noted that relying too heavily on the purpose of the technical regulation can lead to "arbitrary results."[281]

To be sure, the Appellate Body acknowledged regulatory purposes may still hold some influence.[282] Relying in part on its findings in the 2001 *EC—Asbestos* case, the Appellate Body said, "To the extent they are relevant to the examination of certain 'likeness' criteria and are reflected in the products' competitive relationship, regulatory concerns underlying technical regulations may play a role in the determination of likeness."[283] Having clarified the interpretation of "likeness" under 2:1 of the *TBT Agreement*, the Appellate Body went on to address the specific claim by the United States concerning the evaluation of end uses by the Panel in its "likeness" determination.

b. "Likeness" and End Uses

Before the Panel, the United States argued end uses include "satisfying addiction to nicotine" and "creating a pleasurable experience associated with the taste of the cigarette and the aroma of the smoke."[284] The Panel rejected those purported uses as "reasons why people smoke," not end uses.[285] The Panel thought these reasons were more relevant to a consumer tastes and habits analysis.[286] The Panel determined (rather obviously) the end use of both clove and menthol flavored cigarettes is "to be smoked."[287]

On appeal, the United States argued that "when conducting an end-use analysis, [the Panel] must consider the different uses of the products and not just the use that is a 'common denominator' of the products in question."[288] The United States claimed menthol cigarettes are used for satisfying a nicotine addiction.[289] Instead, clove cigarettes generally are used "for experimentation and special social settings."[290] Indonesia, the complainant, responded that the Panel was correct in its determination that the end uses posited by the United States do not relate to end use *per se*. However, even if these end uses were relevant, the

279 Appellate Body Report, *US—Clove Cigarettes, supra* note 234, ¶ 109.
280 *Id.* ¶ 112.
281 *Id.* ¶ 114.
282 *See id.* ¶ 117.
283 *Id.* ¶ 120; *see also* Appellate Body Report, *EC—Asbestos*, *supra* note 56.
284 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 122.
285 *Id.*
286 *See id.*
287 *Id.*
288 *Id.* ¶ 123.
289 *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 123.
290 *Id.*

United States failed to demonstrate clove and menthol cigarettes are not both "capable" of satisfying an addiction to nicotine and creating a pleasurable experience related to the taste and aroma of the cigarettes.[291]

The Appellate Body held the Panel interpreted the end use of clove and menthol cigarettes (for smoking) too broadly for a likeness determination.[292] Despite this mistake by the Panel, the American argument backfired, as the Appellate Body still ruled against the United States. It said, "[T]he more specific products' end uses put forward by the United States [namely, feeding an addiction and experiencing pleasure] also support the Panel's overall finding that clove and menthol cigarettes are like products." Hence, the Appellate Body upheld the finding by the Panel.[293]

Here, the Appellate Body again pointed to its findings in its 2001 *EC—Asbestos* decision.[294] In that case, end uses are defined as "the extent to which products are *capable* of performing the same, or similar, functions, [and consumer tastes and habits as] the extent to which consumers are willing to use the products to perform these functions."[295] According to WTO precedent, the end use and consumer tastes and habits criteria may be "interrelated" and "not mutually exclusive," as was true here.[296]

According to the Appellate Body, what matters in analyzing end use is whether "a product is *capable* of performing it [the end use], not that such end use represents the principal [sic] or most common end use of that product."[297] Here, both clove and menthol cigarettes appeal to youth because of their pleasurable flavor and aroma, their use for social and experimentation purposes, and they satisfy an addiction to nicotine.[298] In sum, the Appellate Body agreed with the Panel that menthol and clove cigarettes have the same end uses, but for different reasons. In turn, both sets of adjudicators held clove and menthol cigarettes are like products.

c. "Likeness" and Consumer Tastes and Habits

The United States argued that the Panel mistakenly limited its analysis of consumer tastes and habits to young and potential smokers. According to the

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[291] *Id.* ¶ 124.

[292] *See id.* ¶¶ 129, 131.

[293] *Id.* ¶ 132.

[294] *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 125; Appellate Body Report, *EC—Asbestos, supra* note 56.

[295] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 125 (quoting Appellate Body Report, *EC—Asbestos, supra* note 56, ¶ 117) (emphasis added).

[296] *Id.* ¶ 126 (quoting Appellate Body Report, *EC—Asbestos, supra* note 56, ¶ 102; and Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 131).

[297] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 131 (alteration in original).

[298] *See id.*

United States, the Section 907(a)(1)(A) ban on flavored but not menthol cigarettes "makes regulatory distinctions among cigarettes based . . . on their appeal to young and potential smokers, . . . [and] current adult smokers."[299] Even though a primary objective of the measure is to prevent and reduce smoking among the youth, "the measure was developed based on a consideration of the health benefits, risks, and consequences to the population as a whole, including the possible negative consequences of banning a type of cigarette, such as menthol cigarettes, to which millions of adults are chemically and psychologically addicted."[300]

It so happens that menthol cigarettes tend to be domestically manufactured, while clove cigarettes (a type of flavored cigarette) tend to be made abroad, particularly Indonesia (the largest clove cigarette exporter to America). But the United States gainsaid any protectionist motive behind the measure. Moreover, the United States argued the *TBT Agreement* does not require an analysis to be based only on "what the Panel construed to be the immediate objective of the measure."[301]

The Appellate Body agreed with the United States that the Panel was "wrong in confining its [like product] analysis of consumer tastes and habits to young and potential young smokers."[302] However, this error by the Panel "did not affect its finding that there is sufficient substitutability between clove and menthol cigarettes to support its overall finding that the products are 'like.'"[303] Therefore, the Appellate Body ultimately upheld the finding of "likeness" by the Panel, despite the error by the Panel in limiting the analysis of consumer tastes and habits.

To reinforce its holding that the two types of cigarettes are "like," the Appellate Body recalled its previous determination that "likeness" should be interpreted based on the competitive relationship between clove and menthol flavored cigarettes.[304] According to the Appellate Body, neither the context nor objective of the *TBT Agreement* "suggest that the regulatory objectives of a technical regulation should play a role that is separate from the determination of a competitive relationship between and among products."[305] The Appellate Body also emphasized the market definition (i.e., what buyers and sellers consider to be within or outside a particular product grouping) determines which consumer tastes and habits to be evaluated by it and the panels.[306]

The Appellate Body said, "[I]f the products are highly substitutable for some consumers but not for others, this [incongruity] may also support a finding

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299 *Id.* ¶ 134.
300 *Id.* ¶ 135.
301 *Id.* ¶ 134.
302 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 139.
303 *Id.* ¶ 153.
304 *Id.* ¶ 136.
305 *Id.*
306 *See id.* ¶ 137.

that the products are like."[307] While this proposition seems paradoxical, the Appellate Body relied on its 2012 *Philippines—Distilled Spirits* precedent:

> [I]n order to determine whether products are like under Article 2:1 of the TBT Agreement, it is not necessary to demonstrate that the products are substitutable for all consumers or that they actually compete in the entire market. Rather, if the products are highly substitutable for some consumers but not for others, this may also support a finding that the products are like.[308]

The Appellate Body examined the record and determined the Panel found "young and potential young smokers perceive clove and menthol cigarettes as sufficiently substitutable."[309] According to the Appellate Body, that was enough to "support the Panel's finding that those products are like within the meaning of Article 2:1 of the TBT Agreement, even if the degree of substitutability is not the same for all adult smokers."[310] In other words, less than 100 percent acceptance of substitutability among consumers of substitutability does vitiate the case for "likeness."

In sum, the Appellate Body upheld the finding by the Panel that clove and menthol cigarettes are "like products" within the meaning of Article 2:1 of the *TBT Agreement*, despite finding immaterial errors in this analysis by the Panel.[311] This decision by the Appellate Body was fatal to the American argument because it meant the United States could not escape its *TBT Agreement* Article 2:1 national treatment obligations on the grounds that menthol and clove cigarettes were not alike.

d. "Treatment Less Favorable" and *TBT Agreement* Article 2:1

The United States made three principal arguments that the Panel improperly found clove cigarettes received less favorable treatment than menthol cigarettes.[312] The first two arguments were that the Panel improperly narrowed the product scope and temporal scope of the "treatment less favorable" requirement. The United States also argued that factors "unrelated to the foreign

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307 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 142.

308 *Id.*; Appellate Body Report, *Philippines—Distilled Spirits*, *supra* note 17, ¶ 131.

309 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 144.

310 *Id.*

311 *See id.* ¶ 154.

312 *See id.* ¶ 163. The United States also argued the Panel violated Article 11 of the *DSU*. *Id.* ¶ 208. According to the United States, the Panel disregarded evidence demonstrating that, *at the time of the ban*, domestic flavored cigarettes other than menthol cigarettes were marketed in the United States. *Id.* Again, the Appellate Body held the Panel did not violate Article 11 of the *DSU*. *Id.*

origin of the imported products" could explain the less favorable treatment.[313] Before addressing each argument, the Appellate Body explained the "treatment less favorable" requirement in Article 2:1 of the *TBT Agreement*.

The Appellate Body said Article 2:1 of the *TBT Agreement* applies to technical regulations. Technical regulations "establish distinctions between products according to their characteristics or their related processes and production methods."[314] According to the Appellate Body, because of this particular scope, "Article 2:1 should not be read to mean that *any* distinction, in particular those that are based *exclusively* on particular product characteristics or their related processes and production methods [is a *per se* violation]."[315]

This legal interpretation is significant, perhaps even new law. It suggests a possible distinction between Article 2:1 from GATT Article III:4, insofar as there is less room under the latter national treatment rule for variance. That is, any un-leveling of the conditions of competition is a violation of the GATT Article III:4 national treatment rule. But such un-leveling is not always the "end of the story" under Article 2:1 of the *TBT Agreement*. Further questions must be asked, for instance, about the technical regulation and product at issue, and how those regulations are administered.

In rendering this interpretation, the Appellate Body read Article 2:1 along with Article 2:2 of the *TBT Agreement*. The Appellate Body focused on this phrase in Article 2:2: "does not operate to prohibit *a priori* any obstacle to international trade."[316] Looking at the Preamble of the *TBT Agreement*, the Appellate Body said its "object and purpose":

> [W]eigh in favor of reading the "treatment no less favorable" requirement of Article 2:1 as prohibiting both *de jure* and *de facto* discrimination against imported products, while at the same time permitting detrimental impact on competitive opportunities for imports that stems exclusively from legitimate regulatory distinctions.[317]

Note the prohibition on discrimination at law or in fact is consistent with GATT Article III:4 jurisprudence.

Indeed, the Appellate Body looked at its precedents in 2001 *Korea—Beef* and 2001 *EC—Asbestos*.[318] In *Korea—Beef*, the Appellate Body said the "treatment less favorable" determination under GATT Article III:4 focused on the

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313 *Id.* ¶ 164.

314 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 169.

315 *Id.* (alteration in original).

316 *Id.* ¶ 171.

317 *Id.* ¶ 175.

318 *See id.* ¶ 177; *see also* Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (*adopted* Jan. 10, 2001) [hereinafter Appellate Body Report, *Korea—Beef*]; Appellate Body Report, *EC—Asbestos*, *supra* note 56.

"conditions of competition" in the relevant market between imported and domestic like products.[319] Furthermore, *EC—Asbestos* "prohibits WTO Members from modifying the *conditions of competition* in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products."[320]

To be sure, the Appellate Body recognized Article 2:1 of the *TBT Agreement* and GATT Article III:4 are distinct. Nevertheless, the Appellate Body said the above precedent regarding GATT Article III:4 is "instructive" in determining the meaning of "treatment no less favorable" under Article 2:1 of the *TBT Agreement*.[321] Put differently, GATT is guidance for the *TBT Agreement*. How could the Appellate Body reason otherwise, given the decades of jurisprudence on the original and most fundamental national treatment rule in GATT-WTO law? At the same time, how could the Appellate Body ignore the fact that the *TBT Agreement* is a specific one, about technical regulations applied to products that are categorized and distinguished by those regulations, whereas GATT is a general one, about all goods? The Appellate Body could not mindlessly imprint the national treatment test under GATT Article III:4 about conditions of competition onto the *TBT Agreement*.

Therefore, when determining whether a violation under Article 2:1 of the *TBT Agreement* occurred, the Appellate Body instructed that any panel "should seek to ascertain whether the technical regulation at issue modifies the *conditions of competition* in the market of the regulating Member to the detriment of the group of imported products vis-à-vis the group of like domestic products."[322] Given the context of Article 2:1, the Appellate Body said both *de jure* and *de facto* discrimination against the imported merchandise violates the "treatment no less favorable" mandate.[323] However, when the discrimination is not *de jure*, then, "the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favorable treatment under Article 2:1."[324] In such a case, a panel must determine, on an individual case basis, the "design, architecture, revealing structure, operation, and application of the technical regulation at issue, and in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products."[325]

Here again is a potential novel legal interpretation, suggesting the possibility of slightly more tolerance for *de facto* (but never *de jure*) dissimilar treatment between like products under Article 2:1 of the *TBT Agreement* than under GATT Article III:4. The key is whether distinctive treatment by a technical regulation is justified by a legitimate purpose for that regulation.

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319 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 177.
320 *Id.* ¶ 179 (emphasis added).
321 *Id.* ¶ 180.
322 *Id.* (emphasis added).
323 *See id.* ¶ 181.
324 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 182.
325 *Id.*

Ultimately, the Appellate Body upheld the determination by the Panel by banning clove cigarettes while exempting menthol cigarettes from the ban: "Section 907(a)(1)(A) of the *FFDCA* accords imported clove cigarettes less favorable treatment than that accorded to domestic menthol cigarettes, within the meaning of Article 2:1 of the *TBT Agreement*."[326] Thus, in this particular case, the United States failed to show its measure was entitled to the "wiggle room" the Appellate Body carved out for technical regulations. Why was the United States unsuccessful? After the Appellate Body concluded its observations concerning the "treatment less favorable" requirement of Article 2:1, it rebutted each of the three specific arguments made by the United States.

First, the United States argued, "[T]he Panel improperly narrowed the *product scope* of its analysis by focusing exclusively on treatment accorded to imported clove cigarettes and to domestic menthol cigarettes."[327] Instead, the Panel should have "compare[d] the treatment accorded to all imported and domestic like products as a group."[328] Furthermore, the Panel should have looked at imported menthol cigarettes from all other countries when considering the treatment accorded to imported products.[329] According to the United States, the Panel also should have considered all domestic flavored cigarettes regarding the treatment of like domestic products.[330] Indonesia responded that the Panel properly determined the product scope of the specific products at issue.[331]

Quite rightly, the Appellate Body said, "[T]he national treatment obligation of Article 2:1 calls for a comparison of treatment accorded to, on the one hand, the group of products imported from the complaining Member and, on the other hand, the treatment accorded to the group of like domestic products."[332] That is exactly what would occur in a GATT Article III:4 analysis. So, once a panel determines "the universe of imported and domestic like products, . . . the treatment accorded to all like products imported from the complaining Member must be compared to that accorded all like domestic products."[333]

Repeating itself, the Appellate Body said Article 2:1 permits regulatory distinctions between like products as long as imported like products are "treated no less favorably" than the domestic like products.[334] The Appellate Body noted:

> [T]he United States' challenge focuses exclusively on the Panel's exclusion of domestically produced flavored cigarettes from the less favorable treatment stage of the Panel's analysis. Because Article 2:1 expressly limits the scope of the less

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326 *Id.* ¶ 233.
327 *Id.* ¶ 163 (alteration in original).
328 *Id.* ¶ 186.
329 *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 187.
330 *See id.* ¶ 188.
331 *See id.* ¶ 189.
332 *Id.* ¶ 194.
333 *Id.*
334 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 194.

> favorable treatment comparison to imported and domestic like products, in the absence of specific findings by the Panel that domestically produced flavored cigarettes other than menthol are like clove cigarettes, we cannot determine whether the Panel erred in failing to include domestically produced flavored cigarettes in its less favorable treatment comparison.[335]

In the end, the Appellate Body determined that "given their relatively low share in the U.S. market, the inclusion of domestically produced flavored cigarettes in the comparison would not have altered the Panel's ultimate conclusion that the group of like domestic products essentially consisted of domestic menthol cigarettes."[336]

Second, the United States argued, "[T]he Panel improperly narrowed the *temporal scope* of its analysis by focusing exclusively on the effects of Section 907(a)(1)(A) on domestic like products at the time the ban on flavored cigarettes came into effect."[337] Specifically, the United States pointed to a concerning sentence made by the Panel: "[A]t the time of the ban there were no domestic cigarettes with characterizing flavors other than menthol [on the U.S. market]."[338] Indonesia responded the Panel correctly determined the temporal scope.[339]

The Appellate Body said that the Panel was required to assess, as of the date of its establishment, whether Section 907(a)(1)(A) is a technical regulation that accords to products imported from Indonesia less favorable treatment than that accorded to "like" domestic products.[340] The Appellate Body explained that particularly "in a *de facto* discrimination claim," a panel is entitled "to take into account evidence pre-dating the establishment of a panel to the extent that such evidence informs the panel's assessment of the consistency of the measure at that point in time."[341] According to the Appellate Body, the specific statement the United States was concerned with was not the basis for the Panel's exclusion of domestic flavored cigarettes from the less favorable treatment analysis.[342] As a result, the Appellate Body dismissed the "temporal scope" argument by the United States.

The final argument was the strongest of the three the United States offered:

> [E]ven if the Appellate Body were to agree with the comparison undertaken by the Panel in its less favorable treatment analysis, the Panel nonetheless erred in finding that the detrimental effect

335 *Id.* ¶ 199.
336 *Id.* ¶ 200.
337 *Id.* ¶ 163 (alteration in original).
338 *Id.* ¶¶ 204, 207 (alteration in original).
339 *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶¶ 164, 204, 207.
340 *Id.* ¶ 205.
341 *Id.* ¶ 206.
342 *Id.* ¶ 205.

> on competitive opportunities for imported clove cigarettes was not "explained by factors unrelated to the foreign origin of those products."[343]

In other words, the United States made a causation argument, saying the un-level competitive playing field for Indonesian clove cigarettes was not due to Section 907(a)(1)(A), but rather to other variables, unconnected with the country of origin of clove cigarettes. Indonesia responded, "[T]he Panel correctly found that the less favorable treatment accorded to clove cigarettes could not be explained by factors unrelated to the foreign origin of the imported products."[344] The Appellate Body agreed with the Panel, despite acknowledging disappointment in the lack of a comprehensive explanation by the Panel for its finding.[345]

The Appellate Body said, "[T]he design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that the detrimental impact on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia."[346] The banned imported products in the case at bar were Indonesian clove cigarettes, which accounted for the majority of the overall imported clove cigarette market share in the United States.[347] The domestic "like" product was the menthol cigarette. Domestic producers made up the majority of the market share of menthol cigarettes in the United States.[348]

The Appellate Body was weary of the American justification for banning clove and other flavored cigarettes under Section 907(a)(1)(A), but not menthol cigarettes.[349] The United States argued it was necessary to exclude menthol cigarettes from the ban on sale of flavored cigarettes because the cost to its healthcare system would be extremely high, given the large percentage of menthol cigarette smokers who would inevitably suffer withdrawal symptoms.[350] To state the argument is to bespeak its weakness, if not inanity. Essentially the Americans were saying: we cannot ban menthol cigarettes, however bad the health effects are on our citizens, because if we did ban them, then too many Americans would be sick from withdrawal, and we could not afford to cover their health care costs. Such an argument raises the question of whether Section 901(a)(1)(A) indeed was about promoting health or protecting domestic industry—or maybe a bit of both.

Part of its final argument concerned demand. According to the United States, the high demand would create "a black market and smuggling of menthol cigarettes."[351] The Appellate Body recounted a scientific fact, one that cut against

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343 *Id.* ¶ 213.
344 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 164.
345 *See id.* ¶¶ 221, 226.
346 *Id.* ¶ 224.
347 *Id.*
348 *Id.*
349 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 225.
350 *Id.*
351 *Id.*

the American argument: "[T]he addictive ingredient in menthol cigarettes is nicotine, not peppermint or any other ingredient that is exclusively present in menthol cigarettes, and that this ingredient is also present in a group of products that is likewise permitted under Section 907(a)(1)(A), namely, regular cigarettes."[352]

In the end, after reviewing all three arguments by the United States, the Appellate Body agreed with the Panel that by exempting menthol cigarettes from the ban on flavored cigarettes, Section 907(a)(1)(A) accords to clove cigarettes imported from Indonesia less favorable treatment than that accorded to domestic "like" products within the meaning of Article 2:1 of the *TBT Agreement*.[353] This *de facto* un-leveling of the conditions of competition could not be justified by any legitimate public policy purpose.

In summary, the Appellate Body upheld, albeit for different reasons, the Panel finding that Section 907(a)(1)(A) of the *FFDCA* is inconsistent with Article 2:1 of the *TBT Agreement* because it accords to imported clove cigarettes less favorable treatment than that accorded to like menthol cigarettes of national origin.[354] The Appellate Body also explained the implications of its holding on national public health measures. The Appellate Body emphasized the outcome of the decision was not meant to deter Members from enacting regulations that target "legitimate health objectives such as curbing and preventing youth smoking."[355] It said the United States is free to ban clove cigarettes, but if it does so, it must comply with its national treatment obligations and extend the ban to menthol cigarettes as well.[356]

5. Issue 2: Transparency, *TBT Agreement* Article 2:12, and Technical Regulations?

Article 2:12 of the *TBT Agreement* states, with emphasis added:

> Except in those urgent circumstances referred to in paragraph 10, Members shall allow a *reasonable interval between the publication of technical regulations and their entry into force* in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Accordingly, the second main issue the United States raised on appeal was one of transparency. Did the Panel err in finding that "by failing to allow a period of not

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352 *Id.*
353 *Id.* ¶ 226.
354 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 234.
355 *Id.* ¶ 236.
356 *See id.*

less than six months between the publication and the entry into force of Section 907(a)(1)(A) of the *FFDCA*, the United States acted inconsistently with Article 2:12 of the TBT Agreement"?[357]

The *TBT Agreement* merely requires a "reasonable interval" between the publication and entry into force of the technical regulation. However, Indonesia posited paragraph 5:2 of the *Doha Ministerial Decision on Implementation-Related Issues and Concerns* (*Doha Ministerial Decision*) defines "reasonable interval" in Article 2:1 of the *TBT Agreement* as six months.[358] Indonesia argued the *Doha Ministerial Decision* is legally binding under Article IX:2 of the *Marrakesh Agreement Establishing the World Trade Organization* (*WTO Agreement*).[359] Paragraph 5:2 of the *Doha Ministerial Decision* states:

> Subject to the conditions specified in paragraph 12 of Article 2 of the *Agreement on Technical Barriers to Trade*, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
>
> Article IX:2 of the *WTO Agreement* states:
>
> The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

The Panel allowed the *Doha Ministerial Decision* to "guide" its interpretation of "reasonable interval" because the *Decision* was "agreed [to] by all WTO Members meeting in the form of Ministerial Conference, the highest ranking body of the WTO."[360] Furthermore, under Article 31(3)(a) of the *Vienna*

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357 *Id.* ¶ 237.

358 *Id.* ¶ 238 (referring to World Trade Organization, Doha Ministerial Decision on Implementation-Related Issues and Concerns, Nov. 20, 2001, WT/MIN(01)17).

359 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 238 (referring to Marrakesh Agreement Establishing the Word Trade Organization art. IX:2, Apr. 15, 1994, 1867 U.N.T.S. 154).

360 *Id.* ¶ 239.

Convention on the Law of Treaties (*VCLT*), the *Doha Ministerial Decision* "could be considered as a subsequent agreement of the parties."[361]

> Article 31(3)(a) of the *VCLT* states:
>
> There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.
>
> On appeal, the United States argued:
>
> [D]espite not having found that Paragraph 5:2 has the legal status of an authoritative interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*, the Panel erred by applying paragraph 5:2 as a 'rule' that amended the text of Article 2:12 of the *TBT Agreement* . . . . [Moreover], the legal value of paragraph 5:2 is at most a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.[362]

Indonesia responded that the Panel made a definitive finding Paragraph 5:2 of the *Doha Ministerial Decision* is binding under Article IX:2 of the *WTO Agreement*.[363] Indonesia also argued Paragraph 5:2 interprets "reasonable interval" in Article 2:12 of the *TBT Agreement* because Paragraph 5:2 is a "subsequent agreement between the parties" under Article 31(3)(a) of the *VCLT*.[364]

The Appellate Body disagreed with Indonesia that the Panel determined the *Doha Ministerial Decision* is binding. The Appellate Body went on to consider whether Paragraph 5:2 of the *Doha Ministerial Decision* is in fact legally binding.[365] It decided the *Doha Ministerial Decision* does not qualify as a multilateral interpretation within the meaning of Article IX:2 of the *WTO Agreement*.[366]

Why not? The Appellate Body said there are two requirements for adopting "multilateral interpretations" of the *TBT Agreement*.[367] First, the Ministerial Conference of General Council must adopt the decision by a three-fourths majority of WTO Members.[368] Second, the Council overseeing the *TBT Agreement* must recommend the adoption of the multilateral interpretation, here

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361 *Id.* (referring to United Nations, Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331).
362 *Id.* ¶ 242 (alteration in original).
363 *Id.* ¶ 243.
364 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 243.
365 *See id.* ¶ 247.
366 *See id.* ¶ 256.
367 *See id.*
368 *Id.* ¶ 251.

Paragraph 5:2 of the *Doha Ministerial Decision*.[369] The Appellate Body said that although the content of Paragraph 5:2 of the *Doha Ministerial Decision* might very well have been based on discussions within the Committee on Technical Barriers to Trade, those discussions are insufficient "to establish that the Ministerial Conference exercised its authority to adopt an interpretation of the *TBT Agreement* on the basis of a *recommendation* from the Council for Trade in Goods."[370]

Although the Appellate Body did not find Paragraph 5:2 binding under Article IX:2 of the *WTO Agreement*, the Appellate Body determined Paragraph 5:2 is a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *VCLT*, on the interpretation of the term "reasonable interval" in Article 2:12 of the *TBT Agreement*. The Appellate Body determined that "a decision adopted by Members, other than a decision adopted pursuant to Article IX:2 of the *WTO Agreement*, may constitute a 'subsequent agreement' on the interpretation of a provision of a covered agreement under Article 31(3)(a) of the *Vienna Convention*."[371]

The Appellate Body said, according to the *VCLT* Article 31(3)(a) text:

> [A] decision adopted by Members may qualify as a "subsequent agreement between the parties" regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.[372]

The Appellate Body said that "it is beyond dispute" that Paragraph 5:2 of the *Doha Ministerial Decision* meets the first requirement.[373]

The Appellate Body relied on its findings in its compliance decision, *EC—Bananas III (Article 21.5 – Ecuador II) / EC—Bananas III (Article 21.5 – US)* to determine Paragraph 5:2 meets the second requirement.[374] Under this precedent, the Appellate Body Paragraph 5:2 "*bears specifically* upon the

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369 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 251.

370 *Id.* ¶ 255 (alteration in original).

371 *See id.* ¶ 260.

372 *Id.* ¶ 262 (alteration in original).

373 *Id.* ¶ 263.

374 *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 251; Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU (*adopted* Dec. 11, 2008) [hereinafter Appellate Body Report, *EC—Bananas III (Article 21.5 – Ecuador II)*], and Corr.1 / *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA (*adopted* Dec. 22, 2008), and Corr.1 [hereinafter Appellate Body Report, *EC—Bananas III (Article 21.5 – US)*].

interpretation of the term 'reasonable interval' in Article 2:12 of the *TBT Agreement*."[375] The Appellate Body said the term "agreement" in Article 31(3)(a) of the *VCLT* "refers . . . to substance rather than to form."[376] Because Paragraph 5:2 "clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term 'reasonable interval' in Article 2:12 of the *TBT Agreement*," the Appellate Body determined Paragraph 5:2 meets the second requirement.[377]

The Appellate Body looked to commentary from the United Nations International Law Commission (ILC) to determine the meaning of Article 2:12 of the *TBT Agreement* in light of the clarification of the term "reasonable interval" provided by Paragraph 5:2.[378] The ILC requires a subsequent agreement, such as Paragraph 5:2, "be read into the treaty for purposes of its interpretation."[379] Accordingly, the Appellate Body interpreted this to mean that the terms of Paragraph 5:2 do not replace or override the terms contained in Article 2:12.[380]

The Appellate Body said the adverb "normally" in Paragraph 5:2 indicates that the rule establishing that foreign producers require a minimum of not less than six months to adapt to the requirements of a technical regulation admits of derogation under certain circumstances.[381] Thus, the Appellate Body concluded:

> [W]hile Article 2:12 of the *TBT Agreement* imposes an obligation on importing Members to provide a "reasonable interval" of not less than six months between the publication and entry into force of a technical regulation, an importing Member may depart from this obligation if this interval "would be ineffective to fulfill the legitimate objectives pursued" by the technical regulation.[382]

The Appellate Body went on to decide whether the Panel erred in finding that Indonesia had established a *prima facie* case of inconsistency with Article 2:12 of the *TBT Agreement* that the United States failed to rebut.[383] Ultimately, the Appellate Body upheld the finding by the Panel.

The United States argued on appeal that Indonesia needed to show the three-month period between publication of Section 907(a)(1)(A) and its entry into force was "unreasonable in light of its impact on the ability of Indonesian

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[375] *Id.* ¶ 266 (alteration in original).
[376] *Id.* ¶ 267.
[377] *Id.*
[378] *Id.* ¶ 269.
[379] Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 263 (quoting the ILC's *Draft Articles on the Law of Treaties with Commentaries*).
[380] *Id.* ¶ 269.
[381] *Id.* ¶ 273.
[382] *Id.* ¶ 275 (alteration in original).
[383] *Id.* ¶ 276.

producers to adapt to the requirements of that measure," and it failed to do so.[384] The Americans and Indonesians did not agree on the elements of a *prima facie* case. The Americans thought the elements of a *prima facie* case should come from Article 2:12 of the *TBT Agreement*, while the Indonesians argued the elements came from Paragraph 5:2 of the *Doha Ministerial Decision*.[385] Thus, the second argument the Americans made was that even if the elements came from Paragraph 5:2, the Panel still erred in determining Indonesia successfully established a *prima facie* case.[386]

The Appellate Body clarified the elements of a *prima facie* case of inconsistency with Article 2:12 of the *TBT Agreement* to take into account both Article 2:12 and Paragraph 5:2.[387] A *prima facie* case is established when "it is shown that an importing Member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue."[388] The burden of proof is on the complaining Member, in accordance with the Appellate Body 1997 *US—Wool Shirts and Blouses* precedent.[389] The respondent Member may rebut a *prima facie* showing, and what is required to do so is determined on a case-by-case basis.[390] The Appellate Body offered some guidance on what may be needed for a strong rebuttal.

First, a respondent Member should show "urgent circumstances" existed, such as "urgent problems of safety, health, environmental protection or national security," where the six-month period between the publication of a technical regulation and its entry into force was unreasonable.[391] Second, one reason for the six-month period is to give foreign producers time to adjust to the new regulation.[392] Therefore, the respondent may rebut a *prima facie* showing if it can prove the foreign producers can adjust in less than the six-month period. Finally, the respondent may rebut a *prima facie* presumption if the six-month period "would be ineffective to fulfill the legitimate objectives pursued by the technical regulation at issue."[393]

The Appellate Body agreed with the Panel that Indonesia properly established a *prima facie* case.[394] The Panel determined there was only a three-

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384 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 276.

385 *Id.* ¶ 278.

386 *Id.* ¶ 276.

387 *Id.* ¶ 279.

388 *Id.* ¶ 280.

389 *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 281; *see also* Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (Apr. 25, 1997) (*adopted* May 23, 1997) [hereinafter Appellate Body Report, *US—Wool Shirts and Blouses*].

390 *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 281.

391 *Id.* ¶ 282.

392 *Id.*

393 *Id.*

394 *Id.* ¶ 291. The Panel had determined Indonesia must "establish a *prima facie* case of inconsistency with Article 2.12 of the *TBT Agreement* that included establishing that a period of at least six months between the publication of Section 907(a)(1)(A) and its entry

month period between publication of Section 907(a)(1)(A) and its entry into force.[395] The United States argued on appeal that Indonesian producers did not need the six-month period to adjust to the technical regulation.[396] According to the United States, "Indonesian producers have been and are able to market tobacco-flavored and menthol-flavored cigarettes in the United States' market, [and that] Indonesian producers, even 16 months after the enactment of [Section 907(a)(1)(A)] have not adjusted their product lines to produce tobacco or menthol-flavored cigarettes."[397]

This American argument failed before the Panel, and it failed again before the Appellate Body, as it well should have. The fact that a particular addressee of a new rule may not need all of the requisite time to adjust to the rule change should not lessen the obligation of transparency, i.e., of providing an adequate time for adjustment. The Appellate Body said this failure to comply by Indonesian producers could also indicate they needed even more than six months to adjust to the technical regulation.

The United States also half-heartedly argued the six-month period would render its technical regulation ineffective. The Appellate Body quickly rejected the argument. The objective of the regulation was to curb youth smoking, and the six-month period did not hamper that goal.[398] In the end, the Appellate Body upheld the holding by the Panel that the United States violated Article 2:12 of the *TBT Agreement* because it failed to allow a six month period between the publication and entry into force of Section 907(a)(1)(A).

6. Commentary

A key point to appreciate about the 2012 *US—Clove Cigarettes* case is the "likeness" of "like" product determinations in the context of national treatment determinations under the GATT-WTO texts. The Appellate Body decided the case sitting on decades of precedent under GATT Article III:4, as well as Articles I and III:2 about how to determine whether two products are "like." Yet, it decided the case under Article 2:1 of the *TBT Agreement*.

The Appellate Body could have invented a new test for "likeness" under that *TBT Agreement*, perhaps on the logic that this text is *sui generis*, or at least to

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into force would not render the fulfillment of the objective pursued by Section 907(a)(1)(A) ineffective." *Id.* ¶ 284.

The Appellate Body disagreed and reiterated a complainant Member must show the respondent failed to allow six months between the publication and entry into force of the technical regulation. *Id.* However, the Appellate Body said Indonesia successfully establish a *prima facie* case based on the record. The United States failed to offer a sufficient rebuttal. *Id.* ¶ 296.

395 Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 291.

396 *Id.* ¶ 294.

397 *Id.* (citation omitted).

398 *See id.* ¶ 295.

be differentiated from GATT in some way. It did not do so. As Carolyn Gleason, partner at McDermott, Will & Emery, put it:

> [I]n evaluating whether clove and menthol cigarettes are "like products" under the *TBT Agreement*, the Appellate Body *rejected the Panel's approach of assessing "likeness" based on the regulatory purpose of a technical measure*.
>
> It found that *complainants and panels may not always know, or be able to identify, all of the objectives of a given measure*. The AB [Appellate Body] *used, instead, the traditional likeness analysis used in GATT national treatment cases*, which looks at the *competitive relationship between the products* at issue and, in particular, their *physical properties, end uses, consumer tastes and habits, and tariff classification*.
>
> [T]he Appellate Body found that *if a measure's regulatory purpose*, such as addressing health risks, *is to be considered at all in a TBT national treatment claim, it should be in the context of a traditional likeness analysis* – for example, whether there are *common physical properties* that make a product toxic or otherwise dangerous to health.[399]

The Appellate Body—implicitly, to be sure—appreciated the persuasive force of the earlier GATT decisions, and in turn viewed them as naturally extendable to the *TBT Agreement*.

Did the Appellate Body take the same approach with respect to the national treatment provision in Article 2:1 of the *TBT Agreement*? The answer is yes, for the most part. As Ms. Gleason indicated:

> [T]he Appellate Body also *disagreed* with the Panel's standard for treatment no less favorable, and in particular *the Panel's finding that less favorable treatment exists if there has been a detrimental impact stemming from the regulatory measures*.
>
> The AB found that the *Panel should have gone further to assess whether the detrimental impact reflects discrimination*, which it said *requires scrutiny of 'the design, architecture, revealing structure, operation, and application of the technical regulation at issue*, and, in particular, *whether the technical regulation is even-handed* . . . .' Based on its more focused assessment of

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[399] Len Bracken, *WTO Appellate Body Upholds Panel Ruling Against United States on Flavored Cigarettes*, 29 INT'L TRADE REP. (BNA) 573 (Apr. 12, 2012) (emphasis added) (quoting another source).

> discriminatory impact, the AB affirmed that the U.S. measure discriminates against clove cigarettes from Indonesia.[400]

In effect, the Appellate Body saw the same pertinent language in Article 2:1 of the *TBT Agreement* and GATT Article III:4, namely, "treatment no less favorable." It eschewed concocting a brand new national treatment test for *TBT Agreement* cases. It also eschewed complacency, i.e., merely presuming discrimination from detrimental impact without a scrupulous examination.

Instead, the Appellate Body extended its jurisprudence from the GATT to the new context. It emphasized the conditions of competition are the touchstone for national treatment, and both *de jure* and *de facto* tilting of those conditions against foreign merchandise is unlawful under GATT. The Appellate Body provided language on which to base an argument under Article 2:1 of the *TBT Agreement* that *de facto* discrimination created by a technical measure against a foreign product could be justified by a legitimate purpose. That is, even if a technical regulation modifies the conditions of competition, if that regulation has a legitimate purpose and is administered in an even-handed way, then it does not violate Article 2:1. Yet, even this suggestion—of more "wiggle room" under Article 2:1 than Article III:4—is dubious.

Notably, however, the final issue in the 2012 *US—Clove Cigarettes* was one of transparency. The Appellate Body might have looked to GATT Article X. It did not. Even more notable was the outcry in the United States against the Appellate Body decision. Congressman Henry Waxman (Democrat-California) called the Appellate Body decision "wrong on the merits and wrong in its interference with our efforts to protect the American public from tobacco's devastating effects."[401]

After all, the 2009 *FSPTCA* did not make any distinction as to the country of origin or manufacture of a cigarette. Lori Wallach, Director of the Global Trade Watch of Public Citizen, a non-governmental organization, intoned that "[t]he Obama Administration and Congress must not bow to yet another ruling from a so-called trade agreement tribunal demanding that the U.S. get rid of yet another important health or environmental policy."[402]

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[400] *Id.* (internal quotation marks omitted).
[401] *Id.*
[402] *Id.*

D. WTO *TBT Agreement*, Continued: *United States—Tuna II (Mexico)*

1. Citation

Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012) (*adopted* June 12, 2012).[403]

2. Facts

Before a WTO Panel, Mexico complained three American measures concerning the importation, marketing, and sale of tuna and tuna products violated GATT Articles I:1 (the most favored nation, or MFN, clause) and III:4 (national treatment), as well as Articles 2:1, 2:2 and 2:4 of the *Agreement on Technical Barriers to Trade* (*TBT Agreement*).[404] The dispute actually is a longstanding one between the United States and not only Mexico, but also the European Union. As discussed at a separate time, in 1992 and 1994, GATT panels opined on the legitimacy under GATT Article XX of a primary and secondary boycott of foreign tuna harvested with the purse seine method because that method kills dolphins. Neither GATT Panel report was adopted.[405]

The 1992 and 1994 cases are known, respectively, as *Tuna Dolphin I* and *II*. That makes the common name for the 2012 case, "*Tuna Dolphin II*," or "*Tuna II*," misleading.[406] It actually is the third case on topic (albeit the issues are different). In any event, in the *US—Tuna II (Mexico)* case, the measures at issue establish the conditions for the use of a "dolphin-safe" label on tuna products.[407] The three measures are: [408]

(1) The 1990 *Dolphin Protection Consumer Information Act* (*DPCIA*), codified in the United States Code (U.S.C.) at Title 16, Section

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403 Hereinafter Appellate Body Report, *US—Tuna II (Mexico)*. The Panel report in this case is Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) (*adopted as modified* June 13, 2012) [hereinafter Panel Report, *US—Tuna II (Mexico)*].

On appeal and at the panel stage, the following WTO Members were third-party participants: Argentina, Australia, Brazil, Canada, China, Ecuador, European Union, Guatemala, Japan, Korea, New Zealand, Taiwan, Thailand, Turkey, and Venezuela.

404 *Id.* ¶ 3.1.

405 For excerpts from these reports, see RAJ BHALA, INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE ch. 43 (3d ed. 2008).

406 The confusing shorthand appears attributable to the WTO. *See United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WORLD TRADE ORG. (June 13, 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

407 *See* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 172.

408 *See* Panel Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 2.1.

1385. The *DPCIA* regulations are in the Code of Federal Regulations (C.F.R.), Title 50, Section 216;

(2) The Code of Federal Regulations, Title 50, Sections 216:91 and 216:92, also known as the *dolphin-safe labeling standards* and *dolphin-safe requirements for tuna harvested in the ETP* [*Eastern Tropical Pacific Ocean*] *by large purse seine vessels* (implementing regulations); and

(3) A ruling from the United States Court of Appeals for the Ninth Circuit in the 2007 case, *Earth Island Institute v. Hogarth* (*Hogarth*).

Both the Panel and Appellate Body refer to the three measures collectively as "the measure at issue," the "U.S. measure," or "the U.S. 'dolphin-safe' labeling provisions."[409] These three measures:

> [C]ondition eligibility for a "dolphin-safe" label upon certain documentary evidence that varies depending on the area where the tuna contained in the tuna product is harvested and the type of vessel and fishing method by which it is harvested. In particular, tuna caught by "setting on" dolphins is currently not eligible for a "dolphin-safe" label in the United States, regardless of whether this fishing method is used inside or outside the Eastern Tropical Pacific Ocean.[410]

While the American measure stipulates "dolphin-safe" labeling requirements, it does not require a "dolphin-safe" label to import or sell tuna products in the United States.[411]

The measure addresses five types of fisheries.[412] Depending on its classification, a fishery may be required to obtain one to two certifications before it may receive a "dolphin-safe" label.[413] The two types of certifications are:

> (1) [A] certification that no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught;
> (2) [A] certification that no dolphins were killed or seriously injured in the nets in which the tuna were caught.[414]

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[409] *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 172; Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007).

[410] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 172.

[411] *Id.*

[412] *Id.* ¶ 173.

[413] *Id.* ¶ 174.

[414] *Id.*

The captain of the vessel, or the captain and an observer provide the certifications.[415] The *DCPIA* prohibits "tuna products containing tuna fished with driftnets on the high seas" from achieving a "dolphin-safe" label.[416]

Certification is slightly different for "tuna harvested by large purse seine vessels in the ETP."[417] The United States Secretary of Commerce must determine whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the ETP.[418]

If the Secretary makes a negative finding, she issues a certification stating "no dolphins were killed or seriously injured during the sets, i.e., nets, in which the tuna were caught," and the tuna is eligible for a "dolphin-safe" label.[419] But if the Secretary makes a positive finding, then the producer must obtain additional certification that "no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins" in order to be eligible for a "dolphin-safe" label.[420] The *DPCIA* also allows tuna products to obtain an official or an alternative "dolphin safe" label.[421] The alternative labels have additional requirements to the official label.[422]

To summarize, the controversial American measure was this: no "dolphin safe" label could be affixed to a package of tuna unless one of two certifications were obtained. The first type was negative determination from the government, which meant that the government itself agreed no purse seine nets were used and no dolphins were killed. The second type was a kind of exception to the first type. If the government rendered a positive finding, then the producer could try to show that in fact, with respect to a particular tuna shipment, purse seine nets were not used, and dolphins were not harmed.

3. Overview of Three Appellate Issues

The three principal issues on appeal concerned Articles 2:1, 2:2, and 2:4 of the *TBT Agreement*.[423] Mexico won on Article 2:1, but the United States prevailed on Articles 2:2 and 2:4.

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415 *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 174.
416 *Id.*
417 *Id.* ¶ 175.
418 *Id.*
419 *Id.*
420 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 175.
421 *Id.* ¶ 177.
422 *Id.*
423 *See id.* ¶ 171. In addition to the three principal issues, the United States unsuccessfully claimed the Panel erred in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1:1 to the *TBT Agreement*. *Id.* (The Americans hoped that if they could win, i.e., if the measure were not a "technical regulation," then it would not be subject to the disciplines of the *TBT Agreement*, thus stealing all thunder from the Mexican claims.) After evaluating the measure at issue, and

First, on appeal, Mexico successfully argued that "the Panel erred in its interpretation and application of the phrase 'treatment no less favorable' in Article 2:1 of the *TBT Agreement*."[424] The Appellate Body agreed and held the American measure violates Article 2:1, i.e., that it is inconsistent with the *TBT Agreement* MFN and national treatment disciplines.[425]

Second, on appeal, the United States successfully argued the Panel incorrectly found its measure violated Article 2:2 of the *TBT Agreement*.[426] In particular, the United States rejected the finding that the American measure is "more trade restrictive than necessary to fulfill the legitimate objectives pursued by the United States."[427] The Appellate Body agreed with the United States—it was not unnecessarily trade restrictive in view of the policy purposes it served. Accordingly, the Appellate Body reversed the holding by the Panel.[428]

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citing its precedents in the 2001 *EC—Asbestos* and 2002 *EC—Sardines* cases, the Appellate Body upheld that the Panel holding that the measure "is a 'technical regulation' within the meaning of Annex 1:1." *Id.* ¶¶ 183-99; *see also* Appellate Body Report, *EC—Asbestos*, *supra* note 56; Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002) (*adopted* Oct. 23, 2002) [hereinafter Appellate Body Report, *EC—Sardines*].

Separately, Mexico asserted that the Panel violated Article 11 of the *DSU* in deciding to exercise judicial economy with respect to Mexico's claims under GATT Articles I:1 and III:4. *Id.* ¶ 407. The Appellate Body agreed and stated, "[P]anels may refrain from ruling on every claim as long as it does not lead to a 'partial resolution of the matter.'" *Id.* ¶ 405 (quoting Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005) (*adopted* Mar. 21, 2005) [hereinafter Appellate Body Report, *US—Upland Cotton*]).

Particularly given, the Panel found the measures were "technical regulations," which could be overturned on appeal, but the Appellate Body said the Panel should have "made additional findings" under GATT Articles I:1 and III:4. *Id.* ¶ 405. Mexico asked the Appellate Body to rule on GATT Articles I:1 and III:4 if the Appellate Body held that the measure violated Article 2.1 of the *TBT Agreement*. However, the Appellate Body refrained from issuing such a ruling because it already found the U.S. measure violated Article 21. *Id.* ¶ 406. In other words, Mexico's effort to "pile it on" in terms of establishing multiple violations of the same measure failed.

424 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 171.

425 *See id.* ¶ 407.

426 *Id.* ¶ 171.

427 *Id.* ¶ 301.

428 *See id.* ¶ 407. Mexico also lodged, and subsequently lost, two conditional appeals in the event the Appellate Body found the American measure did not violate Article 2:2 of the *TBT Agreement*. *See id.* ¶¶ 334-41. The Appellate Body quickly addressed the conditional appeals and:

> [R]eject[ed] Mexico's claim that the Panel erred in finding the United States' dolphin protection objective to be a legitimate objective and also reject[ed] Mexico's request to find the measure at issue inconsistent with Article 2:2 of the *TBT Agreement* based on the Panel's finding that the measure did not entirely fulfill its objectives.

Finally, the United States successfully appealed the decision by the Panel that the American measure violates Article 2:4 of the *TBT Agreement*.[429] The Appellate Body agreed with the American argument that the *Agreement on the International Dolphin Conservation Program* (*AIDCP*) does not qualify as an "international standardizing body" under Article 2:4, and therefore, the *AIDCP* standard is not a "relevant international standard" under the *TBT Agreement*. Thus, in the end, the Appellate Body found the American measure violates Article 2:1, but not Articles 2:2 and 2:4, of the *TBT Agreement*.

4. Issue 1: MFN, National Treatment, and *TBT Agreement* Article 2:1?

The Panel held that the American measure does not violate Article 2:1.[430] On appeal, Mexico argued the Panel incorrectly interpreted and applied Article 2:1 of the *TBT Agreement*.[431] In particular, Mexico disagreed with the finding by the Panel that the American measure does not afford less favorable treatment to Mexican tuna products.[432]

Article 2:1 of the *TBT Agreement* states, with emphasis added:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favorable* than that accorded to like products of national origin and to like products originating in any other country.

Referring to its statements in the 2012 *US—Clove Cigarettes* report, the Appellate Body said a complainant must establish three elements to show a measure violates Article 2:1.[433] Those three required elements are:

> 1) [T]hat the measure at issue constitutes a "technical regulation" within the meaning of Annex 1:1;
> 2) [T]hat the imported products must be like the domestic product and the products of other origins; and
> 3) [T]hat the treatment accorded to imported products must be less favorable than that accorded to like domestic products and like products from other countries.[434]

Id. ¶ 342.

[429] *Id.* ¶ 407.

[430] *See id.* ¶ 200.

[431] *See id.*

[432] *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 202.

[433] *See id.*; Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 87.

[434] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 202.

In its appeal, Mexico only disputed the third element, "treatment no less favorable."[435]

Based on its assessment of the text, the Panel said a violation occurs if the technical regulation disadvantages imported products.[436] However, the Panel noted that "[d]istinctions in treatment must not be designed or applied to the detriment of imports or imports of certain origins."[437] The Panel also said the Preamble to the *TBT Agreement* prohibits technical regulations from being "applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail."[438]

The Panel identified the distinction created by the American measure as one between the treatment of tuna products containing tuna caught by setting on dolphins and the treatment of tuna products containing tuna caught by other fishing methods.[439] According to the Panel, "this distinction, in itself, does not place 'Mexican tuna products at a disadvantage compared to U.S. and other imported tuna products.'"[440] In other words, the disputed measure does not create a *de jure* violation. In turn, reasoned the Panel, Mexican tuna products are not afforded less favorable treatment because "any fleet" in the world must comply.[441]

Moreover, the Panel said, even if tuna of Mexican origin might more likely not be eligible for the label because it would be caught in the ETP by setting on dolphins, this would not necessarily mean that products processed in Mexico would be less likely to qualify for the label.[442] The Panel asserted that the Mexican producers are free to produce their product using "tuna from other origins meeting the requirements of the label."[443] Note this assertion appears to resurrect the controversial distinction between a product and how it is produced.

The Panel also determined that the American measure did not represent a *de facto* violation. The Panel found:

> [T]he impact of the U.S. dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices. In this context, any particular adverse impact felt by Mexican tuna products on the U.S. market is, in our view, primarily the result of "factors or circumstances unrelated to the foreign origin

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435 *Id.* ¶ 202.
436 *Id.* ¶ 203.
437 *Id.* ¶ 204.
438 *Id.* (emphasis added).
439 *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 205.
440 *Id.*
441 *Id.*
442 *Id.*
443 *Id.*

> of the product," including the choices made by Mexico's own fishing fleet and canners.[444]

Therefore, the Panel held the American measure does not violate Article 2:1 of the *TBT Agreement* because the requirements do not afford less favorable treatment to Mexican tuna products.[445]

In reviewing the work of the Panel, the Appellate Body first considered the interpretation of "treatment no less favorable" under Article 2:1 of the *TBT Agreement*. Then it applied its interpretation to the disputed measure.

a. Interpretation of "Treatment No Less Favorable"

By overturning the American victory at the Panel stage on the *TBT Agreement* Article 2:1 issue, the Appellate Body found the Panel indeed had erred in its "approach."[446] Why?

The Appellate Body began by acknowledging the "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods."[447] The Appellate Body said the Preamble to the *TBT Agreement* "informs the meaning of Article 2:1," but, contrary to what Mexico suggested, the Preamble does not set out a "test that is separate and independent from Article 2:1."[448]

Significantly, the Appellate Body emphasized its familiar "conditions of competition test," drawn initially from GATT Article III:4 and extended to the *TBT Agreement*:

> [A] determination of whether imported products are accorded "less favorable treatment" within the meaning of Article 2:1 of the *TBT Agreement* calls for an analysis of whether the contested measure *modifies the conditions of competition to the detriment of imported products*. Contrary to what the Panel appears to have assumed, the fact that a complainant could comply or could have complied with the conditions imposed by a contested measure does not mean that the challenged measure is therefore consistent with Article 2:1 of the *TBT Agreement*.[449]

Regarding the approach by the Panel, the Appellate Body said:

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[444] *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 207, 224.
[445] *Id.*
[446] *Id.* ¶ 227.
[447] *Id.* ¶ 211.
[448] *Id.* ¶ 219.
[449] *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 221 (emphasis added).

> [T]he Panel seems to have assumed, incorrectly in our view, that regulatory distinctions that are based on different "fishing methods" or "geographical location" rather than national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2:1 of the *TBT Agreement*. The Panel's approach is difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2:1 even when it is origin-neutral on its face.[450]

Relying on its statements in the 2012 *US—Clove Cigarettes* case, the Appellate Body reiterated:

> [I]n making a determination of whether a measure is *de facto* inconsistent with Article 2:1, "a panel must carefully scrutinize the particular circumstances of the case, that is, the *design, architecture, revealing structure, operation, and application* of the technical regulation at issue, and, in particular, whether that technical regulation is *even-handed*."[451]

Referring again to *US—Clove Cigarettes*, the Appellate Body reiterated:

> [T]echnical regulations inherently establish distinctions between products according to their characteristics or their related processes and production methods. Thus, Article 2:1 should not be read to mean that any distinction would *per se* accord "less favorable treatment" within the meaning of that provision. At the same time, we have noted that any *adverse impact on competitive opportunities* for imported products *vis-à-vis* like domestic products that is caused by a technical regulation may potentially be relevant for an assessment of "less favorable treatment."[452]

In effect, the Appellate Body scolded the Panel for not following the jurisprudence it had developed that "treatment no less favorable" translates to a "conditions of competition" test, and that test is implemented by looking at the design, architecture, structure, operation, application, and most of all, even-handedness, of the technical regulation at issue. It was wrong of the Panel to depart from this jurisprudence and create its own test under which the American measure could pass muster.

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[450] *Id.* ¶ 225 (alteration in original).

[451] *Id.* (quoting Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 182).

[452] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 226 (emphasis added); *see also* Appellate Body Report, *US—Clove Cigarettes, supra* note 234.

However, to be fair to the Panel, the chronology of the *US—Clove Cigarettes* and *US—Tuna II (Mexico)* cases should be noted. They came in quick succession, within a few months of each other, and thus making it difficult for any Panel to absorb much less identify the body of precedent being developed by the Appellate Body.

b. Application of "Treatment No Less Favorable"

After offering an interpretation of Article 2:1, the Appellate Body conducted a two-part analysis as to whether the American measure afforded less favorable treatment to Mexican tuna producers.[453] First, the Appellate Body looked at "whether the measure at issue *modifies the conditions of competition* in the U.S. market to the detriment of Mexican tuna products as compared to U.S. tuna products or tuna products originating in any other Member."[454] Second, the Appellate Body looked at "whether any *detrimental impact reflects discrimination* against the Mexican tuna products."[455] In the end, Mexico won its appeal.

Just as it had in *US—Clove Cigarettes*, the assessment by the Appellate Body relied on an analysis of the conditions of competition. The Appellate Body identified several undisputed facts, including that the "'dolphin-safe' label has 'significant commercial value on the U.S. market for tuna products'" and "constitutes an 'advantage' on the U.S. market."[456] According to the Appellate Body, the undisputed Panel findings clearly establish the lack of access to the "dolphin-safe" label has a detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market.[457]

The Appellate Body found the disadvantage came from the American measure itself, which "modified the conditions of competition in the market to the detriment of Mexican tuna products."[458] Relying on the 2001 *Korea—Beef* case, the Appellate Body noted:

> The fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the *TBT Agreement*, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.[459]

After establishing the American measure altered the conditions of competition in the American market, the Appellate Body began the second part of

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[453] *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶¶ 228, 231.
[454] *Id.* ¶ 231 (emphasis added).
[455] *Id.* (emphasis added).
[456] *Id.* ¶¶ 233-34.
[457] *Id.* ¶ 235.
[458] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 239.
[459] *Id.*; *see also* Appellate Body Report *Korea—Beef*, *supra* note 318.

its analysis, whether the "detrimental impact" to Mexican tuna products "reflects discrimination."[460]

Again, the Appellate Body looked at a number of uncontested facts found by the Panel.[461] Referencing its 2003 *Japan—Apples* report, the Appellate Body said the burden was on the United States to prove the challenged measure is "'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the ocean."[462] In this demonstration, the United States failed.[463]

The United States unsuccessfully asserted its measure did not violate Article 2:1 because there was a "clear relationship between the objectives of the measure and the conditions under which the tuna products may be labeled 'dolphin-safe.'"[464] However, the Appellate Body agreed with the following statement by the Panel:

> We [the Panel] fail to see . . . how the cost of demonstrating compliance with the same requirement (i.e., that no dolphin was killed or seriously injured) would justify that no such requirement be imposed with respect to the use of an official label [i.e., a dolphin-safe label that follows from a negative determination by the Secretary of Commerce], while it would be imposed for the same tuna caught in the same conditions in the same fisheries, in the case of use of an alternative label [i.e., a dolphin-safe label that follows from a producer rebutting a positive determination by the Secretary of Commerce]. It is also not clear to us what the imposition of this additional requirement means in practice in respect of the alternative label, if it is assumed that it cannot be verified and that this is a reason not to impose it for the use of the official label.[465]

The Appellate Body determined the American measure was not "even-handed." The Appellate Body found:

> [T]he United States has not demonstrated that the detrimental impact of the U.S. measure on Mexican tuna products stems

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[460] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 240.

[461] *See id.* ¶ 298. The United States also claimed that the Panel violated Article 11 of the *DSU* because it did not correctly weigh certain evidence, and made several incorrect factual findings. *See id*. ¶¶ 253-81. The Appellate Body found the Panel did not violate Article 11 of the *DSU* and upheld the findings by the Panel. *See id*. ¶ 298. The Appellate Body utilized those finding in its analysis.

[462] *Id.* ¶ 283; *see also* 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*].

[463] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 297.

[464] *Id.* ¶ 282.

[465] *Id.* ¶ 294 (quoting Panel Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 7.541).

> exclusively from a legitimate regulatory distinction. We note, in particular, that the U.S. measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does "not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP."[466]

In sum, the Appellate Body agreed Mexico had "established a *prima facie* case," which the United States was unable to rebut.[467]

Next, the Appellate Body held (1) the American measure "modifies the competitive conditions in the U.S. market to the detriment of Mexican tuna products," and (2) the United States failed to "demonstrate[] that the detrimental impact of the U.S. measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction."[468] Specifically, the Appellate Body held that the U.S. "dolphin-safe" labeling provisions provide "less favorable treatment" to Mexican tuna products than that accorded to tuna products of the U.S. and tuna products originating in other countries, and therefore, they are inconsistent with Article 2:1 of the *TBT Agreement*.[469]

Here, then, is the central finding on national treatment. It is one that manifestly extends the jurisprudential test developed by the Appellate Body under GATT Article III:4 to the context of TBTs.

But the extension of GATT Article III:4 jurisprudence to interpretation of Article 2:1 of the *TBT Agreement* is not an algorithmic one. In a GATT national treatment case, if a measure creates an un-level competitive playing field, then it violates Article III:4. The purpose of that measure is irrelevant. But in a TBT case, if a technical regulation un-levels the playing field, that regulation is not automatically illegal. It might be judged lawful, depending on the legitimacy of its purpose and the even-handedness of its administration.

5. Issue 2: More Trade Restrictive than Necessary Under *TBT Agreement* Article 2:2?

The United States appealed the finding by the Panel that the American measure violates Article 2:2 of the *TBT Agreement*. Article 2:2 of the *TBT Agreement* states, with emphasis added:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating

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466 *Id.* ¶ 297 (quoting Panel Report, *US—Tuna II (Mexico)*, *supra* note 403). The Appellate Body also noted "the measure at issue does address driftnet fishing in the high seas." *Id.* ¶ 297.

467 *Id.* ¶ 298.

468 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶¶ 240, 297.

469 *Id.* ¶ 299.

> unnecessary obstacles to international trade. For this purpose, *technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective*, taking account of the risks *non-fulfillment* would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, *animal or plant life or health, or the environment*. In assessing such risks, relevant elements of consideration are, *inter alia: available scientific and technical information, related processing technology or intended end-uses of products*.

The Panel held that the measure is more trade restrictive than necessary to fulfill the legitimate objectives pursued by the United States, taking account of the risks non-fulfillment would create.[470]

In reaching its decision, the Panel appreciated that the objectives of the measure are to prevent consumers from misleading or deceitful information about the impact of their tuna products on dolphins ("consumer information objective"), and to contribute to the protection of dolphins by discouraging certain fishing practices ("dolphin protection objective").[471] The Panel said these objectives are "legitimate" because they prevent deceptive practices and protect animal life or health or the environment within the meaning of Article 2:2 of the *TBT Agreement*.[472]

To determine whether the measure was "more trade restrictive than necessary to achieve the United States' objectives," the Panel looked at "the manner in which and the extent to which the measures at issue [fulfill] their objectives."[473] Then, the Panel "compare[d] this [current measure] with a potential less trade restrictive measure."[474] The Panel determined the measure only partially fulfilled American objectives.[475] The Panel said the "dolphin-safe" label may cause consumers to mistakenly believe no dolphins were killed or harmed in the making of the product.[476] Furthermore, the Panel said the measure was capable of achieving its dolphin protection objective only in relation to the practices of setting on dolphins and using high seas driftnets.[477]

The Panel proposed allowing compliance with the "dolphin-safe" labeling requirements of the *AIDCP* in conjunction with the existing U.S. "dolphin-safe" label.[478] (Recall the *AIDCP* is an international label, that is, a certification based on standards set by an international entity, albeit one that the

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470 *Id.* ¶ 302.
471 *Id.* ¶ 301 (quoting Panel Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 303).
472 *See id.*
473 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 304.
474 *Id.*
475 *Id.* ¶¶ 305-06.
476 *Id.*
477 *Id.* ¶ 306.
478 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 305.

Appellate Body found does not satisfy the requirements to be an international standard setting body under Article 2:4 of the *TBT Agreement*.) In effect, Mexico argued that it should be allowed to use the *AIDCP* standard, at least alongside the American one, because it knew it could qualify for the international standard.

The Panel agreed with Mexico. The Panel found the alternative measure proposed by Mexico was "a reasonably available less trade-restrictive alternative that would achieve the [consumer information and] dolphin protection objective[s] at the same level as the measure at issue."[479] Therefore, the Panel said the American measure is "more trade restrictive than necessary to fulfill its legitimate objectives."[480] As a result, the Panel declared the American measure in violation of Article 2:2.

On appeal, the United States argued the Panel erred in its application of Article 2:2.[481] In particular, the United States said the Panel incorrectly found the alternative measure proposed by Mexico "provides a reasonably available, less trade restrictive means of achieving the objectives pursued by the United States at its chosen level."[482] According to the United States, the *AIDCP* label "allows the [harmful] practice of setting on dolphins to catch tuna" and fails to address risks to dolphins outside the ETP, thereby "frustrat[ing] the dolphin protection objective."[483] The United States also argued having two different labels with nearly identical requirements would merely confuse consumers, thereby frustrating the "consumer information objective."[484]

a. Interpretation of *TBT Agreement* Article 2:2

Before turning to whether the Panel erred in its application of Article 2:2, the Appellate Body assessed certain elements of Article 2:2 that relate to whether a technical regulation is "more trade-restrictive than necessary."[485] The Appellate Body focused on interpreting several words and phrases in Article 2:2. In particular, it looked at the meanings of: "legitimate objective"; "fulfillment" with respect to the phrase "fulfill a legitimate objective"; "unnecessary obstacles to international trade" and "not more trade-restrictive than necessary"; and "taking account of the risks non-fulfillment would create."[486] The Appellate Body said:

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479 *Id.* ¶ 307.

480 *Id.* ¶ 308.

481 *See id.* ¶ 301. The United States also accused the Panel of not appropriately weighting certain evidence, and thus of violating its obligations under Article 11 of the *DSU*. The Appellate Body did not address this claim because it had found the Panel erred in its analysis under Article 2.2. *Id.* ¶¶ 332-33. As a result of its finding, the Appellate Body determined the U.S. measure does not violate Article 2.2 of the *TBT Agreement*. *Id.*

482 *Id.* ¶ 324.

483 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 324.

484 *Id.* ¶ 327.

485 *Id.* ¶¶ 312, 322.

486 *Id.*

> [A]n assessment of whether a technical regulation is "more trade-restrictive than necessary" within the meaning of Article 2:2 of the *TBT Agreement* involves an evaluation of a number of factors. A panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure.[487]

Regrettably, this statement by the Appellate Body is circular: item (ii) essentially lists as a criterion one that the Appellate Body seeks to define.

Additionally, the Appellate Body stipulated: "In most cases, a comparison of the challenged measure and the possible alternative measures should be undertaken."[488] The Appellate Body identified two rather obvious occasions when this comparison is unnecessary:

> (1) [T]he challenged measure is not trade restrictive; or
> (2) [T]he challenged measure is trade restrictive, but does not have a legitimate objective.[489]

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[487] *Id.* ¶ 322.

[488] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 322.

[489] *See id.* Relatedly, the Appellate Body explained the burden of proof is on the complainant to show the measure at issue "creates an unnecessary obstacle to trade." *Id.* ¶ 323. A complainant establishes a *prima facie* case when it shows the measure at issue:

> [I]s more trade restrictive than necessary to achieve the contribution it makes to the legitimate objectives, taking account of the risks non-fulfillment would create. [Furthermore], a complainant may also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.

Id.

Showing the measure at issue is not "more trade restrictive than necessary" may offer a sufficient rebuttal to a *prima facie* case. *Id.* To make such a showing, the respondent may show:

> [T]he alternative measure identified by the complainant is not, in fact, "reasonably available," is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective.

Id.

In the case at bar, the comparison was necessary. So, the Appellate Body turned to the issue of whether the Panel correctly applied Article 2:2 to the American measure.

b. Application of *TBT Agreement* Article 2:2

The Appellate Body affirmed the Panel was correct to compare the challenged and proposed alternative measures.[490] But the Appellate Body identified several material errors in the comparison by the Panel.[491] As a result of those errors, the Appellate Body overturned the Panel's findings that the measure at issue is inconsistent with Article 2:2 of the *TBT Agreement*.[492]

First, the Appellate Body said the Panel should have compared the challenged measure with the proposed Mexican measure, which was the "*coexistence* of the AIDCP rules with the U.S. measure."[493] Instead, the Panel mistakenly compared the American measure with only the *AIDCP* measure.[494]

In addition, the Appellate Body advised: "[F]or tuna harvested inside the ETP, the Panel should have examined whether the labeling of tuna products complying with the requirements of the *AIDCP* label would achieve the United States' objectives to an equivalent degree as the measure at issue."[495] The Appellate Body reasoned the alternative measure Mexico proposed (coexistence of the international and American measures) allowed a "dolphin-safe" label for "tuna caught in the ETP by setting on dolphins . . . ."[496] As a result, the alternative measure "would allow more tuna harvested in conditions that adversely affect dolphins to be labeled 'dolphin-safe'" than does the challenged measure.[497] That result followed logically from the fact that the international, i.e., *AIDCP*, criteria for "dolphin safe" were less stringent than the American standards.

Therefore, the Appellate Body determined the alternative Mexican measure contributes to the consumer information and dolphin protection objectives "to a lesser degree" than the challenged measure.[498] Put more directly, the Mexican proposal would not fulfill the American policy goal. Accordingly, the Appellate Body reversed the Panel decision, holding that the American measure does not violate Article 2:2 of the *TBT Agreement*.[499]

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490 *See id.* ¶ 326.
491 *See id.* ¶ 328.
492 *Id.* ¶ 331.
493 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 328 (alteration in original).
494 *Id.*
495 *Id.* ¶ 330.
496 *Id.*
497 *Id.*
498 Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 330.
499 *See id.*

6. Issue 3: "International Standard" in *TBT Agreement* Article 2:4?

On appeal, the United States argued the Panel incorrectly determined the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2:4 of the *TBT Agreement*.[500] Article 2:4 of the *TBT Agreement* states, with emphasis added:

> Where technical regulations are required and relevant *international standards* exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the *fulfillment of the legitimate objectives pursued*, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

The Panel said an "international standard" is a "standard that is adopted by an international standardizing/standards organization and made available to the public."[501] The Panel defined "international standardizing organization" as "a legal or administrative entity based on the membership of other bodies or individuals that has an established constitution and its own administration, has recognized activities in standardization, and whose membership is open to the relevant national body of every country."[502]

Based in part on these definitions, the Panel determined: "[T]he *AIDCP* dolphin-safe definition and certification' constitute a 'standard,' that the *AIDCP* is an 'international standardizing organization,' and that the *AIDCP* standard was made available to the public."[503] The Panel finally determined the *AIDCP* standard is "relevant" under Article 2:4, and the United States should have based its technical regulations on the *AIDCP* pursuant to Article 2:4.[504] However, the Panel determined Mexico failed to carry its burden of proof, and the Panel ruled the American measure does not violate Article 2:4 of the *TBT Agreement*.

On appeal, the United States said the *AIDCP* is not an international standardizing organization.[505] The United States also asserted the "*AIDCP*

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[500] *See id.* ¶ 343. Mexico also appealed the finding by the Panel that Mexico failed to demonstrate that the AIDCP standard is an effective and appropriate means to fulfill the objectives pursued by the United States. *Id.* ¶ 347. The Appellate Body did not rule on this issue because it found the Panel incorrectly determined the AIDCP standard is a "relevant international standard" within the meaning of Article 2:4. *Id.* ¶ 400.

[501] *Id.,* ¶ 344 (quoting Panel Report, *US—Tuna II (Mexico), supra* note 403).

[502] *Id.*

[503] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 344.

[504] *See id.* ¶ 345 (quoting Panel Report, *US—Tuna II (Mexico), supra* note 403).

[505] *See id.* ¶ 343.

dolphin-safe definition and certification," or *AIDCP* standard, is not a "relevant international standard."[506] The Appellate Body stated:

> This question [of what is an "international standard" under the *TBT Agreement*] is important because, by virtue of Article 2:4, if a standard is found to constitute a "relevant international standard," WTO Members are *required* to use it, or its relevant parts, as a basis for their technical regulations, except when such standard would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued by the Member in question. Moreover, pursuant to Article 2:5 of the *TBT Agreement*, technical regulations that are in accordance with relevant international standards are *rebuttably presumed* not to create unnecessary obstacles to international trade.[507]

First, the Appellate Body looked up and regurgitated the meaning of the words "international standard" and other relevant terms used in the *TBT Agreement*. In doing so, it consumed an inordinate amount of paper in its report. However, the key point to keep in mind is why the definitions mattered. If the *AIDCP* is accredited as such, then the controversial American measure is in greater jeopardy than otherwise would be the case. That is because Article 2:4 of the *TBT Agreement* essentially mandates use of an international standards and calls for justifications for deviations from them.[508] Following its extended definitional tour, the Appellate Body turned to the authentic issues, namely, whether the *AIDCP* is an international organization, and whether the *AIDCP* standard constitutes a "relevant international standard."

a. Interpretation of "International Standard" Under *TBT Agreement*

Neither the core text of nor annexes to the *TBT Agreement* actually define "international standard." So, the Appellate Body disaggregated the term, checking the definitions of "standard" and "international body or system" in Annexes 1:2 and 1:4 to the *TBT Agreement*, respectively.[509] Annex 1:2 of the *TBT Agreement*, with emphasis added, defines "standard" as a:

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506 *Id.*

507 *Id.* ¶ 348 (emphasis added). The Appellate Body noted the United States and a number of third-party participants, including Japan and Brazil, emphasized this point.

508 Arguably, a second reason is that if the *AIDCP* is accredited as an international standard-setting body, then the alternative labeling requirement proposed by Mexico has gravitas. If not, that alternative might not be taken as seriously.

509 *See* Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 350-52.

> Document approved by a recognized *body*, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.
>
> *Explanatory note*
>
> The terms as defined in *ISO/IEC Guide 2* cover products, processes and services. This *Agreement* deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by *ISO/IEC Guide 2* may be mandatory or voluntary. For the purpose of this *Agreement* standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This *Agreement* covers also documents that are not based on consensus.

Annex 1:4 of the *TBT Agreement* defines "international body or system," with emphasis added, as a "[*b*]*ody* or system whose membership is open to the relevant *bodies* of at least all Members."

The Appellate Body noted the introductory clause of Annex 1 to the *TBT Agreement* says the definitions of the terms in the *TBT Agreement* follow the definitions laid out in the ISO/IEC Guide 2: General Terms and Their Definitions Concerning Standardization and Related Activities (*ISO/IEC Guide 2:1991*).[510] So, the Appellate Body turned to the relevant definitions in the guide.

Here, the Appellate Body found a definition for "international standard" as a "standard that is adopted by an international standardizing/standards organization and made available to the public."[511] Based on this definition, the Appellate Body said the "characteristics of the entity approving a standard," rather than "the subject matter of the standard," are "material to the determination of whether the standard is 'international.'"[512]

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[510] *See id.* ¶ 353 (citing International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 2, General Terms and their Definitions Concerning Standardization and Related Activities (6th ed. 1991) [hereinafter *ISO/IEC Guide 2: 1991*]).

[511] *Id.* ¶ 353.

[512] *Id.* The Appellate Body commented that "there may be additional procedural conditions that have to be met for a standard to be considered 'international,'" however, the Appellate Body refrained from explaining those procedural conditions because of the narrow scope of the appeal. *Id.*

However, Annex 1 to the *TBT Agreement* also states the particular definitions listed in the *TBT Agreement* "prevail to the extent they depart from the definitions set out in the *ISO/IEC Guide 2: 1991*." Therefore, the Appellate Body cautioned, it is important to check carefully the definitions in the *TBT Agreement* and the *ISO/IEC Guide 2: 1991* to determine where differences occur.[513] The Appellate Body looked at what "type of entity may approve an 'international' standard" under the *TBT Agreement*.[514] Here, it found a difference in the definitions under the *TBT Agreement* and the *ISO/IEC Guide 2: 1991*.

Annexes 1:2 and 1:4 of the *TBT Agreement* refers to the type of entity that may approve an international standard as a "body," while the *ISO/IEC Guide 2: 1991* references an "organization."[515] The words "body" and "organization" have different meanings under the *ISO/IEC Guide 2: 1991*. The *ISO/IEC Guide 2: 1991* states, "[A] '*body*' is a 'legal or administrative entity that has specific tasks and composition,' whereas an '*organization*' is a 'body that is based on the membership of other bodies or individuals and has an established constitution and its own administration.'"[516]

Given these different definitions, the Appellate Body asked whether, under the *TBT Agreement*, the entity that may approve an international standard is a "body" or an "organization." The Appellate Body determined that under the *TBT Agreement* "'international' standards are adopted by 'bodies,' which may, but need not necessarily, be 'organizations.'"[517] In reaching this determination, the Appellate Body found it particularly telling that Annexes 1:2 and 1:4 omit any reference to the word "organization."[518] The Appellate Body further substantiated its finding by relying on the context provided in other Articles and Annexes to the *TBT Agreement*, which also only refer to "body."[519] Recalling the definitions in the *TBT Agreement* prevail over those in the *ISO/IEC Guide 2: 1991*, the Appellate Body found that "in order to constitute an 'international standard,' a standard has to be adopted by an 'international standardizing *body*' for the purposes of the *TBT Agreement*."[520]

Then the Appellate Body looked at other characteristics of an international body that may adopt an international standard.[521] The Appellate Body focused on three features:

(1) The body must be an "international standardizing or standards body";
(2) The body must have "recognized activities in standardization"; and

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[513] *See id.* ¶ 354.
[514] Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 355.
[515] *See id.* ¶¶ 355-56.
[516] *Id.* ¶ 355 (quoting *ISO/IEC Guide 2: 1991*, *supra* note 510) (emphasis added).
[517] *Id.* ¶ 356.
[518] *Id.*
[519] *See* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 356.
[520] *Id.*
[521] *Id.* ¶ 357.

> (3) The membership of the body must be "open."

With respect to the first feature, the Appellate Body looked at what it means to be a "standardizing body."[522] The Appellate Body defined "standardizing body" and "standards body" pursuant to the *ISO/IEC Guide 2: 1991*:

> "[*S*]*tandardizing body*" is defined as a "body that has *recognized* activities in standardization," whereas a "*standards body*" is a "standardizing body *recognized* at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."[523]

The Appellate Body focused on the requirement of "recognized activities in standardization."[524] It found this definition of "standardizing body" "does not conflict," but instead "adds to and complements" the definition of "standard" in the *TBT Agreement*.[525]

The Appellate Body also looked up "international" and "international body in the *ISO/IEC Guide 2:1991* and the *TBT Agreement* and combined components from each definition to create a "holistic" definition of "international standardizing body."[526] The Appellate Body determined:

> [A] required element of the definition of an "international" standard for the purposes of the *TBT Agreement* is the approval of the standard by an "*international standardizing body*," that is, a body that has recognized activities in standardization and whose membership is *open* to the relevant bodies of at least all Members.[527]

The second characteristic of an international standardizing body is it must have "activities in standardization," and those activities must be "recognized."[528]

Predictably, the Appellate Body looked at the words "activity" and "recognized" in the *Shorter Oxford English Dictionary*.[529] Based on those definitions, the Appellate Body said an international body merely needs to be active in standardization, and it noted the term "recognized" has "factual and

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522 *Id.*
523 *Id.* (quoting *ISO/IEC Guide 2: 1991*, *supra* note 510) (emphasis added).
524 Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 357.
525 *Id.*
526 *Id.* ¶ 359.
527 *Id.* (emphasis added).
528 *Id.* ¶ 360-61.
529 *See* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶¶ 360-61 (referencing 1 SHORTER OXFORD ENGLISH DICTIONARY 23 (William R. Trumble & Angus Stevenson eds., 6th ed. 2007)).

normative dimension[s]."[530] The Appellate Body found the *ISO/IEC Guide 2: 1991* defines "standardization" as "the activity of establishing, with regard to actual or potential problems, provisions for common and repeated use . . . ."[531] The *TBT Agreement* defines the word "provisions" as a "document . . . that provides . . . rules, guidelines or characteristics for products . . . ."[532] The Appellate Body said, based on its definition in the *ISO/IEC Guide 2: 1991*, a "standardizing body":

> [D]oes not need to have standardization as its principal function, or even as one of its principal functions. At the same time, we note that the factual dimension of the concept of "recognition" would appear to require, at a minimum, that WTO Members are aware, or have reason to expect, that the international body in question is engaged in standardization activities.[533]

The Appellate Body then answered the question of who needs to recognize a standardizing body's activities. According to the Appellate Body, relevant evidence includes recognition by WTO members and "national standardizing bodies."[534]

Finally, the Appellate Body examined the last feature of the international standardizing body. According to the Appellate Body, its membership must be unrestricted.[535] At the least, membership in the standardizing body should be open to all WTO Members.[536]

The Appellate Body noted that before the Panel, both Parties, and some third parties, referred to the *TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the Agreement* (*TBT Committee Decision*).[537] The *TBT Committee Decision* "sets out principles and procedures that standardizing bodies should observe when developing international standards."[538] The Panel took into account the *TBT Committee Decision*, but it did not explicitly comment on the *Decision's* legal status.[539] The Panel did briefly reference its own statements in the 2002 *EC—Sardines* case: "[T]he *TBT*

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530 *Id.*

531 *Id.* ¶ 360.

532 *Id.*

533 *Id.* ¶ 362.

534 Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 363.

535 *See id.* ¶ 364.

536 *See id.*

537 *See id.* ¶ 366-68 (referring to Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, *in* Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, at 46-48, June 9, 2011, G/TBT/1/Rev.10).

538 *Id.* ¶ 366.

539 Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 370.

Committee Decision 'is a policy statement of preference and not the controlling provision in interpreting the expression relevant international standard as set out in Article 2:4 of the *TBT Agreement*.'"[540]

The Appellate Body decided it needed to "'clarify' the provisions of the covered agreements" pursuant to Article 3:2 of the *DSU*.[541] The Appellate Body determined the *TBT Committee Decision* is a "subsequent agreement" under Article 31(3)(a) of the *VCLT*. Therefore, in this case, the Appellate Body said the "*TBT Committee Decision* bears directly on the interpretation of the term 'open' in Annex 1:4 to the *TBT Agreement*, as well as on the interpretation and application of the concept of "recognized activities in standardization."[542]

In light of this, the Appellate Body said an international standardizing body must be open, on "a non-discriminatory basis" to Members "at every stage of standards development."[543] Under the *TBT Committee Decision*, discrimination may be *de jure* or *de facto*.[544] With respect to "recognized activities of standardization," the *TBT Committee Decision* lets out principles and procedures that WTO Members have decided "should be observed" by international standardizing bodies and assists in the determination of whether an international body's activities in standardization are "recognized" by WTO Members.[545]

The Appellate Body noted that in analyzing whether an entity is an "international standardizing body," a panel should also look toward the purpose of the *TBT Committee Decision*.[546] In particular, the purpose of the *TBT Committee Decision* encourages the "WTO Members to ensure that the development of international standards take place transparently and with wide participation."[547]

b. *AIDCP* as a "Relevant International Standard" Under *TBT Agreement*

The United States disagreed with three findings by the Panel concerning whether the *AIDCP* is a "relevant international standard." First, the United States said the Panel determined the *AIDCP* is "international" based on an "incorrect understanding of what is required for an organization to be open."[548] The Panel determined the *AIDCP* was "open to all Members on a non-discriminatory basis

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[540] *Id.* ¶ 370 (quoting Appellate Body Report, *EC—Sardines*, *supra* note 423 (internal quotation marks omitted)).
[541] Appellate Body Report, *US—Tuna II (Mexico), supra* note 403, ¶ 371 (quoting Article 3:2 of the *DSU*).
[542] *Id.* ¶ 372.
[543] *Id.* ¶ 374.
[544] *See id.* ¶ 375.
[545] *Id.* ¶ 378.
[546] Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 379.
[547] *Id.*
[548] *Id.* ¶ 381.

since any State or regional economic integration organization can be invited to accede the *TBT Agreement* on the basis of a decision by the parties."[549]

The United States also took issue with the Panel's interpretation of the concept of "recognized activities in standardization."[550] The United States disagreed primarily with how the Panel understood the word "recognized."[551] Here, the Appellate Body advised:

> [T]he recognition of those who participate in the development of a standard would not necessarily be sufficient to find that a body has recognized activities in standardization . . . . Nevertheless, it seems . . . the larger the number of countries that participate in the development of standard, the more likely it can be said that the respective body's activities in standardization are "recognized."[552]

The United States also challenged the way in which the Panel applied the word "organization."[553] The Panel said the international standards are adopted by "international standardizing organizations." The Appellate Body already rejected that characterization, and instead found international standards are adopted by "international standardizing bodies."[554]

The United States disagreed with the Panel that the *AIDCP* is an "international standardizing organization" for the purposes of Article 2:4.[555] The United States argued the *AIDCP* is an international agreement, not an international organization.[556] Furthermore, the United States asserted the *AIDCP* is not "international" within the meaning of the *TBT Agreement* because its membership was not, and is not, open to all WTO Members.[557]

Mexico agreed with the American interpretation of "open," but countered with the *AIDCP* was open when the *AIDCP* definition of "dolphin-safe" was developed.[558] Furthermore, Mexico argued, "[I]t is presumably understandable that any [interested] State or regional organization . . . can accede today by a simple invitation of the rest of the Members."[559] The United States responded with, "[A] body in which Members may participate by invitation only is not a

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549 *Id.* ¶ 385.
550 *Id.* ¶ 387.
551 *See* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 388.
552 *Id.* ¶ 390.
553 *See id.* ¶ 395.
554 *See id.*
555 *Id.* ¶ 343.
556 Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 346.
557 *Id.*
558 *Id.* ¶ 381.
559 *Id.* ¶ 383.

body that is open."[560] And Mexico countered with, "[B]eing invited to accede to the *AIDCP* is a 'formality.'"[561]

Referring to its own interpretation, the Appellate Body said an international standardizing body "must be open 'at every stage of standards development.'"[562] The Appellate Body said sometimes Membership by invitation may be a formality.[563] The Appellate Body cautioned that the "provisions, procedures, and practices governing accession to a standardizing body" must be "carefully scrutinized."[564]

According to the Appellate Body, an invitation is a formality when it is automatic once a Member shows interest in joining a standardizing body.[565] That is not the case here where prospective members had to accept an invited member by a consensus vote. Therefore, the Appellate Body said, the *AIDCP* is not "open" within the meaning of Article 2:4 of the *TBT Agreement* and cannot be an "international standardizing body."[566] The Appellate Body said it follows that the "'*AIDCP* dolphin-safe definition and certification' constitute a 'relevant international standard' within the meaning of the *TBT Agreement*."[567]

7. Commentary: Significance of *TBT Agreement* Articles 2:1 and 2:4 Rulings

The *US—Tuna II (Mexico)* report is notable in part because it reaffirms and applies the precedent of *US—Clove Cigarettes*. The test for national treatment under Article 2:1 of the *TBT Agreement* is informed by that of GATT Article III:4—are the conditions of competition in the importing country modified in a way that disfavors the exporting country? However, under Article III:4, the purpose, policy objective, and intent of a controversial measure are irrelevant; essentially, what matters is the evenness of the playing field on which exports and domestic like products compete. In contrast, under Article 2:1, the purpose, policy, objective, and intent of a controversial technical regulation are relevant. In particular, they matter if they affect the conditions of competition and provide a good reason for any un-leveling of the competitive playing field.

The *US—Tuna II (Mexico)* report matters for another reason. The Appellate Body determined that because the *AIDCP* is not an international standardizing organization within the meaning of Article 2:4 of the *TBT Agreement*, that provision properly is interpreted as requiring such an organization to be open at all times to any country, particularly WTO Members. In reaching

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560 *Id.* ¶ 385.
561 Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 385.
562 *Id.* ¶ 382.
563 *Id.* ¶ 386.
564 *Id.*
565 *See id.* ¶ 386.
566 *See* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 398.
567 *See id.* ¶ 399.

this conclusion, after protracted lexicographic analysis, the Appellate Body broke new ground, i.e., it made law on the definition of what kind of body qualifies to set an "international standard." In turn, because the *AIDCP* was not an international standard-setting body, the *AIDCP* standard was not a "relevant international standard" under Article 2:4. As a result, the Appellate Body confirmed the American measure did not violate Article 2:4 of the *TBT Agreement*.

E. WTO *TBT Agreement*, Continued: *United States—COOL*

1. Citation

Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) (*adopted* July 23, 2012).[568]

2. Facts

This case is the third one decided by the Appellate Body in quick succession in 2012 concerning the *Agreement to Technical Barriers to Trade* (*TBT Agreement*). As a temporal fact, the previous two Appellate Body reports analyzing the *TBT Agreement* were unavailable to the participants until just before their oral arguments on appeal in this third case. In all three disputes, the Appellate Body struck down American technical regulations concerning consumer safety and environmental protection because they violated the national treatment principle in Article 2:1 of the *TBT Agreement*.[569] In the previous two 2012 cases, *US—Clove Cigarettes* and *US—Tuna II (Mexico)*, the Appellate Body also found the American technical regulations violated Article 2:2 of the *TBT Agreement* because those measures were "more trade restrictive than necessary to fulfill a

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[568] Hereinafter Appellate Body Report, *US—COOL*. The Panel report in this case is Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) (*adopted as modified* July 23, 2012) [hereinafter Panel Report, *US—COOL*].

At the appellate and panel stages, the following WTO Members were third-party participants. With respect to the Mexican complaint, Argentina, Australia, and Brazil reserved third-party participant rights regarding the Canadian complaint, while China, Colombia, the European Union, Guatemala, India, Japan, and Korea reserved third-party participant rights concerning the Mexican complaint. New Zealand, Peru, and Taiwan reserved their third-party participant rights with respect to both complaints.

[569] *See* Paolo R. Vergano et al., *WTO Appellate Body Upholds the Panel's Ruling in US —Certain Country of Origin Labeling Requirements (COOL)*, 14 TRADE PERSPECTIVES 844 (July 13, 2012).

legitimate objective."[570] In the third case, being unable to complete analysis because of factual insufficiencies, the Appellate Body made no Article 2:2 ruling.

The genesis of the third *TBT Agreement* case in 2012 were separate consultations sought by Canada and Mexico with the United States concerning country of origin labeling (COOL) regulations for meat products sold in the United States.[571] The regulations also concerned livestock from which meat products are derived.[572] The controversial "COOL Measure" itself consists of both law and implementing regulation, that is:

(1) The COOL Statute –
Section 1638 of the *Agricultural Marketing Act of 1946* (the COOL Statute), and

(2) The COOL Regulation –
The 2009 Final Rule (AMS), where "AMS" refers to the Agriculture Marketing Services of the United States Department of Agriculture.[573]

At issue in the Appellate Body action were requirements in the COOL Measure introduced through the 2002 *Farm Bill*, amended in the 2008 *Farm Bill*, and thereafter promulgated by regulation.[574] The primary issues on appeal concerned whether the COOL Measure violated Articles 2:1 and 2:2 of the *TBT Agreement*.

It is important to note the COOL Measure was not a customs or border measure.[575] American customs officials (namely, Customs and Border Protection (CBD)) use the traditional Substantial Transformation Test to determine country of origin for pork and beef products.[576] Under this Test, the country of origin is the place where the livestock was slaughtered.[577] (After all, how could it be doubted that life to death is not a "substantial transformation"?) Therefore,

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[570] *See* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234; Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403.

[571] Although Mexico and Canada approached the WTO separately, the Dispute Settlement Body set up a single panel to hear the complaints by Mexico and Canada. *See* Panel Report, *US—COOL*, *supra* note 568, ¶ 1.5. At the request of the United States, the Panel issued a single report. *See id*. ¶ 2.11. The Panel meetings with the parties were broadcast on televisions in a separate room open to the public. *See id*. ¶ 1.10.

[572] *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 239; Panel Report, *US—COOL, supra* note 568. Note that Mexico and Canada joined each other's consultations as permitted by Article 4:11 of the *DSU*. *Id*. ¶ 1.2.

[573] *See* Panel Report, *US—COOL, supra* note 568, ¶ 7.76. The COOL Measure was the primary measure on appeal. The Panel also looked extensively at the 2009 Final Rule (AMS) and the Vilsack letter. *See id.* ¶ 7.44.

[574] Panel Report, *US—COOL*, *supra* note 568, ¶ 7.77.

[575] Appellate Body Report, *US—COOL, supra* note 568, ¶ 239.

[576] *Id.* ¶ 241.

[577] *Id.*

(notwithstanding the possibility of livestock reincarnation), for customs purposes, only one country of origin is attributed to imported meat products.[578]

The Appellate Body offered the following illustration:

> If, for example, an animal is born and raised in Brazil, and then slaughtered in Argentina, according to the substantial transformation rules, the country of origin of the meat derived from that animal is exclusively Argentina.[579]

Conversely, the COOL Measure allows more than one country to be attributed on a country of origin label. So in this example, the country of origin label under the COOL Measure may list both Brazil and Argentina.

In other words, CBP would use the Substantial Transformation Test and deem Argentina to be the country of origin under the customs law regime. But the COOL Measure would permit the United States Department of Agriculture, in the American TBT regime, to allow retailers to label Brazil or Argentina as the country of origin. Manifestly, two different conclusions could result under the two different regimes. And they did, hence, the dispute. Notably, the Canadians and Mexicans were reasonably tolerant of the idea that different origin determinations could occur in connection with different legal regimes. What incensed them was the discriminatory way in which the Americans operationalized the COOL Measure to protect domestic industries.

As just intimated, the COOL Measure mandated American retailers to mark certain products destined for domestic consumption with a country of origin label.[580] However, a number of exceptions existed for certain types of meat products, and thus a considerable proportion of beef and pork was exempted.[581] The label could take a variety of forms, such as a sticker or placard. But the label had to be placed conspicuously so its consumer could "read and understand" the origin of the labeled product.[582] The COOL Measure also "require[d] upstream suppliers to provide retailers with information on the origin of the meat supplied."[583] (Obviously, such data were necessary for the retailers to affix an accurate label.) Consequently, the COOL Measure imposed recordkeeping requirements on producers along the livestock and meat production chain as part of its "audit verification system."[584]

The COOL Measure uniquely defines origin as "a function of the country(ies), i.e., country or countries, in which the production steps involving the

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578 *See id.*

579 *Id.* ¶ 241 n.379 (citing Panel Report, *US—COOL*, *supra* note 568, ¶ 7.734).

580 *See* Appellate Body Report, *US—COOL, supra* note 568, ¶ 239.

581 *Id.* ¶ 474.

582 *Id.* ¶ 242 n.381 (citing Panel Report, *US—COOL*, *supra* note 568, ¶¶ 7.110, 7.111; 2009 Final Rule (AMS), § 65.400(a)-(b)).

583 *Id.* ¶ 242 (footnote omitted).

584 *Id.* (footnotes omitted).

animals from which that meat is derived took place."[585] Therefore, to label a meat product correctly, the retailer must have information on where the livestock used to produce a given meat product was born, raised, and slaughtered.[586] That is because the three "production steps" are birth, raising, and slaughtering. Information on these steps comes from the upstream livestock and meat supply chain.[587]

Hypothetically, a meat product from an animal born in Bangladesh, raised in India, and killed in Pakistan could originate from any one of those three countries, and different retailers in the United States could render different decisions, reflected on their different labels. The point is that because origin is determined according to different stages in the production process, the COOL Measure allowed for more than one country of origin to be included on the label for beef and pork products.[588]

The COOL Measure had recordkeeping and verification requirements by which upstream livestock and meat supply chains must abide. The Appellate Body noted livestock and meat producers must have accurate origin information for "every stage of the supply and distribution chain" and pass along that information to the next stage in the processing chain.[589] Recordkeeping requirements ensured producers comply with their obligations under the COOL Measure, and the relevant implementing regulation granted the Secretary of Agriculture audit rights to ascertain compliance at each stage in the chain.[590]

The COOL Statute defines "four categories of origin for muscle cuts of meat," which Table 2 sets out:

Table 2: Four COOL Statute Origin Categories

Category A *Meat exclusively of American Origin*	Meat derived from animals "exclusively born, raised, and slaughtered in the United States."[591]
Category B *Meat of Mixed Origin: Foreign Born but Raised and Slaughtered in United States*	Meat derived from animals "born in Country X and raised and slaughtered in the United States. (These animals were not exclusively born, raised and slaughtered in the United States or imported for immediate slaughter.)"[592]

585 *See* Appellate Body Report, *US—COOL, supra* note 568, ¶ 240.
586 *See id.* ¶ 249.
587 *Id.*
588 *See id.* ¶ 240.
589 *Id.* ¶ 249 (quoting Panel Report, *US—COOL*, *supra* note 568, ¶¶ 7.116-17).
590 *See* Appellate Body Report, *US—COOL, supra* note 568, ¶ 249.
591 Panel Report, *US—COOL, supra* note 568, ¶ 7.89.
592 *Id.* ¶ 7.99.

Category C *Meat of Mixed Origin: Foreign Born and Foreign Raised, but Slaughtered in United States*	Meat derived from animals "imported into the United States for immediate slaughter."[593]
Category D *Meat of Foreign Origin: All Production Steps are Foreign*	"Foreign meat imported into the United States."[594]

The aforementioned categories are important because they determine the nature of the label to be applied to the meat product. That is, as Table 3 shows, labels are a function of the meat category contained in the product:

Table 3: Label Rules

Label A American Product Only	Use this label "when 100% of the meat is derived from category A animals."[595] **Essentially, label reads:** *Product of the US.*[596]
Label B Product of Mixed Origin	Use this label when: 1) 100% of the meat is derived from Category B animals; 2) Categories A and B meat are commingled on a single production day; 3) Categories A and C meat are commingled on a single production day; 4) Categories B and C meat are commingled on a single production day; or 5) Categories A, B, and C meat are commingled on a single production day.[597] **Essentially, label reads:** *Product of the U.S., Country X*, with United States appearing first on the label.[598]
Label C	Use this label when: 1) 100% of the meat is derived from Category C animals; 2) Categories A and B meat are commingled on a single production day, meat may be labeled as Label C (or as Label B); 3) Categories A and C meat are commingled on a single production day; 4) 100% of the meat is derived from Category B animals, meat may be labeled as Label C (or as Label B);

593 *Id.*
594 *Id.*
595 *Id.* ¶ 7.100.
596 Panel Report, *US—COOL, supra* note 568, ¶ 7.100.
597 *Id.*
598 *Id.*

	5) Categories B and C meat are commingled on a single production day; or 6) Categories A, B, and C meat are commingled on a single production day.[599] **Essentially, label reads:** *Product of Country X, Product of the US*, with United States appearing last on label.[600]
Label D Foreign Product Only	Use this label "when it is 100% imported foreign meat."[601] **Essentially, label reads:** *Product of Country X*.[602]

Regrettably, the Appellate Body did not clarify the confusing overlap between Labels B and C. To do so, consider Table 4.

This Table reveals the only instance in which a meat retailer in the United States does not have discretion as to choosing between a B or C label is where the meat is Category C. In all other instances, the retailer may choose either a B or C label, which means as a practical matter it can decide whether to put "United States" first or last.

Table 4: Discretion as to Labels B and C

Label B May Be Used If . . .	**Or Label C May Be Used If . . .**
Category B Product only	Category B Product only
No (i.e., cannot use Label B if Category C Product only)	Category C Product only
Categories A and B Product	Categories A and B Product
Categories A and C Product	Categories A and C Product
Categories B and C Product	Categories B and C Product
Categories A, B, and C Product	Categories A, B, and C Product
. . . in which case "United States" appears first on Label (B)	**. . . in which case "United States" appears last on Label (C)**

3. Overview of Three Appellate Issues

The primary issues on appeal concerned Articles 2:1 and 2:2 of the *TBT Agreement*.[603] First, the United States appealed the Panel holding that the COOL

[599] *Id.*
[600] *Id.*
[601] Panel Report, *US—COOL, supra* note 568, ¶ 7.100.
[602] *Id.*
[603] *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 123. In addition, Canada and Mexico raised conditional appeals concerning GATT Articles III:4 and

Measure violates Article 2:1 of the *TBT Agreement*.[604] In particular, the United States argued the COOL Measure does not treat imported livestock less favorably than "like" domestic livestock.[605] The United States lost this appeal.[606]

Second, the Appellate Body addressed several questions on appeal, all of which concerned Article 2:2 of the *TBT Agreement*, and namely, whether the COOL Measure fulfilled a legitimate objective. The Appellate Body began by addressing the appeal by Canada and Mexico that the objective of the COOL Measure is protectionist, which is illegitimate under Article 2:2. Canada and Mexico lost this appeal.

Then, the Appellate Body addressed the American appeal that the Panel incorrectly found the COOL Measure does not fulfill its objective, and thus violates Article 2:2. The United States also appealed the legal framework adopted and applied by the Panel to determine whether a measure is more trade restrictive than necessary "to fulfill" a legitimate objective.[607] The Appellate Body reversed the Panel, finding "the COOL Measure is inconsistent with Article 2:2 of the *TBT Agreement* because it does not fulfill the objective of providing consumer information on origin."[608] That was a victory for the United States.

This victory was modest. The Appellate Body attempted to determine whether the COOL Measure is "more trade restrictive than necessary to fulfill a legitimate objective," as requested by Canada and Mexico.[609] However, the Appellate Body was unable to complete the analysis due to insufficient availability of facts.[610]

Overall, the Appellate Body handed the United States a partial victory that, in practical effect, was a loss. It agreed the COOL Measure was inconsistent with Article 2:1 of the *TBT Agreement*. But the Appellate Body could not reach a determination as to whether the COOL Measure violates Article 2:2.[611] Because

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XXIII:1(b). *See id.* ¶¶ 492-95. The Appellate Body declined to address these matters because they were predicated on the Appellate Body finding the COOL Measure does not violate Article 2:1 of the *TBT Agreement*. *Id.* (As explained before, it held the opposite.) Canada, Mexico, and the United States all asserted the Panel acted inconsistently with Article 11 of the *DSU* in making various findings. The Appellate Body found the Panel had not violated its obligations under Article 11. *See id.* ¶¶ 295-326, 397-424.

604 *See id.* ¶ 233. Regarding the Article 2:1 appeal, the United States also argued the Panel "erred in its determination of the United States' 'level of fulfillment' of its objective." The American argument regarding this appeal included an assertion the Panel violated its obligations under Article 11 of the *DSU*. The Appellate Body quickly dismissed the argument. *See id.* ¶¶ 425-29, 432. Canada also argued the "Panel erred by failing to define the objective of the COOL measure at a 'sufficiently detailed level.'" *Id.* ¶ 432; *see also id.* ¶¶ 430-31. The Appellate Body rejected this ground of appeal. *Id.* ¶ 431.

605 *See id.* ¶ 273.

606 *See id.* ¶ 496.

607 *Id.* ¶ 353 (citing United States' appellant's submission, ¶¶ 120, 124 n.187).

608 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 470.

609 *Id.*

610 *See id.* ¶ 491.

611 *See id.* ¶ 496.

the Measure violated the *TBT Agreement* national treatment rule, it could not stand.

4. Issue 1: MFN, National Treatment, and *TBT* Agreement Article 2:1?

Article 2:1 of the *TBT Agreement* states, with emphasis added:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favorable* than that accorded to like products of national origin and to like products originating in any other country.

The starting point in any dispute involving an alleged violation of the *TBT Agreement* is to establish the measure at issue is a technical regulation. Here, none of the participants appealed the Panel finding that the COOL Measure is a technical regulation.[612] Also left untouched was the Panel finding that Canadian and American hogs and cattle are "like" products, and Mexican and American cattle are "like" products.[613]

The Panel held the COOL Measure violated Article 2:1 of the *TBT Agreement* because it accords less favorable treatment to imported livestock than to like domestic livestock.[614] In doing so, the Panel looked at three issues. First, the Panel determined the categories of labels, i.e., Labels A through D, accord different treatment to imported livestock.[615] Second, the Panel found the COOL Measure implicitly involves segregation through the various meat categories and label types. It determined, unsurprisingly, the costs associated with segregation are higher when "more origins and . . . labels [are] involved."[616] Third, the Panel found the COOL Measure creates a competitive advantage to process domestic livestock over imported livestock due to the compliance costs.[617]

The Appellate Body examined these three issues in turn. Its key finding was on the first one. It held the COOL Measure violates Article 2:1 of the *TBT Agreement*, essentially because it discriminatorily imposes higher recordkeeping and attendant administrative burdens on foreign meat producers than on their American competitors. Notably, the Appellate Body relied heavily on its recent 2012 *TBT Agreement* precedents, which (to be fair to the Panel) were unavailable to the Panel.

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612 *See id.* ¶ 256.
613 *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 256.
614 *See id.* ¶ 254.
615 *See id.* ¶¶ 258-59.
616 *See id.* ¶¶ 260-61 (quoting Panel Report, *US—COOL*, *supra* note 568, ¶¶ 7.331, 7.346).
617 *See id.* ¶¶ 262-63.

a. Interpretation of "Treatment No Less Favorable"

Unsurprisingly, the Appellate Body applied to the COOL Measure its recent interpretations of Article 2:1 of the *TBT Agreement* in its 2012 reports *US—Clove Cigarettes* and *US—Tuna II (Mexico)*.[618] Recalling these reports, the Appellate Body said, "[A]n analysis of less favorable treatment [with regard to the national treatment obligation] involves an assessment of whether the technical regulation at issue modifies the *conditions of competition* in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products."[619] However, given the context of Article 2:1, the Appellate Body cautioned, "Article 2:1 should not be read to mean that *any* distinctions, in particular ones that are based exclusively on such particular product characteristics or on particular processes and production methods, would *per se* constitute less favorable treatment within the meaning of Article 2:1."[620]

This interpretation is also consistent with the reading of GATT Article III:4 drawn by the Appellate Body in its 2001 *EC—Asbestos* report.[621] Here, as in *US—Clove Cigarettes* and *US—Tuna II (Mexico)*, the Appellate Body reiterated GATT Article III:4 may serve as a guide for interpreting the "treatment no less favorable" element of national treatment under the *TBT Agreement*.[622] Consequently, the Appellate Body depended not only on its 2012 reports concerning the *TBT Agreement*, but also its precedent concerning GATT Article III:4.

As in GATT, a technical regulation may be found to violate, *de facto* or *de jure*, the "treatment no less favorable" element of the TBT national treatment principle. In determining a *de facto* violation, both texts require a panel to "take into consideration the totality of facts and circumstances before it, and assess any implications for competitive conditions discernible from the design, structure, and expected operation of the measure."[623] This examination must take into account the market and industry characteristics, "relative market shares," "consumer

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[618] *See* Appellate Body Report, *US—COOL, supra* note 568; Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403.

[619] Appellate Body Report, *US—COOL, supra* note 568, ¶ 268 (emphasis added); *see also* Appellate Body Report, *US—Clove Cigarettes*, *supra* note 243, ¶ 180; Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 215.

[620] Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 268 (emphasis added).

[621] See *id.* ¶ 268 n.479, in reference to Appellate Body Report, *EC—Asbestos*, *supra* note 56, ¶ 100.

[622] *See id.* ¶ 269.

[623] Appellate Body Report, *US—COOL, supra* note 568, ¶ 269 (quoting Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234, ¶ 206; Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶ 130, WT/DS371/AB/R (June 17, 2011) (*adopted* July 15, 2011) [hereinafter Appellate Body Report, *Thailand—Cigarettes (Philippines)*], respectively) (internal quotation marks omitted).

preferences, and historical trade patterns."[624] In other words, a panel must analyze "the operation of the particular technical regulation at issue in the particular market in which it is applied."[625]

Regarding causal effects of a disputed measure or technical regulation, under both GATT and the *TBT Agreement*, the Appellate Body stated, "In every case, it is *the effect of the measure on the competitive opportunities in the market* that is relevant to an assessment of whether a challenged measure has a detrimental impact on imported products."[626] But the words "relevant to," which (regrettably) the Appellate Body did not italicize for emphasis, are critical. The Appellate Body did not equate the national treatment tests under GATT and the *TBT Agreement*.

Yes, an un-level competitive playing field is relevant evidence in both instances. And for GATT cases, such a playing field is the key, i.e., tilting competition against imports is illegal, regardless of the purpose behind the measure that causes the tilt. But for TBT cases, there can be more: a tilt of the playing field against imports is not automatically a violation of the *TBT Agreement*, precisely because the technical regulation that causes the tilt is a technical regulation. Such a regulation creates categories and distinctions that may have a legitimate regulatory purpose. As the Appellate Body indicated, when a "*de facto* detrimental impact . . . stems exclusively from a legitimate regulatory distinction," the measure does not necessarily violate Article 2:1 of the *TBT Agreement*.[627]

So finding a relationship between the measure at issue and a detrimental impact on the competitive position of imports vis-à-vis a "like" domestic product is not dispositive.[628] The key is the measure must not be administered in a discriminatory manner.[629] The Appellate Body restated the increasingly common phrase in disputes concerning Article 2 of the *TBT Agreement*.

The Appellate Body had set the precedent recently in the April 2012 *US—Clove Cigarettes* case, relied on the same language in the June 2012 *US—*

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[624] *Id.* (referring to Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶¶ 233-34 (concerning the analysis of market and industry characteristics and consumer preferences, respectively); Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 8.119, WT/DS308/R (Oct. 7, 2005) (*adopted as modified* Mar. 24, 2006) (concerning market shares); and Appellate Body Report, *Korea—Beef*, *supra* note 319, ¶ 145 (concerning historical trade patterns)).

[625] *Id.*

[626] *Id.* ¶ 270 (alteration in original).

[627] Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 271.

[628] *Id.*

[629] *See id.* Confusingly, the Appellate Body said the presence of a "genuine relationship" is key. *Id.* ¶ 269 (quoting Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403 (referring to Appellate Body Report, *Thailand—Cigarettes (Philippines)*, *supra* note 623, ¶ 134)); *see also* Appellate Body Report, *Korea—Beef*, *supra* note 623, ¶ 137. In fact, the key is not the relationship between a technical regulation, on the one hand, and its impact in the marketplace, on the other hand. That much is relevant, but the key is whether a technical administration is administered in a discriminatory manner.

Tuna II (Mexico) case, and applied the same language in the *US—COOL* case such that "in assessing *even-handedness*, a panel must 'carefully scrutinize the particular circumstances of the case, that is, the *design, architecture, revealing structure, operation and application* of the technical regulation at issue.'"[630]

Simply put, "treatment no less favorable" under Article 2:1 of the *TBT Agreement* means even-handedness in the way a governmental authority applies a TBT measure to foreign and like domestic products. That the impact of the treatment may be disparate is not, itself, conclusive evidence of unfavorable treatment. In turn, with respect to proof, once a complainant makes an initial *prima facie* case, the burden shifts to the respondent, who must show the measure is applied in practice in an even-handed manner.

b. Application of "Treatment No Less Favorable"

First, the Appellate Body looked at whether the labeling requirement treats imports differently from a domestic like product. The United States argued its COOL Measure does not result in different treatment to imported products because all meat requires "the same recordkeeping" and all meat must be labeled with "the same relevant information."[631] According to the United States, even when meat is commingled, "the same label, that is, a B or C Label, is affixed to all meat derived from commingled animals."[632] The United States lost this argument, and the Appellate Body upheld the Panel finding.

The Panel found the COOL Measure caused market participants to choose domestic livestock or meat derived from domestic livestock over the imported like product.[633] In the absence of the COOL Measure, market participants would not have exercised this preference.[634] The Appellate Body declared, "[W]here private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not 'independent' of that measure."[635] Therefore, the Appellate Body agreed with the Panel: "[T]he COOL measure modifies the *conditions of competition* in the U.S. market to the detriment of imported livestock by creating an incentive in favor of processing exclusively domestic livestock and a disincentive against handling imported livestock."[636]

630 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 271 (alteration in original) (drawing from Appellate Body Report, *US—Clove Cigarettes*, supra note 623, ¶ 182, and Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 225).

631 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 275.

632 *Id.*

633 *See id.* ¶ 291.

634 *Id.*

635 *Id.* (alteration in original).

636 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 293 (emphasis added).

However, the Appellate Body determined the Panel failed to complete its analysis as to whether the COOL Measure violates Article 2:1.[637] Merely finding a detrimental impact to the foreign producers or goods is not enough. The Panel failed to determine whether the "detrimental impact stems exclusively from a legitimate regulatory distinction, or whether the COOL measure lacks even-handedness."[638] Instead, the Panel viewed the detrimental impact as dispositive and ended its analysis prematurely.[639] Accordingly, the Appellate Body completed the analysis by examining the "design, architecture, revealing structure, operation, and application of the COOL measure."[640]

The United States argued the COOL Measure would not violate Article 2:1 if the Appellate Body found it was administered even-handedly.[641] The Americans noted there is a difference between a regulatory distinction (i.e., categories of products, or categories within a product class, created by a technical regulation) and the objective of the regulation (i.e., the goal of the regulation).[642] According to the United States, "[T]he mere fact that the [COOL] measure identifies the origins of products in order to label them accordingly at retail does not mean that there is a regulatory distinction made between domestic and imported products."[643]

The Appellate Body said the "relevant regulatory distinction" under the COOL Measure is the segregation of the livestock production steps (birth, raising, and slaughter) and the categories of meat labels.[644] The task for the Appellate Body was to determine whether these distinctions are "designed and applied in an even-handed manner."[645] The Appellate Body said the recordkeeping and verification requirements:

> [R]equire livestock and meat producers to track and transmit to their downstream buyers information regarding the countries in which each production step took place for the animals and/or meat that they process. Thus, for example, a livestock producer must maintain and transmit information sufficient to enable its customers to differentiate between cattle born and raised in the

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637 *See id.*

638 *Id.* ¶ 293.

639 *Id.*

640 *Id.*

641 *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 328 (referring to Appellate Body Report, *US—Clove Cigarettes*, *supra* note 234). Note the United States was able only to refer and respond to questioning regarding *US—Clove Cigarettes* during the oral argument due to the timing of the release of the report. *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 328 n.627.

642 *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 328.

643 *Id.* ¶ 329.

644 *Id.* ¶ 341.

645 *Id.*

> United States, and cattle born in Mexico and raised in the United States.[646]

The Appellate Body noted the COOL Measure requires detailed information from the upstream producers. The label conferring origin information to consumers, however, "is less detailed and will often be less accurate," and the label merely states the country of origin without any reference to the production steps.[647] The Appellate Body pointed out the label may actually contain misinformation because "a retail label may indicate that meat is of mixed origin when in fact it is of exclusively U.S. origin, or that it has three countries of origin when in fact it has only one or two."[648] In addition, an upstream producer has no knowledge of where its product ultimately will end up and whether the product will be exempt from the labeling requirements.[649] Therefore, according to the Appellate Body:

> [I]nformation regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping and verification requirements of the COOL measure, even though a "considerable proportion" of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all.[650]

The Appellate Body said the cost of the recordkeeping and verification requirements are, naturally, "lower when a given producer processes single origin livestock only."[651] Therefore, Label A, meat products derived wholly from American livestock, incurs the lowest costs (because the birth, growth, and slaughtering of the livestock are entirely in the United States).[652]

According to the Appellate Body, the "overall architecture of the COOL measure and the way in which it operates and is applied" shows the compliance requirements for upstream producers "are disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels."[653] Therefore, the Appellate Body determined the regulatory distinction was "arbitrary" and "reflects discrimination."[654] Accordingly, the Appellate Body

646 *Id.* ¶ 342 (footnote omitted).

647 *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 343.

648 *Id.* ¶ 343.

649 *See id.* ¶ 344.

650 *Id.* (alteration in original) (citing Panel Report, *US—COOL*, *supra* note 568, ¶ 7.417).

651 *Id.* ¶ 345.

652 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 345.

653 *Id.* ¶ 347.

654 *Id.* ¶¶ 347, 349.

upheld the finding of the Panel that the COOL Measure violates Article 2:1 of the *TBT Agreement*, albeit for different reasons.

In sum, the Appellate Body held against the United States on the national treatment argument. It did so not solely because the COOL Measure disfavored foreign meat, i.e., meat from livestock born, raised, and/or slaughtered outside the United States, in competition with American meat. Rather, the Appellate Body found the United States could not justify this un-level playing field with its purported regulatory purpose: to convey information to consumers via a retail label. That purpose itself is justifiable, but the labels did not convey much information at all. They did not tell consumers where livestock from the meat was derived was born, raised, or slaughtered. The labels gave only a summation of country of origin.

The Appellate Body weighed this paucity of information in the COOL labels against the significant burden on foreign meat producers to keep records to comply with the COOL Measure. The mismatch was too great. Foreign producers are forced to collect an enormity of information. But much of that information is never conveyed in the label on the product they produce, and thus undermining the stated (and legitimate) purpose of the regulation and hurting foreign producers by raising the cost of their product compared to American meat.

5. Issue 2: More Trade Restrictive than Necessary Under *TBT Agreement* Article 2:2?

Article 2:2 of the *TBT Agreement* states, with emphasis added:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, *technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective*, taking account of the risks non-fulfillment would create. Such *legitimate objectives are*, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

The Panel found the objective of the COOL Measure is "to provide consumer information on origin" and that objective is legitimate within the meaning of Article 2:2.[655] Despite having found a legitimate objective, the Panel held, "[T]he COOL measure violates Article 2:2 because it does not fulfill the

[655] *Id.* ¶ 351.

objective of providing consumer information on origin with respect to meat products."[656]

Canada and Mexico argued on appeal the real objective of the COOL measure is to protect the domestic industry. Canada further argued, if the Panel finding is upheld, the objective of consumer information is not legitimate under Article 2:2.

The United States appealed the Panel holding that the COOL Measure violates Article 2:2 of the *TBT Agreement*.[657] The United States argued the Panel incorrectly found the COOL Measure is "trade-restrictive."[658] Furthermore, the United States argued the Panel incorrectly adopted and applied a legal framework "to determine whether the measure is more trade restrictive than necessary 'to fulfill' a legitimate objective" of the COOL Measure.[659] Finally, should the Panel holding that the COOL Measure is inconsistent with Article 2:2 be reversed, Canada and Mexico requested the Appellate Body "complete the analysis and find that the COOL measure is inconsistent with Article 2:2 because it is more trade restrictive than necessary to fulfill a legitimate objective."[660]

a. "Legitimate Objective"

The Appellate Body explained when there is disagreement between parties as to the objective of a measure of the respondent, a panel should consider, but is not bound by, the interpretation of the respondent of its objective.[661] The Panel needs to also "take into account . . . all the evidence put before it . . . including 'the texts of statutes, legislative history, and other evidence regarding the structure and operation' of the technical regulation at issue."[662] By taking into account all such evidence, the Panel may make an impartial determination as to the objective of the measure.[663]

Citing its June 2012 *US—Tuna II (Mexico)* report, the Appellate Body said a "legitimate" objective is one that is "lawful, justifiable, or proper."[664] The provision itself provides an incomplete list of specific examples. If the objective is explicitly listed, then no further analysis is needed.[665] However, if the objective

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656 *Id.* (referencing Panel Report, *US—COOL*, *supra* note 568, ¶ 7.720).

657 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 353.

658 *See id.*

659 *Id.* (citing United States' appellant's submission, ¶ 171).

660 *Id.* ¶ 352.

661 *See id.* ¶ 371.

662 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 371 (quoting Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 314).

663 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 371.

664 *Id.* ¶ 370 (referencing Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403 (relying on the Shorter Oxford English Dictionary to find "[t]he word 'legitimate' . . . is defined as 'lawful; justifiable; proper.'")).

665 Appellate Body Report, *US—COOL, supra* note 568, ¶ 372.

is not listed, hence the Panel must analyze legitimacy, the Panel may look to objectives listed in other covered agreements, as well as to the Preamble of the *TBT Agreement* itself for further guidance.[666]

Providing consumers with information—the purported purpose of the COOL Measure—is not expressly listed, and so the Panel had to perform a legitimacy analysis. That task was not too difficult because consumer information is related to objectives explicitly laid out in the Preamble to the *TBT Agreement*, Article 2:2 of that *Agreement*, and other WTO Agreements. The Appellate Body essentially replicated the analysis of the Panel.

According to the Appellate Body, when doing a legitimacy analysis, a panel:

> [M]ust seek to ascertain—from the *design, structure, and operation of the technical regulation*, as well as from evidence relating to its *application*—to what degree, if at all, the challenged technical regulation, as written and applied, actually *contributes to the achievement of the legitimate objective* pursued by the Member.[667]

The Appellate Body agreed with the Panel in the case at bar that the objective of the COOL Measure is to "provid[e] consumer information on origin," as opposed to "trade protectionism."[668] Though the Appellate Body ultimately

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[666] *Id.* ¶ 370; *see also* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 313. In particular, the Appellate Body noted the sixth recital of the Preamble to the *TBT Agreement*, which states, with emphasis added:

> *Recognizing* that no country should be prevented from taking measures necessary to *ensure the quality of its exports*, or for the *protection of human, animal or plant life or health*, *of the environment, or for the prevention of deceptive practices*, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement.

[667] Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 373 (emphasis added) (footnote omitted); *see also* Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 317.

[668] Appellate Body Report, *US—COOL*, *supra* note 568, ¶¶ 382, 434. Canada and Mexico argued the Panel incorrectly determined the objective of the COOL Measure. The complainants asserted the Panel committed several violations of Article 11 of the *DSU*. *See id*. ¶¶ 382-433. The Appellate Body rejected the arguments of Canada and Mexico to hold that the Panel did not violate Article 11. In doing so, the Appellate Body reiterated "the fact that a panel does not explicitly reflect all of a party's arguments, or accord to specific evidence the weight that one party considers it should, does not, in and of itself, constitute error." *Id*. ¶ 414. Furthermore, "a panel has a degree of discretion to assess and employ

upheld the Panel finding, the Appellate Body also warned the Panel to be cautious about how much deference it gives to a Member defending its interpretation of an objective.

Next, the Appellate Body addressed an appeal by Canada. Canada argued, unsuccessfully, the consumer information objective is not legitimate under Article 2:2 of the *TBT Agreement*. Canada asserted that when an objective is not explicitly listed in Article 2:2, a panel should undertake a test to determine whether the objective is legitimate.[669] Under this test, the objective is legitimate if it is:[670]

(1) *Directly related* to one of the explicitly listed objectives in Article 2:2;
(2) Of the same type as the listed objectives, i.e., there are *significant elements of commonality*; or
(3) Shown to be legitimate with *clear and convincing evidence*.

The United States opposed the Canadian test as "lack[ing] any basis in the text of Article 2:2," a polite way of saying the Canadians made it up.[671] The United States also asserted the consumer information objective is in fact closely associated with the explicit objective to "prevention of deceptive practices."[672]

The Canadian arguments to the Appellate Body were as unsuccessful as they had been before the Panel. The Appellate Body emphasized the burden of proof lies with the Complainant.[673] The Appellate Body said the thrust of Canada's appeal is the Panel "erred in not adopting the test proposed by Canada, which relies upon the *ejusdem generis* [of the same kind] principle to limit the class of 'legitimate' objectives to those objectives that are of the same type or kind as the ones explicitly listed in that provision."[674] However, while a close association between the objective at issue and an objective explicitly listed in Article 2:2 lends to the likelihood the objective is "legitimate," it is not dispositive.[675]

The Appellate Body said Canada failed to explain how "significant elements of commonality" can "serve to delineate the class of legitimate objectives that fall within Article 2:2."[676] The Appellate Body speculated that

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the evidence before it in the context in which the panel finds it most probative and useful." *Id*. ¶ 416; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 156, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998).

669 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 436.
670 *See id.* ¶ 435.
671 *Id.* ¶ 436.
672 *Id.*
673 *See id.* ¶ 442.
674 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 443.
675 *See id.* ¶ 444.
676 *Id.*

"any relevant 'commonality' among explicitly listed objectives would have to relate to the nature and content of those objectives themselves, rather than, as Canada seems to suggest, to the fact that each objective in Article 2:2 is also listed in exceptions provisions in other covered agreements."[677] Therefore, the Appellate Body rejected the Canadian assertion that the Panel failed to rely upon the *ejusdem generis* principle to identify the class of "legitimate objectives" under Article 2:2 of the *TBT Agreement*.[678]

The Appellate Body reiterated legitimacy determinations may be guided by the Preamble to the *TBT Agreement*, as well as in other covered agreements.[679] In this case, the objective of the COOL Measure may derive legitimacy not only from the objective of "prevention of deceptive practices" reflected in Article 2:2 of the *TBT Agreement*, but also from objectives related to "Marks of Origin" and other objectives related to "prevention of deceptive practices" found in GATT and other covered agreements.[680]

The Appellate Body agreed with the Panel that the Canadian arguments regarding the legitimacy of the objective of the COOL Measure did not stand up. Nevertheless, although the Appellate Body dismissed the Canadian arguments, it noted several ambiguities in the analysis by the Panel.[681] Despite these ambiguities, the Appellate Body upheld the Panel finding that "the provision of consumer information on origin is a legitimate objective within the meaning Article 2:2 of the *TBT Agreement*."[682]

b. "More Trade Restrictive than Necessary to Fulfill a Legitimate Objective"

Lastly, the Appellate Body took up the argument by the United States that the Panel adopted and applied an incorrect legal framework to determine the COOL Measure is "more trade restrictive than necessary to fulfill a legitimate objective."[683] The Appellate Body relied almost exclusively on its report in *US—Tuna II (Mexico)*. According to the Appellate Body, an assessment as to whether a technical regulation fulfills a legitimate objective concerns:

> [T]he degree of contribution that the technical regulation makes towards the achievement of the legitimate objective, and that a panel must seek to ascertain to what degree, or if at all, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member.

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677 *Id.*
678 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 444.
679 *See id.* ¶ 445.
680 *Id.*
681 *See id.* ¶ 449.
682 *Id.* ¶ 453.
683 *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 453.

> The degree of achievement of a particular objective may be discerned from the *design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure*.[684]

The Appellate Body said the contribution of the measure to its objective must be "evaluated along with the other factors mentioned in Article 2.2, that is: (i) the *trade-restrictiveness* of the measure; and (ii) the *nature of the risks* at issue and the *gravity of the consequences* that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure."[685] Often a panel will need to also compare the measure at issue with possible alternative measures, as seen in the *US—Tuna II (Mexico)* case. This comparative analysis helps a panel determine whether the disputed measure is "more trade restrictive than necessary."[686]

On appeal, the United States argued the Panel adopted and applied an incorrect legal framework in finding that the COOL Measure is "more trade-restrictive than necessary to fulfill a legitimate objective."[687] According to the United States, "the Panel's improper use of the two-stage test led it to find that the United States acted inconsistently with Article 2:2 simply because the COOL measure does not contribute to the objective—or fulfill the objective—'*enough.*'"[688] The United States admitted it is important to determine the "level at which a Member seeks to fulfill [the] objective" in order to assess whether the complaining party has met its burden of showing that the same level of fulfillment could be achieved by a significantly less trade-restrictive alternative measure.[689] The United States also argued the Complainants were improperly relieved of their burden of proof.[690]

Canada and Mexico urged the Appellate Body to uphold the Panel holding. The Complainants suggest that "the precise threshold that must be met for a technical regulation to be considered to 'fulfill' its objective" is high.[691] They argued the Panel was correct in finding the COOL Measure does not fulfill its objective, and therefore violates Article 2:2.[692] Mexico and Canada also lodged a related conditional appeal.[693] In the event the Appellate Body overturned the Panel finding, then the complainants requested the Appellate Body complete

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684 *Id.* ¶ 461 (emphasis added) (footnote omitted).
685 *Id.* (emphasis added).
686 *See id.*
687 *Id.* ¶ 455.
688 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 456.
689 *Id.* ¶ 456.
690 *Id.* ¶ 455.
691 *Id.* ¶ 458 (footnote omitted).
692 *Id.*
693 Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 470.

the analysis as to whether the COOL Measure is "more trade restrictive than necessary to fulfill a legitimate objective."[694]

According to the Appellate Body, a panel does not need to determine "whether a measure fulfills the objective completely, or satisfies some minimum level of fulfillment of that objective."[695] Instead, a panel "should focus on ascertaining the degree of contribution achieved by the measure."[696] Given this, the *US—COOL* Panel was incorrect in finding it necessary for the COOL Measure to have fulfilled the objective completely, or satisfied some minimum level of fulfillment to be consistent with Article 2:2.[697]

Although the record showed the COOL Measure contributes to its objective, the findings were insufficient to enable the Appellate Body to ascertain the degree of contribution made by the COOL Measure to such an objective.[698] The Appellate Body, upon examining the record, determined, "the Panel's factual findings suggest that the COOL measure *makes some contribution to the objective* of providing consumers with information on origin; that it has a *considerable degree of trade-restrictiveness*; and that the *consequences that may arise from non-fulfillment* of the objective would not be particularly grave."[699] However, the Appellate Body emphasized the Panel findings "do not enable [the Appellate Body] to ascertain the *degree* of contribution made by the COOL Measure to such an objective."[700]

Interestingly, the degree of contribution made by the COOL Measure towards its objective of providing consumer information appeared to be quite small. In fact, the Appellate Body noted, "[T]he Panel also identified multiple examples of ways in which the labeling scheme prescribed by the COOL measure provides unclear, imperfect, or inaccurate information to consumers, in particular with respect to Labels B and C."[701] However, the Appellate Body stopped short of establishing a benchmark as to what information the labels needed to provide to fulfill their objective of informing consumers.

The Appellate Body reversed the Panel finding that the COOL Measure is inconsistent with Article 2:2 of the *TBT Agreement* because it failed to fulfill a legitimate objective.[702] This reversal triggered the conditional appeal by the complainants.[703] Canada and Mexico requested the Appellate Body complete the analysis as to whether the COOL Measure violates Article 2:2 of the *TBT Agreement* on the ground that it is "more trade restrictive than necessary."[704]

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[694] *Id.*
[695] *Id.* ¶ 468.
[696] *Id.*
[697] *Id.*
[698] Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 476.
[699] *Id.* ¶ 479 (emphasis added).
[700] *Id.* ¶ 476 (alteration in original).
[701] *Id.* ¶ 475.
[702] *Id.* ¶ 468.
[703] *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 470.
[704] *Id.*

Canada and Mexico proposed four alternative measures before the Panel. However, the Panel did not make any findings with respect to those proposed measures because it mistakenly found that the COOL Measure does not fulfill its objective, and subsequently ended its analysis.[705] Ultimately, the Appellate Body determined there were insufficient factual findings to complete the analysis.[706]

The Appellate Body outlined the necessary elements for such an analysis. The Appellate Body attempted to determine: "(i) whether these alternative measures are less trade restrictive than the COOL measure; (ii) whether they would make an equivalent contribution to the relevant objective, taking account of the risks non-fulfillment would create; and (iii) whether they are reasonably available to the United States."[707]

As mentioned above, the Appellate Body found that although the COOL Measure made some contribution to its objective, it could not determine the degree of contribution.[708] It was also unable to determine whether the four alternative measures proposed by Canada and Mexico would be less trade restrictive than the COOL Measure and better at achieving its objective.[709] This lack of facts left the Appellate Body unable to compare (1) how well the COOL Measure contributes to its consumer information objective with (2) the degree to which each proposed alternative measure would contribute to that same objective.[710] Therefore, the Appellate Body could not complete its analysis as to whether the COOL Measure violates Article 2:2.

In sum, the Appellate Body upheld the Panel holding that the COOL Measure violated the national treatment rule of Article 2:1 of the *TBT Agreement*. It did so using a test inspired by, but not identical to, GATT Article III:4. However, the Appellate Body reversed the Panel holding that the COOL Measure violated Article 2:2 of the *TBT Agreement*; contrary to the Panel, the Appellate Body said the American technical regulation does "fulfill a legitimate objective." Finally, the Appellate Body was unable to complete the analysis as to whether the COOL Measure violated Article 2:2 as being "more trade restrictive than necessary to fulfill a legitimate objective."

6. Commentary

a. Deciding Too Much?

The *US—COOL* case was over once the United States lost the national treatment argument under Article 2:1 of the *TBT Agreement*. The COOL Measure

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705 *Id.* ¶ 481.
706 *Id.* ¶ 491.
707 *Id.* ¶ 481 (citing Appellate Body Report, *US—Tuna II (Mexico)*, *supra* note 403, ¶ 322).
708 *See* Appellate Body Report, *US—COOL*, *supra* note 568, ¶ 491.
709 *See id.*
710 *Id.* ¶ 486.

was discriminatory, and the United States had no excuse for that discrimination. Why the Appellate Body prolonged its report by delving into the issue of regulatory purpose and opining on a Canadian argument created out of whole cloth is unclear. Perhaps the Appellate Body was seeking to provide the United States with a consolation prize by holding that the COOL Measure had a legitimate purpose. Nevertheless, no matter how legitimate the purpose of the COOL Measure, no matter how well the Measure fulfilled its purpose, and regardless of whether the Measure was no more trade restrictive than necessary to fulfill its purpose, it was illegal because it was discriminatory. The Appellate Body might have done better to exercise judicial economy after its Article 2:1 determination and conclude its report.

b. Future Implications?

Although the United States was not found to violate Article 2:2 of the *TBT Agreement*, its COOL Measure was found to violate the national treatment principle in Article 2:1 of that *Agreement*. Ron Kirk, the United States Trade Representative (USTR), praised the Appellate Body for holding the United States did not violate Article 2:2.[711] Kirk said of the ruling, "The Appellate Body's ruling confirms that families can still receive information on the origin of their meat and other food products when they shop for groceries."[712]

The United States previously had stated the implications of finding the COOL Measure violate Article 2:1 are broad because almost half of the WTO Members have similar labeling schemes.[713] The United States asserted, "[I]t is difficult to conceive of any country of origin labeling system that would survive WTO scrutiny."[714]

Mexico asserted the COOL Measure denies a "product of the U.S." label to meat derived from cattle born in Mexico, but raised and slaughtered in the United States, where the livestock increases in weight and value by approximately 70 percent.[715] According to Mexico, the measure segregates the previously merged American and Mexican livestock markets.[716] Mexican livestock producers also have seen the price for their livestock drop due to the higher costs of compliance with the COOL Measure incurred by American retailers if they sell foreign versus American meat.[717] (That is, American retailers prefer to substitute

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711 *See* Daniel Pruzin, *WTO Appellate Body Partially Reverses Panel's Ruling on COOL Labeling Requirements*, 29 INT'L TRADE REP. (BNA) 1111 (July 5, 2012).

712 *Id.*

713 *See* Daniel Pruzin, *WTO Backs Canadian, Mexican Claims Against U.S. Country-of-Origin Labeling Rules*, 28 INT'L TRADE REP. (BNA) 844 (May 26, 2011).

714 *Id.*

715 *Id.*

716 *Id.*

717 *Id.*

American for Mexican meat to lessen their regulatory compliance costs.) Canada echoed this concern by Mexico.

According to the Canadian Cattlemen's Association, many American meatpacking plants began to reject Canadian livestock after the COOL Measure came into force, and those that still accepted Canadian livestock only do so at lower prices.[718] The Canadian Cattlemen's Association said the COOL Measure costs the Canadian cattle industry around U.S. $410 million annually.[719]

Public Citizen, the American consumer non-governmental organization (NGO), claimed the ruling against the COOL Measure "will only intensify public opposition to trade pacts, such as the *Trans-Pacific Partnership* (*TPP*)."[720] Public Citizen fears a less stringent COOL Measure will create additional obstacles for health regulators to track the source of food borne illnesses in the future.[721]

F. Trade Remedies—WTO Countervailing and Antidumping Duties: *China—GOES*

1. Citation

Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R (October 18, 2012) (*adopted* November 16, 2012).[722]

2. Background

In April 2009, two Chinese steel producers accused the United States and Russia of dumping and illegally subsidizing grain oriented flat-rolled electrical steel (GOES).[723] GOES is used in power transformers and reactors.[724] The Chinese producers alleged 27 federal and state laws provided countervailable

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718 *See* Pruzin, *WTO Backs Canadian, Mexican Claims Against U.S.*, *supra* note 713.

719 *Id.*

720 Pruzin, *WTO Appellate Body Partially Reverses Panel's Ruling*, *supra* note 711.

721 *See id.*

722 Hereinafter Appellate Body Report, *China—GOES*. The Panel report in this case is Panel Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R (June 15, 2012) (*adopted as modified* Nov. 16, 2012) [hereinafter Panel Report, *China—GOES*].

On appeal and at the Panel stage, the following WTO Members were third-party participants: Argentina, European Union, Honduras, India, Japan, Korea, Saudi Arabia, and Vietnam.

723 Panel Report, *China—GOES*, *supra* note 722, ¶ 2.2; *see also United States Files Two WTO Cases Against China,* OFFICE OF THE U.S. TRADE REPRESENTATIVE (Sept. 2012), ww.ustr.gov/about-us/press-office/press-releases/2010/september/united-states-files-two-wto-cases-against-china.

724 *See United States Files Two WTO Cases Against China*, *supra* note 723.

subsidies to the United States producers of GOES.[725] One federal subsidy the Chinese identified was the controversial "Buy American" provision of the *American Recovery and Reinvestment Act of 2009*.[726] The Chinese producers also "estimated a 25 percent dumping margin for GOES imports from the United States."[727]

The Ministry of Commerce of the People's Republic of China (MOFCOM) looked into these allegations and issued a final affirmative determination on April 10, 2010 in respect of both the antidumping (AD) and countervailing duty (CVD) investigations: "MOFCOM calculated *ad valorem* subsidy rates of 11.7% for AK Steel, 12% for ATI [Allegheny Ludlum Corporation] and 44.6% percent for 'all others.' MOFCOM applied a dumping margin of 7.8% to AK Steel, 19.9% to ATI and 64.8% to 'all others.'"[728]

At the WTO, the United States accused China of violating the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (*Antidumping Agreement*), and GATT.[729]

3. Overview of Three Appellate Issues

After losing at the Panel stage, China raised three issues on appeal. China lost all three appeals. First, China said the Panel erred in holding China violated Article 3:2 of the *Antidumping Agreement* and Article 15:2 of the *SCM Agreement*.[730] In particular, China argued the Panel misinterpreted and misapplied Articles 3:2 and 15:2.[731] Second, China appealed the Panel finding that China violated Articles 6:9 of the *Antidumping Agreement* and 12:8 of the

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725 Panel Report, *China—GOES*, *supra* note 722, ¶ 2.2.

726 *See Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, www.ustr.gov/node/6837 (last visited July 15, 2013).

727 Panel Report, *China—GOES*, *supra* note 722, ¶ 2.2.

728 *Id.* ¶ 2.5.

729 *Id.*; *see also* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter *SCM Agreement*]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 279 [hereinafter *Antidumping Agreement*].

730 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 110. China appealed only the Panel holding concerning the price effects finding by MOFCOM and not the holding regarding the causation finding by MOFCOM. That means, said the Appellate Body, "the Panel's finding regarding MOFCOM's causation finding stands, even if we were to reverse the Panel's finding in respect of MOFCOM's price effects finding." *Id.* ¶ 114. China also unsuccessfully accused the Panel of violating Article 11 of the *DSU*. *Id.* ¶ 182.

731 *Id.* ¶ 123.

SCM Agreement. Agreeing with the United States, the Panel said China failed to disclose essential facts in its Final Determination.[732] Finally, China appealed the Panel determination that China violated Article 12:2:2 of the *Antidumping Agreement* and Article 22:5 of the *SCM Agreement*.[733] In particular, China argued it disclosed the "relevant information" that "led to the imposition of final measures."[734]

4. Issue 1: Interpretation and Application of *Antidumping Agreement* Article 3:2 and *SCM Agreement* Article 15:2?

China appealed the Panel holding that China violated Article 3:2 of the *Antidumping Agreement* and Article 15.:2 of the *SCM Agreement*.[735] Article 3:2 of the *Antidumping Agreement* and Article 15:2 of the *SCM Agreement* pertain to the injury determination of an AD or CVD case, respectively. They read:

> With regard to the volume of the [dumped or subsidized] imports, the investigating authorities shall consider whether there has been a significant increase in [dumped or subsidized] imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the [dumped or subsidized] imports on prices, the investigating authorities *shall consider* whether there has been a significant price undercutting by the [dumped or subsidized] imports as compared with the price of a like product of the importing Member, or *whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases*, which otherwise would have occurred, *to a significant degree*. No one or several of these factors can necessarily give decisive guidance.[736]

(The wording of the two provisions is identical, except for the reference to dumping or subsidization in the *Antidumping Agreement* and *SCM Agreement*, respectively, as noted in square parentheses.) China argued the Panel erred in its interpretation and application of Article 3:2 and Article 15:2.[737]

The Panel said Article 3:2 of the *Antidumping Agreement* and Article 15:2 of the *SCM Agreement* require an authority to find the price depression and suppression are both significant and attributed to the subject merchandise.[738] The

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[732] *Id.* ¶ 243.
[733] *Id.* ¶ 261.
[734] *Id.* ¶ 256.
[735] Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 110.
[736] *Antidumping Agreement* art. 3:2; *SCM Agreement* art. 15:2 (emphasis added).
[737] *See id.* ¶ 123.
[738] *See id.* ¶¶ 120-21.

Panel found although there was *per se* price depression and suppression in this case, MOFCOM incorrectly attributed the negative price effects to the subject merchandise. In particular, MOFCOM failed to make its finding "pursuant to an objective examination" and did not base its determination on "positive evidence."[739]

On appeal, China asserted Articles 3:2 and 15:2 do not obligate an authority "to demonstrate a causal link between subject imports, on the one hand, and significant price depression and suppression, on the other hand."[740] Instead, an authority merely needs to "'consider' the 'existence' of significant price depression or suppression."[741] China argued:

> [I]f Articles 3:2 and 15:2 are interpreted as requiring a consideration of the relationship between subject imports and domestic prices, Articles 3:4 and 15:4 must also be interpreted as requiring an examination of the link between subject imports, on the one hand, and each of the economic factors listed in Articles 3:4 and 15:4, on the other hand.[742]

China also asserted this analysis "grafts onto Articles [3:2, 3:4, 15:2, and 15:4] an obligation that exists under Articles 3:5 and 15:5 and is duplicative."[743]

The Appellate Body characterized the Chinese appeal as:

> [R]ais[ing] the question as to the scope of the investigating authority's obligations, under Articles 3:2 and 15:2 to "consider . . . whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."[744]

The Appellate Body considered the text and context of Articles 3:2 and 15:2, as well as the overall objective and injury determination framework for AD and CVD investigations contained in Articles 3 and 15. Ultimately, the Appellate

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739 *Id.* ¶ 121.

740 *Id.* ¶ 123.

741 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 123 (citing China's appellant's submission, ¶ 78).

742 *Id.* ¶ 148. According to the Appellate Body:

> Articles 3:4 and 15:4 set out the economic factors that must be evaluated regarding the impact of such imports on the state of the domestic industry, and Articles 3.5 and 15.5 require an investigating authority to demonstrate that subject imports are causing injury to the domestic industry.

Id. ¶ 127.

743 *Id.* ¶ 148 (internal quotation marks omitted).

744 *Id.* ¶ 124 (quoting China's appellant's submission).

Body held an investigating authority must "consider" the effect of subject merchandise on domestic prices in a way that illuminates whether the subject merchandise provides explanatory force for the occurrence of significant price depression or suppression pursuant to Article 3:2 and 15:2.[745] Consequently, China lost its appeal.

Arguably, "explanatory force" is a euphemism for causal connection. Unfortunately, the Appellate Body introduced the term, but did not define it. So, exactly what kind of "force" subject merchandise should have to "explain" price depression or suppression is unclear from the *China—GOES* appellate report.

In any event, according to the Appellate Body, Articles 3 and 15 require an injury determination to be based on positive evidence and an objective examination of the volume of subject merchandise, effect of subject merchandise on domestic prices, and impact of subject merchandise on domestic producers of the like product.[746] The Appellate Body relied upon the 2001 *US—Hot-Rolled Steel* case to explain that the term "positive evidence" "relates to the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible."[747]

The Appellate Body also determined the term "objective examination" "requires that an investigating authority's examination 'conform to the dictates of the basic principles of good faith and fundamental fairness' and be conducted 'in an unbiased manner, without favoring the interests of any interested part[ies] in the investigation.'"[748] The Appellate Body also noted Articles 3:2 and 15:2 are essential to determining whether subject merchandise caused injury to the domestic industry.[749]

Manifestly from their text, Articles 3:2 and 15:2 concern the relationship between the subject merchandise and domestic prices. They require an investigating authority to "consider" whether the effect of subject merchandise is to depress prices or prevent price increases to a significant degree."[750] The Appellate Body said this consideration does not mean an investigator must "make *a definitive determination* on the volume of subject imports and the effect of such imports on domestic price."[751]

Regrettably, the Appellate Body did not define what it meant by "definitive determination." Might "definitive" mean "final"? Perhaps, but that would be illogical as an investigator indeed must come to a final conclusion about

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745 *Id.* ¶ 154.

746 *See* Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 125.

747 *Id.* ¶¶ 126-27 (citing Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 192, WT/DS184/AB/R (July 24, 2001) (*adopted* Aug. 23, 2001) [hereinafter Appellate Body Report, *US—Hot-Rolled Steel*]).

748 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 126 (quoting Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 747, ¶ 193).

749 *See* Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 128.

750 *Id.* ¶ 129.

751 *Id.* ¶ 130 (alteration in original).

injury. Yet, suppose "definitive" does not equal "final." Then, the use by the Appellate Body of the word "definitive" seems strained.

In any event, rather than coming to a "definitive determination," the Appellate Body said an investigating authority may undertake two inquiries concerning the effect of subject merchandise on domestic prices:

> (1) First, with regard to significant price undercutting pursuant to Articles 3:2 and 15:2, an investigator may compare "the price of the subject merchandise and the price of the like domestic products."[752]
>
> (2) Second, the investigator must "consider" (i.e., take into account) *whether significant price depression or suppression* on domestic prices is the *consequence of subject merchandise*.[753]

According to the Appellate Body, an assessment is insufficient if a panel reviews domestic price depression or suppression in isolation without examining the effect of subject merchandise on domestic prices.[754] The Appellate Body noted these are not mutually exclusive inquiries. So, "even if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices."[755]

The Appellate Body took into account the economic concepts of price depression and price suppression. An analysis of both price depression and suppression requires an inquiry into the cause of the "price phenomena," specifically whether subject merchandise influence price depression or suppression.[756] The Appellate Body asserted:

> Articles 3:2 and 15:2 would appear to make a unitary analysis of the effect of subject imports on domestic prices more appropriate [i.e., an analysis in which both injury and causation are considered together], rather than a two-step analysis [in which injury and causation are treated sequentially] that first seeks to identify the market phenomena and then, as a second step, examines whether such phenomena are an effect of subject imports.[757]

But the Appellate Body acknowledged a two-step analysis is not inappropriate as long as the second step addresses "the core of the analysis," namely, "whether 'the

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752 *Id.* ¶ 136.
753 *Id.*
754 *See* Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 138.
755 *Id.* ¶ 137.
756 *Id.* ¶¶ 141-42.
757 *Id.* ¶ 142.

effect of' subject imports is significant price depression or suppression."[758] In this case, the two-step analysis by the Panel was sufficient.

Finally, the Appellate Body re-emphasized that the Articles 3:2 and 15:2 findings of an investigating authority form the outcome of the causation determination set forth in Articles 3:5 and 15:5.[759] In other words:

> [U]nder [Articles 3:2 and 15:2], the authority must conduct an analysis of the relationship between subject imports and domestic prices, and, in particular, of whether such imports have *explanatory force* for the significant depression or suppression of domestic prices, in order to have a meaningful basis on which to conduct its causation analysis pursuant to Articles 3:5 and 15:5.[760]

The Appellate Body took pains to distinguish Articles 3:2 and 15:2 from Articles 3:5 and 15:5.[761]

Articles 3:2 and 15:2, as discussed above, inquire about the relationship between subject merchandise and its effects on domestic prices, specifically, price depression or suppression.[762] The Appellate Body said a non-attribution analysis, which is required in Articles 3:5 and 15:5, is not required under Articles 3:2 and 15:2. (That is, under Articles 3:2 and 15:2, an investigating authority does not need to exclude the possibility that price depression or suppression caused by factors other than subject merchandise is wrongly attributed to that merchandise. But it must do so under the causation provisions of Articles 3:5 and 15:5.) But the Appellate Body cautioned that a proper injury analysis under Articles 3:2 and 15:2 would not permit an investigating authority to "disregard evidence that calls into question the explanatory force of the former for significant depression or suppression of the latter."[763]

The injury analysis under Articles 3:2 and 15:2 does not duplicate the work done under Articles 3:4 and 15:4. Instead, the work under Articles 3:4 and 15:4 concerns the relationship between subject merchandise and the state of the domestic industry.[764] This analysis is similar to that under Articles 3:2 and 15:2 because it does not require a determination that subject merchandise injures the domestic industry (rather, the relevant injury factors are being considered, but no final determination is reached under these provisions).[765]

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758 *Id.*; Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 1109, WT/DS316/AB/R (May 18, 2011) (*adopted* June 1, 2011) [hereinafter Appellate Body Report, *EC—Airbus*].

759 *See* Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 143.

760 *Id.* ¶ 144 (emphasis added).

761 *See id.* ¶ 147.

762 *See id.*

763 *Id.* ¶ 154.

764 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 149.

765 *See id.* ¶ 150.

Articles 3:2 and 15:2, as well as Articles 3:4 and 15:4, contribute to the (final) injury and causation determination required by Articles 3:5 and 15:5.[766] (That is, Articles 3:5 and 13:5 require an inquiry into whether the subject merchandise causes injury to the domestic industry.) This inquiry requires an analysis of "'all relevant evidence' before the [investigating] authority, including the volume of subject imports and their price effects."[767] So, the relationship between subject merchandise and domestic prices, i.e., the inquiry under Articles 3:2 and 15:2, bears on the injury and causation determination, i.e., the inquiry under Articles 3:5 and 15:5.[768]

In the end, the Appellate Body held:

> [W]ith regard to price depression and suppression under the second sentence of Articles 3:2 and 15:2, an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices.[769]

In other words, an analysis under Articles 3:2 and 15:2 must consider the effect of subject merchandise on domestic prices. This consideration should help explain whether the subject merchandise contributes to the significant price depression or suppression phenomenon.

The Appellate Body determined the Panel did not err in rejecting the interpretation of Article 3:2 of the *Antidumping Agreement* and Article 15:2 of the *SCM Agreement*. After setting out across roughly 30 pages its own interpretation of Articles 3:2 and 15:2, the Appellate Body declared it was "not persuaded" by the Chinese interpretation that "Articles 3:2 and 15:2 merely require an investigating authority to consider the existence of price depression or suppression, and do not require the establishment of any link between subject imports and these price effects."[770] Consequently, the Appellate Body determined the Panel did not err in not adopting China's interpretation.[771]

Briefly put, however, the first issue seems to be much ado about nothing. The text of Articles 3:2 of the *Antidumping Agreement* and Article 15:2 of the *SCM Agreement* seem clear enough. Under them, an investigating authority must have a look at the connection, if any, between subject merchandise and price depression or suppression. These provisions thus guide the authority as to what factors to examine when considering whether subject merchandise causes injury to

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766 *See id.* ¶ 149.
767 *Id.* ¶ 147.
768 *See id.*
769 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 154.
770 *Id.* ¶ 169.
771 *Id.*

domestic producers of a like product. In turn, they help that authority towards a final affirmative or negative injury determination.

5. Issue 2: Disclosure of "Essential Facts" Under *Antidumping Agreement* Article 6:9 and *SCM Agreement* Article 12:8?

Article 6:9 of the *Antidumping Agreement* and Article 12:8 of the *SCM Agreement* state:

> The authorities shall, before a final determination is made, inform all [interested Members and] interested parties of the essential facts under consideration, which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

The Panel held China violated Articles 6:9 and 12:8 because MOFCOM failed to disclose essential facts in its Final Injury Disclosure.[772] The Panel defined "essential facts" as "those that underlie [an authority's] findings of dumping or subsidization, injury and causal link, because these elements form the basis for the decision to apply definitive measures."[773] The Panel said, "[E]ven accepting China's argument that MOFCOM did not make a finding of significant price undercutting, the 'low price' of subject imports formed an essential part of the reasoning MOFCOM used to support its finding of significant price depression and suppression."[774] Consequently, the Panel decided MOFCOM must disclose all "essential facts" that contributed to its finding concerning the "existence of a 'low price'" because those facts permit interested parties "to defend their interests."[775]

The Panel found the non-confidential summaries by MOFCOM regarding "information underlying the finding of 'low price' of subject imports" were insufficient.[776] The non-confidential summaries failed to incorporate essential facts concerning the low price of subject merchandise and did not "refer to the prices of subject imports relative to the prices of GOES produced by the domestic Chinese industry."[777]

China appealed the Panel holding. China argued, "[C]ontrary to the Panel's view, the essential facts for price depression and suppression do not

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772 *See id.* ¶ 234.
773 *Id.*
774 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 235.
775 *Id.*
776 *Id.* ¶ 237.
777 *Id.*

include any facts about the comparison of domestic prices to subject import prices, or the causal relationship between these two variables."[778]

Of course, if the Chinese argument was true, then the obvious response to it is:

> Great, then disclose to the American producer-exporters you hit with a trade remedy what you just argued, i.e., there is no reason to hide from them the fact that you (China) did not regard as essential facts to justify your affirmative finding of price depression and suppression a (1) comparison of domestic prices to subject import prices, or (2) the causal relationship between domestic and import prices.

Put less diplomatically, the Chinese put themselves in an indefensible position. To use a criminal law analogy, they were trying to argue that a defendant is not entitled to a full report as to why he got convicted and is being sent to jail, rather, a summary is good enough. In this scenario, the defendant—like the respondent producer-exporters—lacks the full breadth and depth of information needed to mount an appeal.

Instead, China said it disclosed the decline in average domestic prices and drop in "price-cost differential," both of which related to its finding of price depression and suppression.[779] China argued its disclosure of "essential facts regarding the existence of significant price depression and suppression" was sufficient.[780]

Not so, said the Appellate Body. According to the Appellate Body, "At the heart of Articles 6:9 and 12:8 is the requirement to disclose, before a final determination is made, the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures."[781]

The Appellate Body stressed only essential facts must be disclosed. Essential facts are "first, those that 'form the basis for the decision whether to apply definitive measures' and, second, those that ensure the ability of interested parties to defend their interests."[782] The Appellate Body said the information disclosed by China in its Preliminary Determination and Final Injury disclosure was insufficient.[783] In particular, China failed to "disclose the essential facts pertaining to the 'low price' of subject imports" because "MOFCOM's finding [that] the 'low price' of subject imports referred to the existence of price

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778 *Id.* ¶ 243.

779 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 243.

780 *Id.* (citing China's appellant's submission, ¶¶ 211-12).

781 *Id.* ¶ 240 (alteration in original).

782 *Id.* (footnote omitted); *see also* Panel Report, *European Communities—Anti-Dumping Measure on Farmed Salmon from Norway*, ¶ 7.805, WT/DS337/R (Nov. 26, 2007) (*adopted* Jan. 15, 2008).

783 *See* Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 247.

undercutting [during the period of investigation] and that MOFCOM relied on this factor to support its finding of significant price depression and suppression."[784]

In summary, the Appellate Body held, "MOFCOM was required to disclose the 'essential facts' relating to the 'low price' of subject imports on which it relied for its finding of significant price depression and suppression."[785] According to the Appellate Body, MOFCOM should have disclosed the facts of price undercutting that were required to understand that finding.[786] Instead, MOFCOM failed to provide any facts relating to the price comparisons of subject imports and domestic products.[787] Therefore, the Appellate Body ultimately upheld the Panel holding that China violated Article 6:9 of the *Antidumping Agreement* and Article 12:8 of the *SCM Agreement*.[788]

6. Issue 3: Adequate Public Notice and Explanation Under *Antidumping Agreement* Article 12:2:2 and *SCM Agreement* Article 22:5?

The last issue on appeal was whether China violated Article 12:2:2 of the *Antidumping Agreement* and Article 22:5 of the *SCM Agreement*.[789] These articles state, in relevant part, with emphasis added:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, *all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures* . . . due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in [Article 12:2:1 of the *Antidumping Agreement* and Article 22:4 of the *SCM Agreement*].

Before the Panel, the United States argued MOFCOM provided inadequate "public notice and explanation" concerning its conclusion that prices for subject merchandise were lower than the prices of the like domestic product.[790] The Panel agreed.

The Panel held China violated Articles 12:2:2 of the *Antidumping Agreement* and Article 22:5 of the *SCM Agreement* "by failing adequately to disclose all relevant information on the matters of fact underlying MOFCOM's

784 *Id.* ¶ 247.
785 *Id.* ¶ 251.
786 *Id.*
787 *Id.*
788 Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 251.
789 *Id.* ¶ 110.
790 *Id.* ¶ 253.

conclusion regarding the existence of 'low' subject import prices."[791] The Panel determined the "low price" of the subject merchandise was significant in the final determination against the American imports.[792] Despite its importance, the Chinese omitted this price information from the Final Determination.

The Panel distinguished this case from the 2005 *US—DRAMS (Korea)* case. In *US—DRAMS (Korea)*, the Appellate Body said, "Article 22:5 does not require the agency to cite or discuss every piece of supporting record evidence for each fact in the final determination."[793] However, because the omitted evidence in the *China—GOES* case was significant, the Panel decided China should have included it in the Final Determination.[794]

China appealed the Panel holding. China said the Panel incorrectly "focused on the existence and magnitude of price undercutting, thereby making a comparison of subject import prices to domestic prices 'essential elements' and 'an important aspect' of MOFCOM's price effects examination."[795] China unsuccessfully argued:

> [G]iven that the Panel determined that MOFCOM made a finding of price depression and suppression, and not of price undercutting, the evidence about price undercutting during the 2006-2008 period is the type of "supporting record evidence" that the Appellate Body considered would not need to be disclosed under Article 22:5 of the *SCM Agreement*.[796]

In its analysis, the Appellate Body focused on the Articles 12:2:2 and 22:5 requirement to include "'all relevant information' on 'matters of fact,' 'which have led to the imposition of final measures.'"[797]

The Appellate Body noted the purpose of notice is to allow interested parties access to the facts underlying a final decision to impose AD duties and CVDs.[798] Disclosure of "relevant information" also allows parties to seek "judicial review of a final determination."[799] According to the Appellate Body, "'all relevant information on the matters of fact' consists of those facts that are required to understand an investigating authority's price effects examination

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[791] *Id.* ¶ 254 (citing Panel Report, *China—GOES*, *supra* note 568, ¶ 7.592).

[792] *Id.*

[793] Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 254 (quoting Appellate Body Report, *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, ¶ 164, WT/DS296/AB/R (June 27, 2005) (*adopted* July 20, 2005) [hereinafter Appellate Body Report, *US—DRAMS (Korea)*]).

[794] *Id.*

[795] *Id.* ¶ 261.

[796] *Id.* ¶ 264.

[797] *Id.* ¶ 256.

[798] Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 259.

[799] *Id.*

leading to the imposition of final measures."[800] Moreover, if there is confidential information relevant to the final determination, then the investigating authority may issue "non-confidential summaries of that information."[801]

MOFCOM failed to make adequate disclosure of its findings regarding comparisons between the price of subject imports and like domestic products.[802] The Appellate Body pointed out: "MOFCOM's finding as to the 'low price' of the subject imports referred to the existence of price undercutting [during the period of investigation], and that MOFCOM relied on this factor to support its finding of significant price depression and suppression."[803] Merely stating "'average domestic prices dropped' and the 'price-cost differential dropped'" fails to communicate all the "relevant information on the matters of fact."[804]

Consequently, the Appellate Body upheld the Panel holding. The Appellate Body said MOFCOM must disclose "all relevant information on the matters of fact" concerning not only the low price of subject merchandise, but also facts related to the price undercutting upon which MOFCOM relied upon to find "significant price depression and suppression."[805]

Manifestly, as with the second issue, on the third issue, China put itself in an indefensible position. Having adequate notice of the basis on which an administering authority makes a trade remedy decision is essential for both the respondent producer-exporters and the petitioning domestic industry. Without such notice, they cannot know exactly how to frame their arguments, as they are unclear about the precise issues they need to address.

China again sought to defend the proposition that it need only inform a defendant of a summary of the charges to be brought against him and need not disclose the evidence for those charges.[806] These propositions are incongruous with a universal precept of justice, i.e., one applicable in International Trade Law as well as Criminal Law, namely, due process. Respondent producer-exporters, like defendants, need material that tends to exonerate them, or undermine the strength of the case against them. At the least, they need to know the justifications for the case against them.

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[800] *Id.* ¶ 260.

[801] *Id.* ¶ 259.

[802] *See id.* ¶ 264.

[803] Appellate Body Report, *China—GOES*, *supra* note 722, ¶ 262.

[804] *Id.* ¶ 264.

[805] *Id.* ¶¶ 262, 267.

[806] Indeed, by logical extension, the Chinese were defending the proposition that they need not disclose exculpatory evidence (known in the American criminal justice system as "*Brady* material," after the landmark United States Supreme Court decision, *Brady v. Maryland*, in which the Court held evidence in the possession of the prosecution but favorable to (and requested by) the defendant must be disclosed by the former to the latter, and failure to do so is grounds for reversal. Brady v. Maryland, 373 U.S. 83 (1963).

7. Commentary: Political Case

American politics almost certainly influenced the Obama Administration to bring the *China—GOES* case to the WTO.[807] Ohio and Pennsylvania were key "swing states" in the 2012 Presidential election, replete with Electoral College votes that both candidate Barack H. Obama and candidate Mitt Romney coveted. Ohio and Pennsylvania, respectively, happened to be the headquarters of AK Steel Corporation and ATI Allegheny Ludlum.[808] So, "getting tough" on China was an almost macho-like ritual during the election. Naturally, speculation concerning the political nature of the decision was rife after President Obama announced the WTO filing at a campaign event in Ohio.[809] Why bring the *China—GOES* case, in particular, when there were plenty of other trade remedy actions that could have been taken against other countries?

China rightly pointed out also that "the U.S. request for WTO consultations came after China initiated WTO dispute proceedings the same day challenging a U.S. law that re-establishes the U.S. Commerce Department's authority to impose countervailing duties on nonmarket economies such as China and Vietnam."[810] In other words, China claimed that America behaved in a tit-for-tat manner. That was ironic because the United States had made the same charge against China in past trade spats. Had the Americans fallen to the level of China in triggering their trade remedy because of a Chinese one?

Unsurprisingly, the Obama Administration denied these allegations.[811] The United States Trade Representative emphasized that the AD-CVD duties imposed by China reduced American exports of GOES, which threatened American jobs.[812] (Never mind that jobs were the most important issue in the 2012 Presidential election for the vast majority of the electorate, thus making the USTR response self-defeating.) The Chinese action also threatened the success of the American policy goal to double American exports by 2015.

Lodging the *China—GOES* case entailed an opportunity cost. Steel jobs in Ohio and Pennsylvania are important. Arguably, in a utilitarian calculus, of greater significance is alleged currency manipulation: it threatens jobs in far more economic sectors than steel. By focusing on alleged abuse of trade remedies by China, the United States shied away from the bigger issue of currency manipulation.[813] At the same time, there is no evidence that by refraining from

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807 *See China Tariffs on US Steel: WTO Rejects Beijing's Appeal*, BBC NEWS (Oct. 18, 2012), www.bbc.co.uk/news/business-20000299.

808 *See* Eric Linton, *WTO Strikes Down China Tariff on US Steel*, INT'L BUSINESS TIMES (Oct. 18, 2012), www.ibtimes.com/wto-strikes-down-china-tariff-us-steel-849313.

809 *See* Daniel Pruzin, *Punke Rejects Chinese Claims U.S. is 'Politicizing' WTO Trade Disputes Against It*, 29 INT'L TRADE REP. (BNA) 1583 (Oct. 4, 2012).

810 *Id.*

811 *Id.*

812 Daniel Pruzin, *WTO Appellate Body Back US Complaint Against Chinese AD/CVD Duties on GOE Steel*, 29 INT'L TRADE REP. (BNA) 1690 (Oct. 25, 2012).

813 Pruzin, *Punke Rejects Chinese Claim*, *supra* note 809.

prosecuting such WTO cases the United States would have been any more likely to have convinced China to address the charges of currency manipulation.

G. Trade Remedies—WTO Countervailing Duties: *United States—Boeing*

1. Citation

Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R (March 12, 2012) (*adopted* March 23, 2012).[814]

2. Background

a. Lengthy, Painful Reading (Again)

As in the *EC—Airbus* case, the WTO adjudicators once again managed to draft a lengthy, tortuous reading, although thankfully, it did not reach the record-breaking numbers from its sister case.[815] In *US—Boeing*, the Panel report flew to 783 pages and 4,268 footnotes, while the Appellate Body report touched-down at 599 pages and 2,716 footnotes. Some sympathy can be had for the modern WTO Panels and Appellate Bodies; however, surely it is possible to better organize and make a report user-friendly. As a result, practitioners are forced to wade through dozens of pages of inefficient and regularly repeated facts and findings. Such effort begs the question, is it really worth it to even read such a report?

Ultimately, it is possible the Appellate Body report in *US—Boeing* will hold little significance. At least, when compared to the *EC—Airbus* report, this is sure. As you may glean from this review of *US—Boeing*, the lasting impressions

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[814] Hereinafter Appellate Body Report, *US—Boeing*. The Panel report in this case is Panel Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R (*adopted as modified* Mar. 31, 2011) [hereinafter Panel Report, *US—Boeing*].

On appeal and at the Panel stage, the following WTO Members were third-party participants: Australia, Brazil, Canada, China, Japan, and South Korea.

As the Appellate Body explained, the case began on February 17, 2006 with the establishment of a panel before the entry into force of the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* (*Treaty of Lisbon*), which was done at Lisbon on December 13, 2007. By virtue of the *Treaty of Lisbon*, as of December 1, 2009, when that *Treaty* entered into force, the term "European Union" replaced "European Community." *See* Appellate Body Report, *US—Boeing*, at 1 n.1. However, throughout this discussion, the reference European Union (EU) is used. Regrettably from the vantage point of simplicity, the Appellate Body chose not to adhere to a standardized reference. *See id*.

[815] The Panel report in *EC—Airbus* numbered 1,049 pages and 6,083 footnotes. Subsequently, the Appellate Body report in *EC—Airbus* was slimmed down to 613 pages and 3,068 footnotes. Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1109.

will likely be the Appellate Body decision regarding Annex V, and its blessing of two distinct approaches towards the collective assessment of multiple subsidies. The Annex V decision is important because of its potential future impact[816] as is the use of different collective assessment approaches when considering multiple subsidies discussions because of the increasingly complex nature of subsidy schemes throughout the world.

However, absent these two takeaways, the Appellate Body spent considerable space doing one of two things. First, for the most part the Appellate Body chastised the Panel approach (usually deservedly), while still upholding almost all of the Panel findings. Indeed, there were arguably no major changes in the Appellate Body findings as compared to the Panel report.[817]

Second, the Appellate Body repeatedly cited and quoted from its own report in *EC—Airbus*. Such reliance is not improper but does further support the proposition that in the future, the most useful legal statements and factual comparisons will likely come from *EC—Airbus*. For just shy of 600 pages, studying the *US—Boeing* case would likely result in a negative cost-benefit ratio for most trade law practitioners.

b. Who is the Worst Offender?

With the release of the Appellate Body report in *US—Boeing*, it is possible to discern which country most subsidized its respective aircraft manufacturer. In the 2011 *EU—Airbus* case, the Appellate Body recommended damages amounting to roughly $22 billion. By comparison, here, the Appellate Body in *US—Boeing* recommended a relatively "miniscule" $4.392 billion in damages.

Airbus had claimed the Boeing 787 "Dreamliner" to be the most subsidized aircraft in the history of the industry. Yet, the Appellate Body findings seemed to indicate differently, at least if measured in outright dollar terms. Moreover, the Appellate Body findings in *EU—Airbus* were barely able to consider the response of Airbus to the Boeing 787, the A350-XWB.[818] Arguably,

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[816] *See* Daniel Pruzin & Len Bracken, *WTO Appellate Body Affirms Boeing Receiving Illegal Subsidies, Reverses Finding on Taxes*, 29 INT'L TRADE REP. (BNA) 408 (Mar. 15, 2012) (stating the United States may find the Annex V ruling useful in combatting different multilateral issues relating to China).

[817] *See* Daniel Pruzin, *WTO Appellate Body Issues Confidential Ruling on Boeing Subsidies; U.S., EU mum*, 29 INT'L TRADE REP. (BNA) 364 (Mar. 8, 2012). Ultimately, the Appellate Body findings raised the Panel's monetary recommendations from $2.7 billion to $4.3 billion. *See* James Politi & Joshua Chaffin, *Boeing Gained From Illegal Subsidies, Confirms WTO*, FIN. TIMES, Mar. 13, 2012, at 4. Such a monetary outcome is relatively little compared to original $23.7 billion sought by the EU. *See* Pruzin & Bracken, *supra* note 816.

[818] The applicability of the A350-XWB in compliance proceedings is being disputed as of this writing. *See infra* note 1357 and accompanying text.

the Appellate Body report in *EU—Airbus* dealt with only some of the egregious behavior by Airbus, insofar as Airbus provides Launch Aid for the A350-XWB.

3. Synopsis of Key Facts and Conclusions

Unlike its complimentary decision in *EU—Airbus*, in *US—Boeing* all complaints were directed at subsidies from one country, namely, the United States. The measures at issue in this dispute concern a broad array of subsidies provided by the United States to Boeing in relation to the manufacture of large civil aircraft (LCA). The subsidies challenged by the EU can be divided into two categories.[819]

First, the United States Federal Government provided support to Boeing through the US National Aeronautics and Space Administration (NASA), US Department of Defense (USDOD), US Department of Commerce (USDOC), and US Department of Labor (USDOL).[820] Second, support was provided to Boeing from: the states of Washington, Kansas, and Illinois; the counties of Snohomish, Washington and Cook, Illinois; and the cities of Everett, Washington, Wichita, Kansas, and Chicago, Illinois.[821]

Though each measure will be explained further, the Panel was kind enough to provide a table summarizing its findings with regard to specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.

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[819] *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 427.
[820] *See id.* ¶ 430.
[821] *See id.* ¶ 427.

Table 5: Amount of Subsidies to Boeing LCA Division from 1989–2006[822]

Gov't or Gov't Agency	Measures found to constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*	Amt. of Subsidy
NASA	- Payments made to Boeing pursuant to procurement contracts entered into under the eight aeronautics R&D programs at issue - Access to government facilities, equipment, and employees provided to Boeing pursuant to procurement contracts and Space Act Agreements entered into under the eight aeronautics R&D programs at issue	$2.6 billion
USDOD	- Payments made to Boeing pursuant to assistance instruments entered into under the RDT&E programs at issue - Access to government facilities provided to Boeing pursuant to assistance instruments entered into under the RDT&E programs at issue	Unclear
FSC/ETI	- The tax exemptions and tax exclusions provided to Boeing under FSC/ETI [Foreign Sales Corporation/Extraterritorial Income] legislation, including the transition and grandfather provisions of the ETI Act and the AJCA	$2.2 billion
State of Washington and municipalities therein	- B&O tax rate reduction provided for in House Bill 2294 - B&O tax credits for preproduction development, computer software and hardware, and property taxes provided for in House Bill 2294 - Sales and use tax exemptions for computer hardware, peripherals, and software provided for in House Bill 2294 - City of Everett B&O tax rate reduction - Workforce development program and Employment Resource Center	$77.7 million
City of Wichita, Kansas	- Property and sales tax abatements provided to Boeing pursuant to IRBs issued by the State of Kansas and municipalities therein	$476 million
State of Illinois and municipalities therein	- Reimbursement of a portion of Boeing's relocation expenses provided for in the CHRA [Corporate Headquarters Relocation Act of 2001] - 15-year Economic Development for a Growing Economy (EDGE) tax credits provided for in the CHRA - Abatement or refund of a portion of Boeing's property taxes provided for in the CHRA - Payment to retire the lease of the previous tenant of Boeing's new corporate headquarters building	$11 million
	- Abatement or refund of a portion of Boeing's property taxes provided for in the CHRA - Payment to retire the lease of the previous tenant of Boeing's new corporate headquarters building	
Total		**At least $5.3 billion**

822 *Id.* ¶ 479 tbl.1 (footnotes omitted) (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1433 tbl.1) (the table is renumbered herein).

The two broad categories, and the measures in them that the Panel and Appellate Body agreed were legally problematic, are explained as follows:

a. United States Federal Government Measures

Not all of the Panel findings regarding the United States Government measures were challenged on appeal.[823] First, the Panel found subsidies provided to Boeing by the USDOC and USDOL were not specific within the meaning of Article 2 of the *SCM Agreement*.[824] Additionally, the Panel found the EU failed to establish the existence of independent research and development expenditures, and bid and proposal costs, allegedly provided to Boeing by NASA and the USDOD.[825] Thus, the three categories and the measures left to the Appellate Body are as follows:

1) Aeronautics R&D Measures

NASA and the USDOD provided the Aeronautics R&D measures challenged by the EU. The EU argued all of the Aeronautics R&D measures qualified as a "subsidy" under the definition of that term in the *SCM Agreement*, namely, each form was a "financial contribution" under Article 1:1(a)(c)(i), which conferred a "benefit" on Airbus under Article 1:1(b) and was "specific" to Boeing under Article 2.[826] These provisions state, with emphasis added and footnotes omitted:

> *Article 1*
> *Definition of a Subsidy*
>
> 1.1. For the purpose of this Agreement, a *subsidy* shall be deemed to exist if:
>
> (a) (1) there is a *financial contribution* by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e., where:
>
> (i) a government practice involves a *direct transfer of funds* (e.g., grants, *loans*, and equity infusion), *potential direct transfers of funds* or liabilities (e.g., *loan guarantees*);

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823 *See id.* ¶ 430.
824 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 430.
825 *Id.*
826 *Id.*

(ii) government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or

(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and

(b) a *benefit is thereby conferred.*

1.2. A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is *specific* in accordance with the provisions of Article 2.

Article 2
Specificity

2.1. In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in sub-paragraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this sub-paragraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation.
>
> 2.2. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.
>
> 2.3. Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.
>
> 2.4. Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

First, the EU challenged payments and free access to NASA facilities, equipment, and employees NASA provided to Boeing through R&D contracts and agreements under eight aeronautics R&D programs.[827] To aid in the analysis, the eight Aeronautics R&D programs were split into two broad categories.[828] The first

[827] The eight programs, noted in Table 78-1, were:

(1) Advanced Composites Technology (ACT)
(2) High Speed Research (HSR)
(3) Advanced Subsonic Technology (AST)
(4) High Performance Computing and Communications (HPCC)
(5) Aviation Safety (AS)
(6) Quiet Aircraft Technology (QAT)
(7) Vehicle Systems (VS)
(8) Research and Technology Base (R&T Base)

Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 432.

[828] *Id.* ¶ 433.

category was "NASA Procurement Contracts." Under American law and regulations, these contracts were used only where the principal purpose of the activity is the acquisition of goods or services for the direct benefit of, or use by, the US Government.[829] The second category was "*Space Act* Agreements."[830] These Agreements authorized NASA "to enter into and perform contracts, leases, and cooperative agreements or other transactions as may be necessary to conduct its work."[831]

The Panel concluded that the support NASA provided to Boeing through the Procurement Contracts and *Space Act* Agreements constituted specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.[832] It estimated that the total amount of these subsidies over the 1989-2006 period to be $2.6 billion, of which $1.05 billion corresponded to payments under R&D contracts and $1.55 billion corresponded to access to facilities, equipment, and employees under R&D contracts and agreements.[833]

Second, the EU challenged funding and access to facilities the USDOD provided to Boeing to perform R&D related to "dual-use" technologies—that is, research applicable to both military and commercial aircraft—through contracts and other instruments under the USDOD Research, Development, Test, and Evaluation Program (RDT&E Program).[834] The Panel thought the EU challenge to the USDOD support was relatively narrow—in effect, less significant than—its challenge to the NASA programs.[835]

The Panel thought this for three reasons. First, the EU only challenged a subset of funding related to dual-use technologies provided to Boeing under 23 USDOD RDT&E Programs.[836] Second, the EU limited its challenge to payments the USDOD provided to Boeing for R&D; it did not also include the purchase of military aircraft from Boeing.[837] Third, the EU only challenged access to facilities, which did not include equipment and employees under the RDT&E Programs.[838]

Regarding USDOD support, at the Panel stage, the United States, for the most part, held off the EU challenge. The Panel concluded that "the payments and access to USDOD facilities provided to Boeing under procurement contracts were not financial contributions within the meaning of Article 1:1(a)(1) of the *SCM Agreement*."[839] However, the Panel held one kind of USDOD support, known as

829 *Id.* (citations omitted).

830 *See id.* NASA undertook the "Space Act Agreements" pursuant to its authority under the *National Aeronautics and Space Act of 1958* (*Space Act*).

831 *Id.* ¶ 433 (footnote omitted).

832 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 434.

833 *Id.*

834 *Id.* ¶ 435.

835 *Id.* ¶ 436.

836 *Id.*

837 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 436.

838 *Id.*

839 *Id.* ¶ 438.

"Assistance Instruments," were specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.[840] Even so, the Panel rejected the estimated subsidy amounts from the United States and the EU, but failed to arrive at its own monetary estimate of the subsidies provided to Boeing under the USDOD Assistance Instruments.[841]

2) Allocation of Patent Rights

The second category of subsides the EU challenged were allocation of intellectual property (IP) rights under procurement contracts and agreements entered into by Boeing with NASA and the USDOD for Aeronautics R&D.[842] American patent rights:

> [G]enerally authorize a patent holder, during the term of the patent, to prevent all other entities from exploiting the technologies covered by the patent, and allow the patent holder to license the technology to others in exchange for compensation. In particular, an American patent accords the right to "exclude others from making, using, offering for sale, or selling" an invention in the United States, or from "importing" the invention into the United States, for a specific period of time (a minimum of 20 years from the date of application).[843]

Additionally:

> Prior to 1980, the United States had a general policy of assuming all rights to patents over inventions developed by contractors under federally funded R&D contracts (and then granting non-exclusive licenses to any applicant, including the contractor, who wished to use the subject invention). In 1980, however, the United States changed its policy so that government contractors obtained ownership of patents over any invention they developed with federal funding under R&D contracts (with the government receiving a limited "government use" license to use the subject invention without having to pay the contractor royalties). Originally, the new policy applied only to non-profit organizations and small business firms. Subsequently, the policy was extended to all government contractors, regardless of

[840] *Id.*
[841] *Id.* ¶ 439.
[842] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 440.
[843] *Id.* ¶ 441.

> size and profit/non-profit status, and implemented through a variety of different legal instruments.[844]

The Panel identified the following five American IP laws as relevant:

> (1) [T]he *patent and Trademark Law Amendments Act of 1980* (the "*Bayh-Dole Act*");
>
> (2) [A] 1983 Presidential Memorandum to the heads of Executive departments and agencies (entitled "Government Patent Policy") that extended the scope of the policy enacted under the *Bayh-Dole Act* to all government contractors, regardless of size and profit/non-profit status (the "1983 Presidential Memorandum");
>
> (3) [A] 1987 Executive Order (entitled "Facilitating Access to Science and Technology") into which the terms of the 1983 Presidential Memorandum were incorporated (the "1987 Executive Order");
>
> (4) [T]he corresponding general federal regulations implementing the *Bayh-Dole Act*, the 1983 Presidential Memorandum, and the 1987 Executive Order ([published at] Title 48, Subpart 27.3, [of the Code of Federal Regulations,] entitled "Patent Rights Under Government Contracts"); and
>
> (5) [T]he NASA-specific federal regulation (entitled "Patents and Other Intellectual Property Rights," with Subpart 1 entitled "Patent Waiver Regulations").[845]

Under the post-1980 policy, the US government receives "a nonexclusive, non-transferable, irrevocable paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world." [846] The government also obtains certain "march-in" rights. These rights empower the relevant federal agency to compel the contractor, in certain limited circumstances, to grant a license to applicants on reasonable terms, or to grant the license itself. No US government department or agency, however, has exercised march-in rights for any patent under any contract.

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844 *Id.* ¶ 442.

845 *Id.* ¶ 443 (emphasis added) (footnotes omitted).

846 *Id.* ¶ 444 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1286 (referring to European Communities' first written submission to the Panel, ¶ 813)). March-in rights essentially entail a compulsory license, which is the subject of Article 31 of the WTO *Agreement on Trade Related Aspects of Intellectual Property Rights* (*TRIPs Agreement*).

How do NASA and the USDOD fit within an application the aforementioned IP laws? First:

> The [1958] *Space Act* provides that any invention developed pursuant to a contract with NASA "shall be the exclusive property of the United States, and if such invention is patentable a patent therefore shall be issued to the United States," unless waived by NASA. To comply with the 1983 Presidential Memorandum, NASA formulated regulations under which it generally waives its patent rights to large companies, such as Boeing, for inventions developed pursuant to NASA-funded research. NASA waives such rights in order to, in part, "promote early utilization, expeditious development and continued availability of [the] new technology for commercial purposes." The NASA patent waiver regulations permit requests for waivers at two points in time: (i) in advance of an invention, as to any and all inventions made under a contract; and (ii) after reporting an invention, subsequent to the invention being developed.[847]

Second:

> Unless NASA, the USDOD does not have its own detailed regulations regarding patent allocation. Instead, the USDOD generally relies on the relevant portion of the *Bayh-Dole Act* and 1983 Presidential Memorandum, as well as the corresponding general federal regulations implementing these instruments. This aspect of US law, along with the terms of the 1983 Presidential Memorandum, is generally implemented by the USDOD by incorporating certain clauses into R&D contracts.[848]

3) FSC/ETI and Successor Legislation

The EU challenged a tax exemption enjoyed by Boeing in relation to certain income under the FSC legislation and under successor legislation.[849] These tax exemptions were the subject of a previous WTO dispute between the EU and the US.[850] There, the tax exemption under the FSC legislation and the

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[847] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 445 (emphasis added) (citations omitted).

[848] *Id.* ¶ 446 (emphasis added) (citations omitted).

[849] *Id.* ¶ 447.

[850] *Id.*

exclusion of certain income under the *ETI Act* were found to be export subsidies prohibited under Articles 3.1(a) and 3.2 of the *SCM Agreement*.[851]

The United States did not dispute that the FSC/ETI tax exemptions were specific subsidies.[852] Additionally, the United States accepted the estimated amount of $2.199 billion in FSC/ETI tax breaks to the Boeing LCA division from 1989 through 2006.[853] The only issue before the Panel was whether Boeing would continue to receive FSC/ETI benefits after 2006.[854] Ultimately, the Panel did not consider it necessary to make a finding on this issue because the EU had failed to explain how such a finding would be relevant to the serious prejudice or threat of serious prejudice issue.[855]

b. State and Local Measures[856]

On appeal, there were three categories of State and Local Measures at issue:

(1) Those provided to Boeing by the State of Washington;
(2) Wichita, Kansas Industrial Revenue Bonds (IRBs); and
(3) Four measures relating to the relocation of the headquarters of Boeing to the State of Illinois.

However, the Appellate Body only mentioned briefly the State of Illinois measures before disposing of them during its adverse effects analysis. (Accordingly, they are not discussed further below.)

1) State of Washington[857]

The first state-related EU challenge was a tax incentive package pursuant to Washington State House Bill 2294, entitled *An Act Related to Retaining and*

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851 *Id.*
852 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 448.
853 *Id.*
854 *Id.*
855 *Id.*
856 *See id.* ¶¶ 456-78.
857 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶¶ 456-66. In addition to the five state-level tax measures addressed by the Panel, there were two minor local measures within Washington State. First, the City of Everett had a local Business and Occupation (B&O) Tax Rate Reduction that was similar in nature to the one imposed at the state level. *Id.* ¶ 467. Second, the Project Olympus Master Site Agreement (MSA) created a state of the art facility. *Id.* ¶ 469. The specific measure at issue here was job-training incentives. *Id.* The Panel found both measures to be specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement* at an estimated amount of $2.2 million and $11 million, respectively. *See id.* ¶¶ 468, 471.

Attracting the Aerospace Industry to Washington State (House Bill 2294).[858] Specifically, the EU challenged five tax measures including[859]:

(1) The Washington State B&O Tax Rate Reduction;
(2) B&O tax credits for preproduction development, computer software and hardware, and property taxes;
(3) Sales and use tax exemptions for computers, and construction services and equipment;
(4) Leasehold excise tax exemptions; and
(5) Property tax exemptions.

However, on appeal, the EU challenged the finding of the Panel only in regard to three of the tax measures, namely, the: (1) Washington State B&O Tax Rate Reduction; (2) Washington State B&O Tax Credits; and (3) Washington State Sales and Use Tax Exemptions. Each is discussed below.

i. Washington State B&O Tax Rate Reduction

The first challenged aspect of the B&O tax was the Tax Rate Reduction, which is a tax on the "gross receipts of all businesses operating in Washington State, as a measure of the privilege of engaging in business."[860] The Panel noted that "gross receipts" refers to the gross proceeds of sales, the gross income of a business, or the value of products, depending upon which is applicable. Moreover, taxpayers are taxed based on the activities in which they engage in the state, such as manufacturing, wholesaling, retailing, or the provision of services.

State of Washington House Bill 2294 provided for a reduction in B&O tax rate to occur in two stages for manufacturers of commercial airplanes or components for such airplanes.[861] The first stage took place from October 1, 2005 to June 30, 2007 and reduced the tax rate from 0.484 to 0.4235 percent.[862] The second stage lowered the tax rate to 0.2904 percent as of July 1, 2007, or as of the commencement of final assembly of a "super-efficient" airplane, whichever was later.[863]

Additionally, the taxation reduction applied until 2024, "unless the final assembly of a super-efficient aircraft had not commenced by 31 December 2007, in which case the tax rate reverts to 0.484% for manufacturing and wholesaling

[858] *Id.* ¶ 456.
[859] *Id.*
[860] *Id.* ¶ 458.
[861] *Id.* ¶ 459.
[862] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 459.
[863] *Id.*

activities, and 0.471% for retailing activities."[864] Accordingly, the reduced taxation rate will continue until 2024 because the final assembly of the super-efficient Boeing 787 commenced in Washington in the first half of 2007.[865]

The Panel concluded that Washington State B&O tax reduction was a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.[866] The amount of this subsidy to the LCA division at Boeing was estimated to be $13.8 million.[867]

ii. Washington State B&O Tax Credits

The second aspect of the B&O tax challenged by the EU was the B&O tax credits for preproduction development, computer software and hardware, and property taxes. The Appellate Body described the three tax credits as follows:

> 461. . . . First, it provides for a B&O tax credit for preproduction development to any "manufacturer or processor for hire of commercial airplanes, or components of such airplanes" for its expenditure on certain aeronautics-related research, design, and engineering activities performed in the development of a product.
>
> 462. Second, a B&O tax credit is granted for computer software and hardware to any "manufacturer of commercial airplanes" for its expenditures, between 1 July 1995 and 1 July 2003, on design and preproduction development computer software and hardware used primarily for the digital design and development of commercial airplanes.
>
> 463. Third, House Bill 2294 grants a B&O tax credit for property taxes where the tax credit is equal to the state and local property taxes paid on certain property used in the manufacture of commercial airplanes or components for such airplanes.[868]

The Panel concluded that the B&O tax credits for preproduction development, computer software and hardware, and property taxes were subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*, and it estimated

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[864] *Id.* (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.48 (referring to House Bill 2294, §§ 3(13), 4(13)); European Communities' first written submission to the Panel, ¶ 106; United States' first written submission to the Panel, ¶ 438).

[865] *Id.*

[866] *Id.* ¶ 460.

[867] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 460.

[868] *Id.* ¶¶ 461-63 (citations omitted).

that the amount of these subsidies to the LCA division at Boeing to $42.4 million.[869]

iii. Washington State Sales and Use Tax Exemptions

The third measure attributed to Washington State challenged by the EU were sales and use tax exemptions for computer software, hardware, and peripherals. Specifically, "[t]he retail sales tax [was] a tax on the sale of tangible personal property and certain services. The use tax [was] due on the value of tangible personal property and certain services on which the retail sales tax ha[d] not been paid."[870]

State of Washington House Bill 2294 introduced two exemptions from these taxes: the first was an exemption relating to computer hardware, software, and peripherals; and the second was for certain construction services and equipment.[871] The Panel concluded the sales and use tax exemptions for computer hardware, software, and peripherals were a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*, and it estimated the amount of this subsidy to the Boeing LCA division to be $8.3 million.[872]

2) Wichita (Kansas) Industrial Revenue Bonds (IRBs)

The EU next challenged IRBs issued by cities and counties in the State of Kansas on behalf of private entities.[873] The IRBs were designed to assist in raising revenue to fund the purchase, construction, or improvement of various types of industrial and commercial property. The Appellate Body described the steps taken to issue IRBs as follows:

> The city or county acts as the issuer of the bonds. The issuer sells the bonds to the general public, or bondholders, through an underwriter or private placement, in exchange for proceeds that will be used to acquire or enhance the project property. The issuer serves as a passive conduit whose role is simply to lend its status as a municipal corporation to the transaction. The private entity, on behalf of which the IRBs are issued, acts as the lessee or tenant. The lessee conveys the project property to the issuer for the term of the IRBs, and the issuer leases the project property back to the lessee for the length of that term. The

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869 *Id.* ¶ 464.
870 *Id.* ¶ 465 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.57).
871 *Id.*
872 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 466.
873 *Id.* ¶ 472.

> lessee makes rent payments that are sufficient to pay the principal and interest on the IRBs to the bondholders. Finally, a bank acts as the trustee on behalf of the bondholders.[874]

The dispute from the EU arose because rather than the IRBs being purchased by the public, the IRBs in question were issued on behalf of Boeing and purchased by Boeing itself.[875]

The EU alleged that typically the advantages for a private entity of having IRBs issued on its behalf include:

> (1) [T]he ability to borrow funds at lower than market interest rates, due to tax-exempt interest;
> (2) [P]roperty tax abatements for up to 10 years on project property; and
> (3) [S]ales tax exemptions on project property and services acquired with the proceeds of IRBs.[876]

However, when the IRBs are issued and purchased by one company, the result is a cash flow from that company to itself.

The Panel found the tax benefits to Boeing arising from the issuance of IRBs were a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*, and the value of this subsidy for the LCA division at Boeing was estimated by the Panel to be $475.8 million.[877]

Before the Panel, the EU challenged every measure in these two broad categories as a specific subsidy that satisfied the tests for "financial contribution," "benefit," and "specificity" under Articles 1 and 2 of the *SCM Agreement*. The EU alleged the measures caused adverse effects to the United States under Articles 5 and 6 of the *SCM Agreement*. In other words, the EU contended every measure was an actionable, or Yellow Light, subsidy. Further, the EU argued that certain measures were prohibited under Article 3 of the *SCM Agreement*. That is, the EU highlighted a few measures as Red Light subsidies.

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874 *Id.* (citing City of Wichita IRB Overview: "Industrial Revenue Bond Issuance in the State of Kansas" (Panel Exhibit EC-741)).

875 *Id.* ¶ 474.

876 *Id.* ¶ 473.

877 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 475.

4. Four Key Appellate Issues and Holdings

On appeal, there were four key substantive issues.[878]

a. Financial Contribution Under *SCM Agreement* Article 1:1(a)?

The first substantive issue addressed by the Appellate Body concerned whether certain measures provided by NASA, the USDOD, and the State of Washington constituted a "financial contribution" within the meaning of Article 1:1(a) of the *SCM Agreement*.

1) NASA Procurement Contracts and USDOD Assistance Instruments

The Appellate Body first addressed the structure of the analysis by the Panel. The Panel accepted the American characterization of the controversial measures—the agreements (i.e., the NASA procurement contracts and the USDOD assistance instruments)—as "purchases of services." This characterization concerned the scope of Article 1:1(a)(1)(i) of the *SCM Agreement*. The Article speaks of "direct transfers of funds" as being "financial contributions." The American motive was to create a term, "purchases of services," which would fall outside the scope of "direct transfers of funds," and thus outside the scope of "financial contributions." As a theoretical matter, the Panel accepted the idea that "purchases of services" is a viable category.

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[878] This discussion draws from Appellate Body Report, *US—Boeing*, *supra* note 814, and Panel Report, *US—Boeing*, *supra* note 814. In addition to the major substantive issues discussed above, the Appellate Body was faced with and decided a procedural issue regarding Annex V of the *SCM Agreement*. Some commentators have considered the possibility the Appellate Body finding regarding this Annex V procedure may have the biggest future impact. *See* Pruzin & Bracken, *supra* note 816.

A brief summary of the Appellate Body analysis of this issue is as follows: on appeal, the EU challenged a preliminary Panel ruling regarding a procedure pursuant to Annex V of the *SCM Agreement*, entitled "Procedures for Developing Information Concerning Serious Prejudice." Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 480. Ultimately, the Appellate Body found the Panel erred in denying various EU requests with respect to an Annex V procedure. *See id.* ¶ 549.

Important here was the Appellate Body interpretation of Paragraph 2 of Annex V to the *SCM Agreement*. *See id.* In the Appellate Body view, the "initiation of an information-gathering procedure in a serious prejudice dispute occurs automatically provided that a request for such a procedure has been made and a panel established." *Id.* None of these issues is discussed further herein. Likewise, claims concerning whether the Panel failed to provide a reasoned and adequate explanation for its findings under Article 11 of the *DSU* are not discussed. *See, e.g.*, *id.* ¶¶ 701-23.

Then, the Panel considered whether the controversial measures—that is, the agreements, namely, (1) NASA procurement contracts, (2) USDOD assistance instruments, and (3) USDOD procurement contracts—were "purchases of services." If so, the United States would have a clear-cut victory because they would be outside the scope of "financial contributions." In turn, they would not be considered subsidies subject to the disciplines of the *SCM Agreement*.

In rendering its decision as to which of the three measures was properly characterized as "purchases of services," the Panel invented a test. This test asked whether the measures were "principally for [Boeing's] own benefit and use, or whether . . . [they were] principally for the benefit and use of the [United States] Government (or unrelated third parties)."[879] Applying its test, the Panel did not give the Americans a complete victory. The Panel found the USDOD Procurement Contracts to be purchases of services, and thus excluded them from further consideration as financial contributions.[880]

But the Panel concluded the NASA Procurement Contracts and USDOD Assistance Instruments could not be properly characterized as purchase of services. Thus, the Panel treated those two measures as direct transfers of funds within the meaning of Article 1:1(a)(1)(i) of the *SCM Agreement*.[881] Further, the Panel said access to NASA facilities, equipment, and employees provided by NASA, and access to facilities provided by USDOD, constituted provision of goods and services under Article 1:1(a)(1)(iii).[882]

Unsurprisingly, given this split verdict, both the United States and EU appealed.[883] The EU sought reversal or modification of the interpretation of the Panel that measures properly characterized as purchases of services are excluded from the scope of Article 1:1(a)(1) of the *SCM Agreement*.[884] That is, the EU objected to the theoretical acceptance by the Panel that there exists a "purchases of services" category into which certain measures could be put, and which thereby would be exempt from the *SCM Agreement* disciplines. The United States sought reversal of the findings of the Panel that the NASA Procurement Contracts and USDOD Assistance Instruments do not constitute purchases of services, and thus are direct transfers of funds within the meaning of Article 1:1(a)(1)(i) of the *SCM Agreement*.[885] Additionally, the United States challenged the finding that the other support provided to Boeing by NASA and the USDOD constituted the provision of goods and services within the meaning of Article 1:1(a)(1)(iii).[886]

The Appellate Body dubbed the analytical structure of the Panel an "odd approach." The Appellate Body found it more logical to determine, first, the

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[879] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶¶ 550-51 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶¶ 7.978, 7.1137).

[880] *Id.* ¶ 552.

[881] *Id.*

[882] *Id.*

[883] *See Id.* ¶ 553.

[884] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 553.

[885] *Id.*

[886] *Id.*

proper characterization of the measures at issue and, second, whether those particular measures fall within the scope of Article 1:1(a)(1) of the *SCM Agreement*.[887] In other words, the Appellate Body found it unnecessary to create a new category of measures, such as "purchases of services." Why not, instead, proceed directly to the question of whether the controversial measures fall within any of the existing categories in Article 1:1(a)(1) with category (i) being the most relevant here?

The Appellate Body supported its approach with its decision in 2010 *China—Auto Parts*.[888] In that case, the Appellate Body stated:

> [A] panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics, [and] [i]n making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant [measure] and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements.[889]

After rejecting the "curious" approach the Panel concocted, the Appellate Body applied a three-step process to reach its conclusion.[890] First, it identified the principal characteristics of the measures before it. Second, it interpreted the relevant provisions of Article 1:1(a)(1) of the *SCM Agreement*. Third, it determined whether the measures fall under one of the sub-paragraphs of Article 1:1(a)(1).[891]

As to the first step, the Appellate Body addressed what the proper characterization should be for the NASA and USDOD measures.[892] Under American law, procurement contracts are instruments used when the United States government intends to acquire property or services.[893] However, the classification of a transaction under municipal law is not "determinative."[894] A measure must

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887 *Id.* ¶ 585.

888 *See id.* ¶ 586 (citation omitted).

889 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 586 (internal quotation marks, citations, and footnotes omitted).

890 *Id.* ¶ 585.

891 *Id.* ¶ 621.

892 *See id.* ¶ 593.

893 *Id.* ¶ 593 (citing 48 C.F.R. §§ 21.605, 35.003).

894 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 586 (quoting Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada,* ¶ 56, WT/DS257/AB/R (Jan. 19, 2004)).

be assessed by its characteristics rather than its title.[895] Accordingly, the Appellate Body turned its attention to the three challenged measures, *in seriatim*.

i. NASA Procurement Contracts

The United States argued that under the terms of the NASA procurement contracts, Boeing was paid only to conduct research services. The Appellate Body did not agree. Instead, it stated the American characterization of the procurement contracts was too narrow. The Appellate Body stated some of the transactions involved NASA giving Boeing access to its equipment, facilities, and employees.[896] The Panel estimated the value of outright payments to be $1.05 billion and valued the access to the equipment, facilities, and employees at $1.55 billion.[897]

Yet, most important to the decision of the Appellate Body was the collaborative nature between NASA and the American aeronautics industry.[898] In brief, the Appellate Body held that the NASA-Boeing collaboration was tantamount to a joint venture, and a joint venture is analogous to an equity infusion, and thus a financial contribution under Article 1:1(a)(1)(i) of the *SCM Agreement*. How did the Appellate Body arrive at this chain of logic?

The Appellate Body agreed (albeit vaguely) with a point made by the Panel: not only did NASA give funding and access to facilities to Boeing, but also NASA and Boeing pooled non-monetary resources and employees. In addition to this pooling of non-monetary and labor inputs, the Appellate Body analyzed the collaborative arrangement between NASA and Boeing. It looked at the outputs resulting from the NASA-Boeing relationship.

The Appellate Body observed that each organization had distinct rights over derived reports and patentable discoveries. Additionally, NASA and Boeing were subject to certain intellectual property (IP) protection and to non-disclosure requirements.[899] Given these rights and duties, the Appellate Body characterized the relationship between the two parties as a "species of joint venture."[900] The Appellate Body supported this determination with statements made by NASA officials.[901] Yet, an unbiased reader familiar with the structure of joint ventures in international business might well cast doubt on this Appellate Body finding. Bluntly put, it is not well grounded in fact. Joint ventures come in many forms, but the terms of most of them are clearly laid out because the parties intend to create such a venture. To infer the existence of one from a few collaborative

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[895] *Id.* ¶ 593.
[896] *Id.* ¶ 594.
[897] *Id.* ¶ 595 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1109).
[898] *Id.*
[899] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 596.
[900] *Id.* ¶ 597.
[901] *Id.* ¶ 598.

terms is to make a key decision affecting the outcome of the case on thin circumstantial evidence and hearsay.

ii. USDOD Assistance Instruments

Next, the Appellate Body addressed Assistance Instruments between the USDOD and Boeing. It applied essentially the same chain of logic to them as it had to the NASA Procurement Contracts. The Assistance Instruments included cooperative agreements, technology investment agreements, and certain "other transactions" entered into by the USDOD under the United States Code, Title 10, Section 2371.[902] These collaborative arrangements meant Boeing and the Pentagon were in a joint venture, a joint venture is an equity infusion, and an equity infusion is a financial contribution. The Appellate Body focused on two notable features of the instruments.

First, the definition of "assistance" in United States federal regulations included language similar to that of Article 1:1(a)(1)(i) of the *SCM Agreement*. Under those regulations, "assistance" is:

> The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States . . . . Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.[903]

Thus, like Article 1:1(a)(1)(i), the definition of "assistance" refers to a "transfer" from the government to an enterprise. However, the Appellate Body also made sure to reiterate a measure must be assessed by its characteristics rather than its title.[904]

Second, the USDOD and Boeing jointly contributed financial resources to research projects.[905] The review by the Appellate Body confirmed the assistance instruments commit Boeing to contribute financial resources to projects, and also confirmed the Pentagon funds at least 50 percent of the projects.[906] Furthermore, as with NASA procurement contracts, under some of the assistance instruments, the USDOD provided access to its facilities in addition to funding.[907]

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902 *Id.* ¶ 602. The certain "other transactions" refer to transactions other than contracts, cooperative agreements, and grants that may be entered into to carry out basic, applied, and advance research projects. *Id.*

903 *Id.* ¶ 603 (quoting 32 C.F.R. § 21.615).

904 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 604.

905 *Id.* ¶ 605.

906 *Id.*

907 *Id.* ¶ 607.

The Appellate Body evaluated the American distinction between cooperative agreements versus grants. In a cooperative agreement, the American government would have substantial involvement in the work done under that agreement.[908] In a grant, the government would transfer funds, but not get involved in work. Perhaps the United States was caught off guard by this evaluation. Earlier in the case, the Americans had created the distinction, probably unaware the Appellate Body would deem a cooperative agreement to be collaboration akin to a joint venture, and thereafter analogize a joint venture to a grant. But it did just that, and in so doing, it turned the distinction against the United States. Indeed, under the logic of the Appellate Body, the distinction did not matter because either a cooperative agreement or a grant was a financial contribution.

Again mimicking its discussion of the NASA Procurement Contracts, the Appellate Body, after analyzing the inputs of the USDOD transactions, turned to the expected outputs. Just as with the NASA Procurement Contracts, the Appellate Body considered the shared nature of rights and responsibilities stemming from the Assistance Instruments.[909] Thus, the Appellate Body found the transactions under the USDOD were: composite, because of the combination of funding and access to facilities; and collaborative, because they involved the Pentagon and Boeing pooling monetary and non-monetary resources on the input side and some "sharing of the fruits" of the research on the output side.[910] The Appellate Body opined that these characteristics are not usually associated with a mere purchase transaction. Rather, these features resemble a joint venture arrangement.[911]

As further support for its finding, the Appellate Body tied the NASA Procurement Contracts and USDOD Assistance Instruments to Boeing by discussing a portion of the Panel report concerning serious prejudice arising from these financial contributions-*cum*-subsidies.[912] The Panel referred to numerous NASA and USDOD Programs as "collaborative efforts," or having been "undertaken in collaboration" with the United States industry.[913] The Appellate Body saw in such references additional support for the characterization of the measures at issue as collaborative, or similar to joint ventures. Here again, the above comment—the gist of which is that the commercial sophistication of the Appellate Body (or a panel) to make such a pronouncement about what constitutes a joint venture—is pertinent.

Nevertheless, in sum, the Appellate Body held the transactions under the NASA Procurement Contracts and the USDOD Assistance Instruments as being akin to a species of joint venture. The rationale for this holding was the

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[908] *Id.* ¶ 606.
[909] *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 608.
[910] *Id.* ¶ 609.
[911] *Id.*
[912] *See id.* ¶ 610.
[913] *Id*. (citing Panel Report, *US*—Boeing*, supra* note 814, ¶ 7.1764).

transactions were comprised of three key elements, namely, NASA and Boeing, or the Pentagon and Boeing:[914]

(1) Committed monetary and non-monetary resources and labor;
(2) Collaboratively determined the subjects to be researched; and
(3) Shared the fruits of research, such as IP rights and reports, from their work.

Having determined the characteristics of each measure at issue, the Appellate Body then reviewed the types of financial contributions covered by Article 1:1(a)(1) of the *SCM Agreement*. That led to its determination that the measures were financial contributions, and therefore subsidies.

The Appellate Body focused on Article 1:1(a)(1)(i), regarding a direct transfer of funds from a government. Expanding on the obvious definition of "funds," the Appellate Body cited itself in *Japan—DRAMs (Korea)*.[915] In that 2007 case, the Appellate Body endorsed a meaning of "funds" that includes not only money, but also financial resources and other financial claims generally.[916] The *Japan—DRAMs (Korea)* precedent also listed transactions, in addition to those found within Article 1:1(a)(1)(i), which would qualify as direct transfers of funds, and thus as financial contributions. They included debt forgiveness, the extension of loan maturity, and debt-to-equity swaps.[917]

While sub-paragraph (i) of Article 1:1(a)(1) concerns financial contributions in the form of funds, sub-paragraph (iii) deals with financial contributions that take the form of goods or services. This latter form entails two types. The first is government provision of goods or services other than general infrastructure. The second is government purchases of goods from an enterprise.[918] Under both sub-paragraphs (i) and (iii) of Article 1:1(a)(1) of the *SCM Agreement*, government provision of goods or services, or of funds, qualify as a financial contribution, regardless of consideration. That is, it does not matter whether the government does these transactions gratuitously or in exchange for a thing of value.

Finally, after devoting 70 paragraphs (550-620) to the aforementioned topics, the Appellate Body addressed in just five paragraphs (621-625) whether the NASA and USDOD measures raised on appeal constituted "financial contributions" within the meaning of Article 1.1(a)(1) of the *SCM Agreement*. Given the chain of logic the Appellate Body manufactured concerning collaboration-joint venture-equity infusion, the answer was a foregone conclusion.

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[914] *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 611.

[915] *Id.* ¶ 614.

[916] *See* Appellate Body Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R (*adopted* Dec. 17, 2007) [hereinafter Appellate Body Report, *Japan—DRAMs (Korea)*].

[917] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 615.

[918] *Id.* ¶ 618.

And, even the five key paragraphs were replete with redundancies from the previous 70 paragraphs.

So, the Appellate Body first asked whether any of the measures at issue could be deemed a "direct transfer of funds" within Article 1:1(a)(1)(i) of the *SCM Agreement* and the *Japan—DRAMs (Korea)* jurisprudence.[919] The Appellate Body saw similarities between the collaborate nature of the NASA-Boeing and USDOD-Boeing measures and equity infusions.[920] In an equity infusion, provision by a government of capital to a recipient is made in return for the acquisition of shares.[921] The Appellate Body described characteristics of an equity infusion and of a joint venture as including uncertain returns on investment.

Specifically, the success or failure of an investor depends on the performance of the enterprise.[922] The Appellate Body likened these characteristics to the NASA-Boeing and USDOD-Boeing measures by considering the return to be in the form of scientific and technical information, discoveries, and data expected as a result of their interactive work.[923] Similarly, the Appellate Body said NASA and the Pentagon had no certainty at the time of funding commitment that the research would be successful.[924]

Building on its characterization of the measures as joint ventures, the Appellate Body found them to be analogous to equity infusions. From there, it was easy to find the NASA Procurement Contracts and USDOD Assistance Instruments constituted a "financial contribution" under Article 1:1(a)(1)(i) of the *SCM Agreement*. That was because "equity infusions" is a listed example within that provision.[925] Further, but without any explanation, the Appellate Body also found the access given to NASA facilities, equipment and employees and to USDOD facilities to constitute the provision of goods and services within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*.[926]

2) Washington State B&O Tax Rate Reduction

The Appellate Body then addressed the Panel finding that the Washington State B&O tax rate reduction applicable to commercial aircraft and component manufacturers under Washington State House Bill 2294 constituted a financial contribution under Article 1:1(a)(1)(ii) of the *SCM Agreement*.[927]

The Panel looked to the Appellate Body reasoning in the *Foreign Sales Corporation* and *Foreign Sales Corporation (Article 21.5—EC)* reports for

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919 *Id.* ¶ 621.
920 *Id.* ¶ 622.
921 *Id.*
922 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 622.
923 *Id.* ¶ 623.
924 *Id.*
925 *Id.* ¶ 624.
926 *Id.* ¶ 625.
927 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 801.

guidance on the administration of tax and the "foregoing of government revenue that is otherwise due." Accordingly, the test in *Foreign Sales Corporation* involved "examining the situation that would have existed but for the measure in question and determining whether there would have been a higher tax liability in the absence of the measure."[928] The Appellate Body also recognized the possibility of a "but for" test in *Foreign Sales Corporations (Article 21.5—EC)*.[929]

The Panel said:

> [W]here it is possible to identify a general rule of taxation applied by the Member in question, a "but for" test can be applied, . . . [but] in other situations . . . the measure should be compared to the treatment applied to comparable income, for taxpayers in comparable circumstances in the jurisdiction in issue.[930]

When applied to the facts of this case, the Panel concluded Washington did have a general tax rate applicable to all manufacturing activities and the Washington State B&O Tax Rate Reduction constituted an exception to this rule.[931] The Panel then concluded "but for" the preferential rate provided by House Bill 2294, Boeing would be subject to the general tax rate.[932] Thus, it found the Washington B&O Tax Rate Reduction resulted in the "foregoing of revenue otherwise due" and constituted a financial contribution under Article 1:1(a)(1)(ii) of the *SCM Agreement*.[933]

The Appellate Body focused its legal analysis on the question: when does a government forego revenue otherwise due?[934] It emphasized the observations from *Foreign Sales Corporations* that "the foregoing of revenue otherwise due implies less revenue has been raised by the government than would have been raised in a different situation, and the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised."[935]

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928 *Id.* ¶ 802 (citing Panel Report *US—Boeing*, *supra* note 814, ¶ 7.117 (quoting Panel Report, *United States—Tax Treatment for "Foreign Sales Corporations,"* ¶ 7.49, WT/DS108/R (Oct. 8, 1999) (*adopted as modified* Mar. 20, 2000) [hereinafter Panel Report, *US—Foreign Sales Corporations*])).

929 *Id.* (citing Panel Report *US—Boeing*, *supra* note 814, ¶ 7.117 (citing Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"—Recourse to Article 21.5. of the DSU by the European Communities*, ¶ 91, WT/DS108/AB/RW (Jan. 14, 2002) (*adopted* Jan. 29, 2002)) [hereinafter Appellate Body Report, *US—Foreign Sales Corporations (Article 21.5—EC)*])).

930 *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.120).

931 *Id.* ¶ 803.

932 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 805.

933 *Id.*

934 *See id.* ¶¶ 806-15.

935 *Id.* ¶ 806.

However, there must be "some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise.'"[936] Additionally, "a domestic tax system may be so replete with exceptions that the rate applicable to the general category of income in fact no longer represents the 'general rule,' but rather, the 'exception.'"[937] In sum, identifying when government revenue otherwise due is foregone requires a comparison between the tax treatment that applies to the alleged subsidy recipients and the tax treatment of comparable income of comparably situated taxpayers.[938]

On appeal, the United States first contended the Panel over-relied on the "but for" test and failed to consider other methods of analysis. The Appellate Body partially agreed—at least that the approach of the Panel could lead to an overly narrow conception of the relevant rules. But ultimately the Appellate Body felt the Panel wording that the "but for" test "can" be applied indicated that the awareness of the Panel of other legal standards.[939]

The United States also alleged two specific errors of law.[940] First, the Americans said the Panel erred by failing to consider the Washington State B&O tax system as a whole.[941] Second, they asserted the Panel erred by failing to consider that the effective tax rate for aerospace manufacturing exceeds the average effective tax rate for businesses in Washington State.[942] The EU contended the Panel acted properly on both accounts.[943] Specifically, the EU stated the United States offered no evidence or argument supporting the notion that the average effective B&O tax rate is a normative benchmark.[944]

The Appellate Body sided with the Panel and the EU. In the Appellate Body view, the Panel identified the broad categories of tax treatment and determined commercial aircraft and component manufacturers are subject to a lower tax rate, with the possibility of reversion to a higher general tax rate.[945] Additionally, the Appellate Body found the Panel properly considered whether the Washington State B&O tax system as a whole could operate as a benchmark.[946]

Lastly, the Appellate Body agreed with the Panel assessment that the effective tax rate of the Washington B&O tax regime was not a proper metric for analysis.[947] Thus, the Appellate Body upheld all of the Panel findings related to

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936 *Id.* (quoting Appellate Body Report, *US—Foreign Sales Corporations (Article 21.5—EC)*, *supra* note 929, ¶ 90).

937 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 815.

938 *Id.* ¶ 812.

939 *Id.* ¶ 818.

940 *Id.* ¶ 819.

941 *Id.*

942 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 819.

943 *Id.*

944 *Id.*

945 *Id.* ¶ 825.

946 *Id.* ¶ 827.

947 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 829.

its conclusion that the reduction in the Washington State B&O tax rate applicable to commercial aircraft and component manufacturers constituted the foregoing of revenue otherwise due, and therefore, it was a financial contribution within the meaning of Article 1:1(a)(1)(ii) of the *SCM Agreement*.[948]

b. NASA Procurement Contracts and USDOD Assistance Instruments, and Conferral of Benefit Under *SCM Agreement* Article 1:1(b)?

The second main substantive issue addressed by the Appellate Body concerned whether certain measures provided by NASA and USDOD constituted a "conferral of a benefit" within the meaning of Article 1:1(b) of the *SCM Agreement*.

The Appellate Body first took the opportunity to define "benefit" within the meaning of Article 1:1(b). It went so far as to quote itself in the 1999 *Canada—Aircraft* case, in which it explained:

> [T]he word "benefit," as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred," because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient in the market.[949]

Additionally, the Appellate Body referred to its own clarification of "benefit" made in *EC—Airbus*.[950]

In *EC—Airbus*, the Appellate Body considered whether the benefit was financial and whether the behavior of the grantor and recipient of the alleged subsidy at issue are assessed against the behavior of commercial actors in the market.[951] Additionally, the Appellate Body stated that the assessment of a benefit requires examining the terms and conditions of the challenged transaction

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948 *Id.* ¶ 831.

949 *Id.* ¶ 635 (quoting Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WT/DS70/AB/R (Aug. 2, 1999) (*adopted* Aug. 20, 1999) [hereinafter Appellate Body Report, *Canada—Aircraft*]).

950 *Id.* ¶ 636 (referring to *EC—Airbus*, *supra* note 758).

951 *Id.* (citing Appellate Body Report, *Canada—Aircraft*, *supra* note 949, ¶¶ 706, 836).

at the time it is made and comparing them to the terms and conditions that would have been offered in the market at the time.[952]

Again, the Appellate Body began its discussion by criticizing the Panel's chosen test, but this time for determining whether a benefit had been conferred. Reusing part of its previous test, the Panel asked which party of the transaction derived the "principal benefit and use" from the research.[953] The Appellate Body disagreed with this question for two reasons. First, the Panel test would invariably find a benefit because R&D is principally for the benefit of the commissioned party rather than the commissioning government.[954]

Second, the market benchmark employed by the Panel assumed "no commercial entity . . . would provide payments . . . to another commercial entity on the condition the other entity perform R&D activities principally for the benefit and use of that other entity."[955] The Appellate Body expressed concern that the Panel assumption was not supported by evidence.

Future panels should take caution that the Appellate Body went so far as to state:

> We believe that, to the contrary, the Panel could not have arrived at a conclusion as to whether a benefit was conferred within the meaning of Article 1:1(b) without empirically testing the views that it had about the market on the basis of the evidence submitted by the parties pertinent to relevant market benchmarks.[956]

Related to the evidentiary issues created by the Panel, the Appellate Body also criticized the Panel for not explaining how it reached the conclusion that the EU had established a *prima facie* case that the transaction would not take place in the market.[957] The Appellate Body agreed the burden lay on the United States to rebut a *prima facie* case; however, the Panel said the Americans had failed to provide any relevant evidence or examples of commercial transactions. The Appellate Body disagreed, stating that the United States had provided evidence of market transactions.[958] Moreover, the Appellate Body was not persuaded that no situation existed where such an agreement would take place involving a private entity.[959]

Accordingly, the Appellate Body determined it could not sustain the Panel reasoning as to whether the payments and support provided to Boeing under

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952 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 636 (citing Appellate Body Report, *Canada—Aircraft*, *supra* note 949, ¶ 838).
953 *Id.* ¶ 641.
954 *Id.*
955 *Id.* ¶ 642 (citing Panel Report *US—Boeing*, *supra* note 814, ¶¶ 7.1039, 7.1184).
956 *Id.* ¶ 644 (footnote omitted).
957 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 645.
958 *Id.*
959 *Id.* ¶ 646.

the NASA Procurement Contracts and the USDOD Assistance Instruments conferred a benefit within the meaning of Article 1:1(b) of the *SCM Agreement*.[960] Additionally, the Appellate Body took it upon itself to complete the analysis where there were sufficient factual findings by the Panel or undisputed facts on the record to enable it to do so. As support, it cited the 2002 *US—Section 211 Appropriations Act* case.[961]

According to the 1999 *Canada—Aircraft* decision, the determination of a benefit under Article 1:1(b) of the *SCM Agreement* seeks to identify whether the financial contribution has made the recipient better off than it would otherwise have been, absent that contribution.[962] Again quoting *Canada—Aircraft*, the Appellate Body stated:

> [T]he marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred," because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient in the market.[963]

Applied here, the Appellate Body decided Boeing obtained more, and NASA and USDOD obtained less, respectively, than it would have obtained in the market.[964]

Accordingly, that difference was sufficient to establish "the provision by NASA and the USDOD of funding and other support to Boeing on the terms of the joint venture arrangements . . . conferred a benefit on Boeing within the meaning of Article 1:1(b) of the *SCM Agreement*."[965]

c. Specificity of a Benefit Under *SCM Agreement* Articles 1-2?

The third main substantive issue addressed by the Appellate Body on appeal concerned whether the NASA/USDOD allocation of patent rights, the Washington State B&O Tax Rate Reduction, and the City of Wichita IRBs were "specific" within the meaning of Articles 1 and 2 of the *SCM Agreement*. No subsidy is actionable (Yellow Light) or prohibited (Red Light) unless it is, indeed, a "subsidy." That means, *inter alia*, that it must be specific to a certain enterprise or industry. If it is generally available, then it flunks the Specificity Test of Articles 1 and 2:1(a) and (c) of the *SCM Agreement*.

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[960] *Id.* ¶ 647.

[961] *Id.* ¶ 649 n.1346 (citation omitted).

[962] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 662 (citing Appellate Body Report, *Canada—Aircraft*, *supra* note 949, ¶ 157).

[963] *Id.* ¶ 662 (quoting Appellate Body Report, *Canada—Aircraft*, *supra* note 814, ¶ 157).

[964] *Id.*

[965] *Id.*

As before, the Appellate Body did not move directly to the essential analysis here: an Article 2:1 analysis of the allocation of patent rights. Rather, the Appellate Body began its discussion by criticizing the approach used by the Panel. In this instance, the Appellate Body did not agree with the *arguendo* approach of the Panel—assuming that the allocation of patent rights to Boeing was a financial contribution that confers a benefit within the meaning of Article 1:1 of the *SCM Agreement*.

Again, perhaps cautioning future panels or trade practitioners, the Appellate Body pointed to problems with such an approach. First, the assumptions made by the Panel were not clear to both parties. For instance, in the view of the United States, the Panel assumption was broad enough to include numerous legislative and executive acts of government by the United States.[966]

Second, the Panel assumption could leave to an unresolved problem if the Appellate Body were to reverse the Panel decision. As the Appellate Body stated, if it found instead that the allocation of patent rights under NASA-USDOD contracts and agreements is specific within the meaning of Article 2:1, then there would be no Panel findings as to whether the allocation of patent rights under those contracts and agreements constitutes a subsidy.[967]

Moreover, insufficient factual findings would frustrate the purpose of Article 3:3 of the *DSU*.[968] In sum, the Appellate Body warned that though the Panel shortcut initially appeared more efficient, it ultimately could result in inefficient outcomes.[969]

1) NASA and USDOD Allocation of Patent Rights

On appeal, the EU only challenged one of the two claims rejected by the Panel.[970] The EU claimed the allocation of patent rights under NASA and USDOD contracts and agreements were specific within the meaning of Article 2:1 of the *SCM Agreement*.[971] Additionally, the Appellate Body noted the patent rights allocation issue was central to the arguments of the EU and the analysis of the Panel in regards to previous discussions of purchases of services, and the conclusion that the payments and other support provided under the contracts and agreements constituted subsides within the *SCM Agreement*.[972] Lastly, the United States did not dispute the other Panel findings of specificity within Article 2:1 of the *SCM Agreement* with regards to payments and other support provided under the NASA and USDOD contracts and agreements at issue.[973]

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966 *Id.* ¶ 740.
967 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 741.
968 *Id.*
969 *Id.*
970 *Id.* ¶ 725.
971 *Id.* ¶¶ 724-25.
972 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 726.
973 *Id.* ¶ 730.

In this dispute, the issue before the Appellate Body was whether the Panel interpretation of the United States government "as a whole" could be a "granting authority" for purposes of Article 2:1 of the *SCM Agreement*. The EU asserted the interpretation of a granting authority is limited to the authority that actually provides the challenged subsidy.[974] The United States contended the inquiry "must look at the broader legal framework."[975] Ultimately, the Appellate Body sided with the Panel and the United States, rejecting the EU appeal.[976]

In light of this determination, the Appellate Body then turned to the EU's allegation that the Panel erred in the application of Article 2:1 of the *SCM Agreement*. In line with the EU interpretation, it again contended only NASA and USDOD should be considered as granting authorities for this analysis of specificity.[977] However, as expected following the preceding determination, the Appellate Body considered the entire legal framework as it addressed whether access to the NASA and USDOD subsidies was explicitly limited to certain enterprises.[978]

Here, the relevant government policies were implemented beginning in 1980 through the five legal instruments,[979] previously outlined. The Appellate Body analyzed the policy considerations, allocated rights, and instructions under each of these legal instruments. When viewed on its own, the NASA-specific regulations appear to give unique rights to NASA when it contracts with private entities. Additionally, when coupled with the 1987 Executive Order, the *Bayh-Dole Act* applied to all government contractors. The Appellate Body decision to consider the broad legal framework proved key to its conclusion (discussed below).

As mentioned by the Appellate Body, under the *Space Act*, rights over inventions discovered in the course of work performed under a contract with NASA belong exclusively to the United States. Importantly, NASA is also granted authority to waive patent rights.[980] Requests for waivers may be made before or after the reporting of the invention.[981] Additionally, "the regulations provide that the [NASA Inventions and Contributions] Board will 'normally' recommend that the request for waiver be granted."[982]

However, it does not seem this normal recommendation alone would suffice to dispose of specificity in regards to the NASA contracts. Instead, the existence of the 1983 Presidential Memorandum and the 1987 Executive Order allowed for the United States to prevail. The Appellate Body looked to the "Fact Sheet explaining the 1983 Presidential Memorandum states agencies, such as

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974 *Id.* ¶ 745.
975 *Id.*
976 *Id.* ¶ 760.
977 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 761.
978 *See id.*
979 *Id.* ¶ 764 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1278).
980 *Id.* ¶¶ 775-76.
981 *Id.* ¶ 777.
982 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 777.

[NASA] . . . are expected to make maximum use of the flexibility available to them to comply with the provisions and spirit of the Memorandum."[983]

Additionally, the Appellate Body said:

> NASA's regulations provide that, in making waiver determinations, NASA's Administrator will be guided by the objectives of the Space Act of 1958 and by the basic policy of the Presidential Memorandum and Statement of Government Patent Policy to the Heads of the Executive Departments and agencies dated February 18, 1983.[984]

The Appellate Body was persuaded by how the regulations functioned in relation to one another. As it stated:

> The key point is that, both under the general regulations, which apply to the USDOD and other departments, and under a NASA waiver, ownership rights (title) over the invention will belong solely to the contractor through the allocation of patents under NASA and USDOD contracts and agreements, even though the mechanism for the initial allocation of patent rights is formally somewhat different.[985]

Having failed to make persuasive arguments about *de jure* specificity relating to Article 2:1(a) of the *SCM Agreement*, the EU turned to arguments about *de facto* specificity under Article 2:1(c) of the *Agreement*.[986]

Once again, before getting to the heart of the matter, the Appellate Body paused to address the incomplete analysis provided by the Panel. Though the Panel included the EU *de facto* specificity arguments in its summary of the arguments of the parties, it failed to refer to Article 2:1(c) in its later analysis of specificity, or to explain why the argument was not addressed.[987]

The Appellate Body found the Panel analysis incomplete and not sustainable. It supported this determination with its 2011 decision in *US—AD/CVD (China)*.[988] There:

> [T]he Appellate Body stated that "[t]he reference in Article 2:1(c) to 'any appearance of non-specificity' resulting from the

[983] *Id.* ¶ 779 (citation and internal quotation marks omitted).

[984] *Id.* (citation and internal quotation marks omitted).

[985] *Id.* ¶ 780.

[986] *Id.* ¶ 790.

[987] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 793.

[988] *Id.* ¶ 792 (citing Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 370, WT/DS379/AB/R (Mar. 11, 2011) (*adopted* Mar. 25, 2011) [hereinafter Appellate Body Report, *US—AD/CVD (China)*]).

> application of Article 2:1(a) and (b) supports the view that the conduct or instruments of a granting authority may not clearly satisfy the eligibility requirements of Article 2:1(a) or (b), but may nevertheless give rise to specificity in fact." The Appellate Body added that, "[i]n such circumstances, application of the factors under Article 2:1(c) to factual features of a challenged subsidy is warranted. Since an 'appearance of non-specificity' under Article 2:1(a) and (b) may still result in specificity in fact under Article 2:1(c) of the *SCM Agreement*, this reinforces our view that the principles in Article 2:1 are to be interpreted together." Based on this, the Appellate Body concluded "a proper understanding of specificity under Article 2:1 must allow for the concurrent application of these principles to the various legal and factual aspects of a subsidy in any given case."[989]

In brief, the principles of Article 2:1 must be applied concurrently. A finding of non-specificity under sub-paragraphs (a) and (b) did not provide an opportunity for the Panel to refrain from examining the EU's claims under sub-paragraph (c).[990]

The Appellate Body discussed the threshold needed to apply Article 2:1(c) of the *SCM Agreement*. In addition to first addressing sub-paragraphs (a) and (b), a panel may only proceed to an application of sub-paragraph (c) if there are reasons to believe that the subsidy may in fact be specific.[991] The Appellate Body distinguished between the potential conclusion of a panel of "an appearance of non-specificity" under Article 2:1 (a)-(b) and "reasons" for a panel to believe an assessment under Article 2:1(c) is warranted. In some cases, both instances may be present.

Here, the EU pointed to the discretion included with authority of NASA to deny request for a waiver and the authority of the USDOD to preclude a contractor from electing to retain patent rights over an invention.[992] However, the evidence did not show any instances where NASA or the USDOD actually exercised these options.[993] The EU also attempted to support its claim by referring to the share of NASA contracts and USDOD funding received by Boeing.

However, preceding the Panel assumption that the allocation of patent rights is separate from any NASA-USDOD contracts and agreements, the Appellate Body felt this evidence was not relevant. This assumption deemed

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989 *Id.* (footnotes omitted); *see* Appellate Body Report, *US—AD/CVD (China)*, *supra* note 988, ¶¶ 370-71.

990 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 793.

991 *Id.* ¶¶ 796-97.

992 *Id.* ¶ 798.

993 *Id.*

patent rights a self-standing subsidy, and as the Appellate Body noted, limited the analysis of *de facto* specificity.[994]

2) Washington State B&O Tax Rate Reduction

The United States also appealed the Panel finding that the Washington State B&O Tax Rate Reduction under House Bill 2294 was a specific subsidy within the meaning of Article 2:1(a) of the *SCM Agreement*.[995] The Panel focused its legal analysis on the meaning of "explicit."[996] Using the *Oxford English Dictionary* as guidance, "explicit" indicates a limitation on access to a subsidy must "distinctly express all that is meant; leaving nothing merely implied or suggested" and must be "unambiguous" and "clear."[997] In the Panel view, "the express limitation can be found either in the legislation by which the granting authority operates, or in other statements or means by which the granting authority expresses its will."[998] Additionally, the 2005 *US—Upland Cotton* case suggested "there is some tipping point . . . at which access to the subsidy in issue is no longer considered to be limited to 'certain enterprises' but rather is 'sufficiently broadly available' throughout an economy as to be non-specific."[999]

In the Panel view, the title of Washington State House Bill 2294, *Aerospace Industry – Tax Incentives*, plus the language and operation of the bill limited the tax measures to the aerospace industry or to certain enterprises within the aerospace industry.[1000] Additionally, when examining the Washington State B&O tax system as a whole, there was insufficient evidence showing the subsidies at issue were broadly available.[1001] Thus, the Panel found the B&O Tax Rate Reduction granted to the aerospace industry under House Bill 2294 was a specific subsidy within the meaning of Article 2:1(a) of the *SCM Agreement*.

On appeal, the United States challenged the Panel application of Article 2:1(a), rather than its interpretation.[1002] In particular, the Americans urged a look at the Washington State tax system as a whole.[1003] The EU maintained the Panel needed only to examine House Bill 2294, but that even so, the Panel correctly

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[994] *Id.* ¶ 800.

[995] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 832.

[996] *Id.* ¶ 833.

[997] *Id.* (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.190 (quoting 1 SHORTER OXFORD ENGLISH DICTIONARY 888 (Lesley Brown ed., 4th ed. 1993))).

[998] *Id.*

[999] *Id.* (referring to Panel Report, *United States—Subsidies on Upland Cotton*, ¶ 7.1139, WT/DS267/R (Sept. 8, 2004) (*adopted as modified* Mar. 21, 2005) [hereinafter *US—Upland Cotton*]).

[1000] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 834.

[1001] *Id.* ¶¶ 835-37.

[1002] *Id.* ¶ 838.

[1003] *Id.*

found there was no connection among the broad tax rate receptions to constitute a single tax rate regime.[1004]

According to the Appellate Body, a proper inquiry under Article 2:1(a) of the *SCM Agreement* must look first to the subsidy in question as defined in Article 1:1.[1005] Then, it is proper to look at the broader legislation pursuant to which the granting authority operates the subsidy, or to express acts of granting authority.[1006] In this case, the Appellate Body was satisfied with the Panel analysis because the Panel correctly conducted its inquiry in this manner.[1007] Thus, as it did in regards to the financial contribution analysis (discussed above), the Appellate Body upheld the Panel finding that the Washington State B&O Tax Rate Reduction granted under House Bill 2294 was a specific subsidy within the meaning of Article 2.1(a) of the *SCM Agreement*.[1008]

3) City of Wichita IRBs

The last issue on appeal relating to specificity within the meaning of Article 2:1(c) of the *SCM Agreement* concerned the Panel finding of specificity with regard to the IRB subsidies provided by the City of Wichita.[1009] Here, the alleged illegal subsidies were provided not only to Boeing, but also to Spirit.[1010]

Generally, "IRBs were issued by the City of Wichita to the general public on behalf of a qualifying private entity, the proceeds of which were used to purchase, construct, or improve commercial or industrial property for that entity."[1011] Here, the scheme operated "somewhat differently" because Boeing and Spirit, rather than the public, purchased the IRBs.[1012] As a result, Boeing and Spirit funded their own property development while taking advantage of property and sales tax exemptions associated with the IRBs.[1013]

As required by Article 2 of the *SCM Agreement*, the Panel first considered the challenged measure under Article 2:1(a) of the *Agreement*.[1014] Having found the IRBs did not expressly limit the availability of the subsidy

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1004 *Id.* ¶ 839.
1005 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 841.
1006 *Id.*
1007 *Id.* ¶ 844.
1008 *Id.* ¶ 858. Also, the Appellate Body did not consider further analysis under Article 2:1(b) or (c) to be warranted because neither party advanced arguments therein and because the foregoing analysis indicated there was an explicit limitation on access to a subsidy to certain enterprises, respectively. *See id.* ¶ 859.
1009 *Id.*
1010 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 859.
1011 *Id.* ¶ 860.
1012 *Id.*
1013 *Id.*
1014 *Id.* ¶ 861. The Panel did so even though the EU had not submitted arguments under this provision. *Id.*

within the meaning of Article 2:1(a), the Panel turned to consider the IRBs specificity under Article 2:1(c) of the *Agreement*.[1015]

The Panel ultimately found the IRBs were a specific subsidy within Article 2:1(c) of the *SCM Agreement* because Boeing and Spirit were granted disproportionately large amounts of the subsidies.[1016] First, the Panel looked to "establish the correct interpretation of 'disproportionality.'"[1017] Second, it applied its interpretation of disproportionality to the City of Wichita IRBs granted to Boeing and Spirit.[1018]

The parties and Panel struggled with the proper way to assess whether a subsidy was disproportionately large. The EU "contended [the] ratio used should consist of information about Boeing, such as employment levels, relative to comparable information relating to the entire economy in the jurisdiction of the granting authority."[1019] The United States argued the comparison should be with information about the group of recipients of the alleged subsidy.[1020] The Panel found both approaches problematic, but saw some textual support for the EU suggestion. Even so, the Panel pointed to problems with ideas of each party.[1021]

First, the EU approach contradicted the Panel approach in the 2005 *US—Upland Cotton* case. There, the Panel held there was "a tipping point, which is not subject to rigid quantitative definition, at which a subsidy becomes sufficiently broadly available throughout an economy as to become non-specific."[1022]

Second, the American approach was more mathematically logical, but lacked textual support in Article 2 of the *SCM Agreement*.[1023] In the view of the Panel, under the American approach, a subsidy could be granted to a limited number of entities as long as these two or three enterprises received the subsidy in proportion to their relative economic contributions as compared to each other.[1024] In large part, the Panel agreed with the EU, but mended the approach by interpreting disproportion to mean a significant disparity, rather than any disparity.[1025]

With this interpretation in hand, the Panel applied it to the facts. In *US—Boeing*, the Panel noted Boeing and Spirit received 69 percent of the IRBs between 1979 and 2005, but accounted for 16 percent and 32 percent of manufacturing employment in Wichita, respectively.[1026] In the Panel view, that was enough to conclude that "there [was] a significant disparity between the

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[1015] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 861.
[1016] *Id.*
[1017] *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.753).
[1018] *Id.*
[1019] *Id.* ¶ 863.
[1020] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 863.
[1021] *See id.* ¶¶ 865-69.
[1022] *Id.* ¶ 865.
[1023] *Id.* ¶¶ 867-68.
[1024] *Id.* ¶ 868.
[1025] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 869.
[1026] *Id.* ¶ 870.

proportion of IRBs received by Boeing and Spirit and their place within the goods sector of the economy, as indicated by the proportion of the sector they employ."[1027] Additionally, it concluded the United States had shown insufficient evidence for rebuttal.[1028] Accordingly, the Panel found that the IRB tax abatements granted to Boeing and Spirit were disproportionately large, and therefore specific to "certain enterprises" within the meaning of Article 2:1(c).[1029]

As expected on appeal, the United States challenged the Panel finding that the IRB subsidies were granted in disproportionately large amounts within the meaning of Article 2:1(c) of the *SCM Agreement*.[1030] In particular, the Americans disagreed with "the Panel's decision to use company-specific employment levels of Boeing and Spirit, relative to total manufacturing employment in the City of Wichita, as the benchmark for its disproportionality analysis."[1031] The United States considered the Panel approach too narrow.[1032] The EU argued the United States failed to present sufficient evidence relating to an alternative approach or that the approach used was misleading.[1033]

The Appellate Body first praised the Panel for considering the application of Article 2:1(a) of the *SCM Agreement*, absent any arguments put forward by either party.[1034] The Appellate Body reiterated that application of Article 2:1(c) proceeds where "there are reasons to believe a subsidy may in fact be specific."[1035] It further explained that such application is appropriate when "a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure."[1036]

As recognized by the Panel, in the *US—Boeing* dispute, only the third factor (out of four) outlined in Article 2:1(c) applied: "[T]he granting of disproportionately large amounts of subsidy to certain enterprises."[1037] The Appellate Body made clear what it considered the proper approach:

> [T]he first task is to identify the "amounts of subsidy" granted. Second, an assessment must be made as to whether the amounts of subsidy are "disproportionately large." This term suggests that disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion, or relatively too large. When viewed against the

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1027 *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.769).
1028 *Id.*
1029 *Id.*
1030 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 871.
1031 *Id.*
1032 *Id.*
1033 *Id.* ¶ 872.
1034 *Id.* ¶ 876.
1035 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 877.
1036 *Id.*
1037 *Id.* ¶ 879.

> analytical framework set out above regarding Article 2:1(c), this factor requires a panel to determine whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2:1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.[1038]

The Appellant Body considered it likely that although the legal basis for the allocation of IRBs may be broadly available to enterprises in Wichita, those actually in a position to avail themselves of IRB benefits represent only a subset of all enterprises in Wichita.[1039]

Even so, the Appellate Body expected there should be a wide distribution of the IRB benefits across various sectors of the Wichita economy.[1040] In *US—Boeing*, the Appellate Body found persuasive the fact that Boeing and Spirit received over two-thirds of IRB property tax abatements from the City of Wichita over a 25-year period.[1041] Moreover, the Appellate Body rejected the contention that the share accounted for by an entity of employment in Wichita was relevant to the inquiry at hand.[1042]

In passing, the Appellate Body recognized the strength of the American argument that the inquiry should look at companies that actually made investments in industrial or commercial property, or as it put, "qualifying investments."[1043] However, the Appellate Body stated the United States failed to provide sufficient evidence supporting this argument.[1044] Thus, the Appellate Body upheld the Panel findings, but did so in large part because the Americans failed to provide sufficient evidence. Accordingly, the Appellate Body held the IRB subsidies provided by the City of Wichita to Boeing and Spirit were specific within the meaning of Article 2:1(c) of the *SCM Agreement*.[1045]

1038 *Id.* (footnote omitted).
1039 *Id.* ¶ 883.
1040 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 883.
1041 *Id.* ¶ 884.
1042 *Id.* ¶ 886.
1043 *Id.*
1044 *Id.* ¶ 888.
1045 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 889.

d. Yellow Light Subsidies and Adverse Effects in Form of Serious Prejudice Under GATT Article XVI:1 and *SCM Agreement* Articles 5-6?

The fourth, and last, general substantive issue addressed by the Appellate Body concerned whether certain measures were "adverse effects" within the meaning of Articles 5 and 6 of the *SCM Agreement*. As opposed to addressing each measure on its own, the Panel felt it best to separate the subsidies into three groups (each with a relevant product market) and identified three relevant product markets. Additionally, the Panel considered two mechanisms through which the subsidies allegedly caused serious prejudice. Those mechanisms included the effects on prices of Boeing LCA, i.e., Price Effects, and technological development for new Boeing LCA models, i.e., Technological Effects.[1046]

The three groups of subsidies created by the Panel were[1047]:

(1) "Aeronautics R&D Subsidies;"
(2) "Tied tax Subsidies;" and
(3) "Remaining Subsidies."

The Aeronautics R&D Subsidies included[1048]:

(1) Payments made to Boeing, plus the access for Boeing to NASA facilities, equipment, and employees pursuant NASA procurement contracts; and
(2) Payments made to Boeing, plus the access for Boeing to USDOD facilities pursuant to the USDOD assistance instruments.

The Panel found these subsidies amounted to at least $2.6 billion.[1049] The Panel evaluated these subsidies on the basis of their alleged "technology effects."[1050]

The Tied Tax subsidies included[1051]:

(1) Tax exemptions and exclusions from the FSC/ETI legislation;
(2) The Washington State B&O tax rate reduction; and
(3) The City of Everett, Washington, B&O tax rate reduction.

The Panel found these subsidies amounted to approximately $2.2 billion.[1052] The Panel assessed them according to their alleged "price effects."[1053]

[1046] *Id.* ¶ 890.
[1047] *Id.* ¶ 892.
[1048] *Id.* ¶ 893.
[1049] *Id.*
[1050] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 896.
[1051] *Id.* ¶ 894.

The eight Remaining Subsidies, which amounted to approximately $550 million, included[1054]:

(1) Property and sales tax abatements issued by the City of Wichita, Kansas;
(2) Washington State B&O tax credits for preproduction development, computer software and hardware, and property taxes;
(3) Washington State sales and use tax exemptions for computer hardware, peripherals, and software;
(4) Washington State workforce development program and Employment Resource Center;
(5) Reimbursement by the State of Illinois of a portion of the relocation expenses of Boeing;
(6) The 15-year Economic Development for a Growing Economy (EDGE) tax credits provided by the State of Illinois;
(7) The abatement or refund by the State of Illinois of a portion of the property taxes paid by Boeing; and
(8) The payment to retire the lease of the previous tenant of the new headquarters building of Boeing in Chicago, Illinois.

As it had with the Tied Tax subsidies, the Panel examined these subsidies according to their alleged "price effects."[1055]

1) Appellate Body and
Causation-Non-Attribution Analysis

Interestingly, the Appellate Body commenced its treatment with a summary of the main elements of a causation analysis under Part II of the *SCM Agreement*. The Appellate Body felt the Panel had not sufficiently elaborated on its own understanding of these elements. The Appellate Body admitted it was doing so, "[a]lthough neither participant [had] appealed the Panel's articulation of its intended approach . . . ."[1056] The Appellate Body took it upon itself to add arguably unnecessary page length to an already torturous document. However, to be fair, the articulation by the Appellate Body could assist international trade practitioners.

The Appellate Body continued by discussing how a plain reading of the language of Articles 5, 6:2, and 6:3 of the *SCM Agreement* makes clear "a complainant must demonstrate not only the existence of the relevant subsidies and

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1052 *Id.*
1053 *Id.* ¶ 896.
1054 *Id.* ¶ 895.
1055 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 896.
1056 *Id.* ¶ 912.

adverse effects to its interests, but also that the subsidies at issue have caused such effects."[1057]

These provisions state:

Article 5
Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.,:

(a) [I]njury to the domestic industry of another Member;
(b) [N]nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;
(c) Serious prejudice to the interests of another Member.

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the *Agreement on Agriculture*.

Article 6
Serious Prejudice
. . . .
6.3. Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) [T]he effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
(b) [T]he effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
(c) [T]he effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
(d) [T]he effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to

[1057] *Id.* ¶ 913.

> the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.[1058]

The Appellate Body cited its decisions in the 2005 *US—Upland Cotton* and 2011 *EC—Airbus*. In both cases, it articulated the causal link required as "a genuine and substantial relationship of cause and effect."[1059]

Further, "the mere presence of other causes that contribute to a particular market effect does not, in itself, preclude the subsidy from being found to be a 'genuine and substantial' cause of the effect."[1060] A proper analysis must ensure the effects of those other causal factors are not attributed to the subsidies at issue.[1061]

In practice, this non-attribution analysis can be difficult. Often, a Panel has to consider other factors, and their varying degrees of contribution.[1062]

2) Overview of Appellate Body Findings on Causation of Adverse Effects

Finally, the Appellate Body turned its discussion to the appeal by each party. First, it considered the American appeal of the findings of the Panel with respect to the Technology Effects of the Aeronautics R&D Subsidies. Later, it addressed the American appeal regarding the Price Effects of the Tied Tax subsidies. Last, on the Remaining Subsidies, the Appellate Body addressed the European appeal of the decisions of the Panel not to undertake a collective assessment of these Subsidies and their effects when examining their alleged seriousness.

3) Technology Effects

With regard to the Technology Effects, the United States put forth three arguments. First, the United States sought reversal of the legal finding by the Panel that the aeronautics R&D subsidies caused adverse effects to the interests of the European Communities.[1063] Second, the Americans said the Panel erred in finding, "absent the aeronautics R&D subsidies, Boeing would not have been able to launch an aircraft incorporating all of the technologies that are incorporated on

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[1058] *SCM Agreement* arts. 5-6 (footnotes omitted).
[1059] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 913 (footnote omitted).
[1060] *Id.* ¶ 914.
[1061] *Id.*
[1062] *Id.*
[1063] *Id.* ¶ 1012.

the 787 in 2004, with promised deliveries commencing in 2008."[1064] Third, the United States challenged each of the Panel findings relating to significant lost sales, threat of displacement and impedance, and significant price suppression.[1065]

i. Five Specific Grounds for American Appeal

The United States first took issue with the conclusion of the Panel at the close of the first stage of its analysis. There, the Panel found the Aeronautics R&D Subsidies "contributed in a genuine and substantial way to Boeing's development of technologies for the 787 and that, in the light of the conditions of competition in the LCA industry, these subsidies conferred a competitive advantage on Boeing."[1066] The Panel reached this conclusion by considering four factors: (i) objectives of the aeronautics R&D subsidies; (ii) structure and design of the aeronautics R&D subsidies; (iii) operation of the aeronautics R&D subsidies; and (iv) conditions of competition in the LCA industry.[1067]

On appeal, the United States pointed to five of the Panel's own factual findings, which it argued the Panel failed to take into account. Those were:

a) [M]uch of the work that NASA funded bore a weak relationship to the 787 as it was not directed toward the six critical 787 technologies identified by the Panel;
b) [E]ven the NASA research most directly on the development pathway toward the 787 is far removed from the ultimate technologies used on that aircraft;
c) NASA funding was only one of many sources available to Boeing for technology development and was unavailable for later stages of the research;
d) [N]on-subsidy sources were responsible for most of the technology eventually used to make the 787 and Boeing's ability to apply that technology to the 787; and
e) [T]he magnitude of the subsidies was small in relation to the cost of developing the 787.[1068]

1064 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1013 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1775).

1065 *Id.* ¶ 1015.

1066 *Id.* ¶ 934 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1773).

1067 *Id.*

1068 *Id.* ¶ 950 (citing United States' other appellant's submission, ¶ 257 (noting that "[a]lthough the United States sets out its arguments on appeal under six subheadings, it also appears to categorize them thematically under the five headings at subparagraphs (a)-(e) above")).

The Americans contended that when the above findings are considered in their totality, they demonstrate no possible cause and effect relationship existed between support for Boeing and adverse effects visited on the EU (i.e., Airbus).

The Appellate Body was puzzled by the standard the United States intended to apply. To the Appellate Body, the American argument raised numerous questions. What if it felt the Panel only failed to consider properly one or more (but not all five) of the findings?[1069] Does it matter that the five findings only apply to the third step in the Panel's analysis?[1070] More importantly, is this not a question of the weight given to factual findings and, therefore, an issue under Article 11 of the *DSU*?[1071] (That certainly was the argument of the EU, i.e., that all five points were factual matters contestable properly under *DSU* Article 11, not in terms of causation under the *SCM Agreement*.)

Ultimately, the Appellate Body accepted some of the American arguments as legal, while it took others to be questions of fact the United States should have appealed under Article 11 of the *DSU*. No matter. The Appellate Body went one-by-one through the five above-mentioned American arguments and rejected every one of them.

The first specific argument the United States made alleged the Panel erred by extrapolating findings from three of the most important NASA programs to the remaining NASA and USDOD R&D programs at issue.[1072] The EU contended, "[T]he Panel assessed the evidence before it and properly concluded the varying degrees of contribution from the technologies used on the 787."[1073] The Appellate Body sided with the EU.[1074] With regard to the programs outside the most important three, it stated the causal link found by the Panel was not an extrapolation. Instead, the Panel reasoned that all of the programs, to differing degrees, had contributed to the technological development of the 787 technologies.[1075]

The second appellate argument alleged that the Panel understated the time and resources Boeing itself was required to invest. The United States pointed to a miscalculation the amount of time by which the NASA research accelerated the development of the 787 technologies.[1076] The United States argued this understatement caused the Panel to underestimate how far removed the NASA research was from the actual technology used on the 787.[1077] Again, the EU contended such a miscalculation is a factual error and thus should have been

[1069] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 951.
[1070] *Id.* ¶ 952.
[1071] *Id.* ¶ 953.
[1072] *Id.* ¶ 960.
[1073] *Id.* ¶ 962.
[1074] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 970.
[1075] *Id.*
[1076] *Id.* ¶ 972.
[1077] *Id.*

appealed as a claim under Article 11 of the *DSU*. Ultimately, the Appellate Body agreed, holding it was unable to consider the grounds for the American appeal.[1078]

Next, the United States challenged the assessment of the Panel concerning the role played by Boeing and its suppliers.[1079] The Americans argued the NASA-funded research was small in comparison to its own.[1080] Additionally, the Americans contended a significant amount of Boeing's knowledge and experience was gained through its relationship with its suppliers, not NASA. Here, too, in the view of the EU, these claims should be addressed under Article 11 of the *DSU*.[1081] The Appellate Body looked to language in the decision of the Panel that proved the Panel did consider both Boeing's own efforts, and the knowledge and experience gained through Boeing's relationship with its suppliers. So, in siding with the EU, the Appellate Body stated the Panel sufficiently considered these alternative contributions, and deferred to its judgment.

Fourth, the United States argued the Panel failed to account properly for the public dissemination requirement of NASA.[1082] According to the United States, this requirement lessens the value of the Aeronautics R&D Subsidies to Boeing.[1083] However, the Appellate Body said the Panel did consider and reject this argument.[1084] The Panel noted, "Although differing in their nature and scope, each of these limited access rights seek to delay the foreign transfer of commercially sensitive information or prevent its public release without prior written approval of NASA or the [US]DOD."[1085] Moreover, if the United States was asking it to find for a lesser monetary value, then the Appellate Body was unable to do so given the limited scope of an appellate review.[1086]

Finally, the United States argued the $2.6 billion worth of aeronautics R&D subsidies was small relative to Boeing's own research and spending. The Panel had rejected this argument because it assumed Aeronautics R&D Subsidies "can essentially be reduced to their cash value."[1087] The Panel recognized the Aeronautics R&D Subsidies were "intended to multiply the benefit from a given expenditure."[1088] The Appellate Body agreed with the Panel, stating that the proposition that precise quantification is not an indispensable part of a serious prejudice analysis is supported by Appellate Body jurisprudence in the 2005 *US—Upland Cotton* and 2011 *EC—Airbus* cases.[1089]

1078 *Id.* ¶ 979.
1079 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 982.
1080 *Id.*
1081 *Id.* ¶ 983.
1082 *Id.* ¶ 997.
1083 *Id.*
1084 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 999.
1085 *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1771 n.3699).
1086 *Id.* ¶ 1000.
1087 *Id.* ¶ 1005 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1760).
1088 *Id.* ¶ 1004 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1760).
1089 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶¶ 1006-07.

Thus, the Appellate Body rejected the American contention that "when considered in their totality," the findings of the Panel did not establish a genuine and substantial relationship of cause and effect.[1090] Put simply, the Appellate Body rejected all five of the American arguments about causation. Instead, it found the Panel did not err by finding the Aeronautics R&D Subsidies contributed in a genuine and substantial way to Boeing's development of technologies for the 787 in 2004.[1091]

To be candid, the entire above-summarized discussion of the Appellate Body seems largely a waste of time that could have been summarized in two sentences, namely:

> Our [the Appellate Body] review of the record of the case indicates the Panel did examine properly the five contentions raised by the United States. Therefore, we find the Panel was correct in identifying the *SCM Agreement* causation standard, namely, that there be a genuine and substantial relationship between the unlawful subsidy of the respondent and adverse effects of complainant, and that such a relationship existed here.

ii. American Appeal of Panel Counterfactual Analysis

The second American argument on appeal relating to causation of adverse effects contended the Panel erred in finding that "absent the Aeronautics R&D subsidies, Boeing would not have been able to launch in 2004 an aircraft incorporating all of the technologies found in the 787, with promised deliveries commencing in 2008."[1092] The Panel found these Aeronautics R&D subsidies caused adverse effects to the EU. In the first and second stages of the Panel assessment of the technology effects, the Panel analyzed the effect of the Aeronautics R&D subsidies on Boeing and Airbus, respectively.[1093] The United States argued both the counterfactual analysis at both stages was insufficient.[1094]

With regard to the first stage, the United States argued the Panel failed to take fully into account the research priorities and activities of Boeing, as well as its available resources when it found Boeing would not have launched the 787 when it did absent the Aeronautics R&D subsidies.[1095] The main American argument considered by the Appellate Body, put simply, was that the fierce competition between Boeing and Airbus created strong incentives for Boeing to invest in R&D, regardless of whether it obtained assistance from other entities.

[1090] *Id.* ¶ 1012.
[1091] *Id.*
[1092] *Id.* ¶ 1013 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1775).
[1093] *Id.*
[1094] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1013.
[1095] *Id.* ¶ 1014.

However, the Appellate Body rejected this argument. The Appellate Body reasoned that such an incentive does not show whether Boeing would necessarily have undertaken such investment.[1096]

Another American argument considered by the Appellate Body was that the Aeronautics R&D subsidies were inconsequential. The United States said the $16 billion spent by Boeing repurchasing stock from 1986-2006, compared to the amount spent on Aeronautics R&D subsidies, showed how relatively little the subsidies meant to Boeing.[1097] However again, the Appellate Body sided with the Panel in rejecting the American argument.[1098] The Appellate Body said the value of Aeronautics R&D subsidies to Boeing were not directly comparable to the cash amounts paid to shareholders, and the effects of the subsidies were not reducible to their cash value.[1099] Instead, the Appellate Body accepted the Panel finding that Aeronautics R&D subsidies were meant to have multiplier effects.[1100]

With regard to the second stage of the Panel analysis, the United States argued "the Panel should have explored further a counterfactual scenario involving Boeing aircraft [it] deemed 'most likely' to have occurred in the absence of subsidies."[1101] The Panel had considered two scenarios most likely to occur if Boeing did not receive the Aeronautics R&D subsidies.[1102] The United States added the Panel should have also considered a counterfactual scenario involving a "767-plus."[1103] The 767-plus is the LCA Boeing would have likely developed had it not chosen to develop the 787.

Ultimately, the Appellate Body rejected the scenario proposed by the United States. The Appellate Body said either party did not advance it originally at the Panel stage. The larger point, however, concerns the discretion available to a panel.[1104] As long as the scenarios considered by a panel are reasonable, the Panel does not need to explore every hypothetical possibility.[1105]

The American-proposed counterfactual analysis broke down to three parts. First, the United States asserted "the Panel should have made findings as to how a Boeing 767-plus would have competed against the older Airbus A330, or whether the Original A350 would have been launched at all, given that the A350 was a response to the 787."[1106] Second, the Americans contended the Panel only looked at the price suppressive impact of the 787 on the A330 and Original A350 prices when it should have considered the price impact from a 767-plus.[1107] Third,

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[1096] *Id.* ¶ 1032.
[1097] *Id.* ¶ 1033.
[1098] *Id.* ¶ 1035.
[1099] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1035.
[1100] *Id.*
[1101] *Id.* ¶ 1015 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1775).
[1102] *Id.* ¶ 1017.
[1103] *Id.* ¶ 1037.
[1104] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1020.
[1105] *Id.*
[1106] *Id.* ¶ 1038.
[1107] *Id.*

said the United States, in its assessment of lost sales and threat of displacement or impedance, the Panel should have considered whether airlines that ordered the 787 would have bought the 767-plus in its place had the 787 not been available.[1108]

The Appellate Body easily rejected the American argument. It said the adequacy of a counterfactual analysis must be determined according to, *inter alia*, the scenarios, arguments, and evidence on record of a particular dispute. In the *US—Boeing* appeal, the American argument were derived from the counterfactual analysis of the Panel, but not based on any counterfactual arguments of the parties.[1109]

iii. American Appeal Relating to Second Stage of Panel Analysis

The United States also appealed Panel findings in the second stage of its analysis when it examined the effects of the Aeronautics R&D subsidies on the prices and sales of Airbus LCA.[1110] The Panel analysis of the EU claims of serious prejudice examined allegations of significant lost sales, threat of displacement or impedance, and significant price suppression. The Panel first examined EU allegations of significant lost sales.[1111]

On that matter, the Panel determined: "[T]he performance characteristics of the 787 and/or its scheduled entry into service in 2008 appear to have been the decisive factors in the outcomes of the Qantas, Ethiopian Airlines, and Icelandair campaigns in 2005 and the Kenya Airways campaign in 2006."[1112] Therefore, the Panel found "but for" the effects of the Aeronautics R&D subsides, Airbus would not have suffered significant lost sales within the meaning of Article 6:3(c) of the *SCM Agreement*.[1113]

Additionally, the Panel concluded there was a threat of displacement and impedance within the meaning of Article 6:3(b) of the *SCM Agreement* on EU exports in the third-country markets of Australia, Ethiopia, Kenya, and Iceland.[1114] It did so based on market share data from those relevant third-country markets in which it found lost sales.[1115] Here, the Panel used actual delivery data and projected future delivery data to support its findings.[1116] So, the Panel also found:

> [*B*]*ut for* the effects of the aeronautics R&D subsidies, Airbus would have obtained additional orders for its A330 or Original

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[1108] *Id.*
[1109] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1040.
[1110] *Id.* ¶ 1041.
[1111] *Id.* ¶ 1042.
[1112] *Id.* ¶ 1043 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1786).
[1113] *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1786).
[1114] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1044.
[1115] *Id.*
[1116] *Id.*

> A350 LCA from customers in third-country markets . . . , and thus would not have suffered the threat of displacement or impedance of its exports from third-country markets, within the meaning of Article 6:3(b) of the SCM Agreement.[1117]

Lastly, the Panel considered the EU allegations regarding significant price suppression suffered by Airbus in the 200-300 seat LCA market.[1118] The Panel determined the launch of technologically advanced aircraft forced competing aircraft with older technology to be offered at lower prices.[1119] The Panel was satisfied with this explanation relating to the A330 and the launch of the Boeing 787 in 2004.[1120]

The Panel supported its finding that the Aeronautics R&D subsidies contributed in a genuine and substantial way to the development by Boeing of technologies for the 787 with evidence concerning pricing trends on the A330 and market share data.[1121] Therefore, the Panel concluded that "but for" the effect of the Aeronautics R&D subsidies, Airbus would not have suffered significant price suppression within the meaning of Article 6:3(c) of the *SCM Agreement*.[1122]

In sum, all three allegations examined by the Panel resulted in a violation of Article 6:3 of the *SCM Agreement*, and each violation constituted serious prejudice to the interests of the EU within the meaning of Article 5(c) of the *SCM Agreement*.[1123]

Thus, on appeal, the United States challenged each of the Panel findings relating to significant lost sales, threat of displacement and impedance, and significant price suppression. Ultimately, the United States was successful in having the Panel finding of threat of displacement and impedance reversed.[1124] However, the Appellate Body upheld the remaining Panel findings.[1125]

iv. Significant Lost Sales?

The United States first challenged the Panel finding that the effects of the Aeronautics R&D subsidies were significant lost sales to Airbus within the meaning of Article 6:3(c) of the *SCM Agreement*.[1126] The United States first asserted the Panel "double-counted" lost sales because it treated each sale won by

1117 *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1791 (alteration in original)).
1118 *Id.* ¶ 1045.
1119 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1045.
1120 *Id.*
1121 *Id.* ¶¶ 1045, 1048.
1122 *Id.* ¶ 1049.
1123 *Id.*
1124 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1126.
1125 *Id.*
1126 *Id.* ¶ 1051.

the 787 as a lost sale for both the Original A350 and A330.[1127] Next, the United States argued the Panel erred by failing to consider other factors.[1128]

The Appellate Body began by looking to its own decision in the 2011 *EC—Airbus* and 2005 *US—Upland Cotton* cases.[1129] In *EC—Airbus*, the Appellate Body defined a "lost sale" as one that a supplier "failed to obtain."[1130] Additionally, the concept of a lost sale is "relational," entailing consideration of the subsidized firm that must have won sales and the competing firm that allegedly lost sales due to the effect of the subsidy.[1131] Moreover, in *US—Upland Cotton*, the Appellate Body noted the term "significant" means "important, notable or consequential."[1132]

As mentioned above, the first argument by the United States contended the Panel "double-counted" lost sales because it treated each sale won by Boeing as two lost sales for Airbus.[1133] The United States said for the lost sales found by the Panel, Airbus either did not submit a bid or offered the Original A350 against the 787.[1134] However, in reviewing the Panel findings, the Appellate Body observed no statement or implication by the Panel that it considered two sales had been lost by Airbus for each 787 ordered. In particular, the Appellate Body noted the repeated use of "or" by the Panel when referring to airlines' considerations of the Original 350 or the A330.[1135]

Second, the United States argued the Panel erred in finding lost sales to certain airlines because it failed to account for other factors, namely, "customer-specific situations."[1136] The United States pointed to customer-specific situations, including relationships of Boeing with relevant airlines and the failure of Airbus to submit a formal offer within the time limit specified by an airline.[1137]

In the American view, had the Panel considered properly the relationships of Boeing with other airlines, the Panel would have considered the Boeing relationships with the relevant airlines here, namely, Ethiopian Airlines, Icelandair, and Kenya Airways.[1138] The EU countered with the assertion that such a consideration was impossible due to the Highly Sensitive Business Information (HSBI) nature of those sales campaigns.[1139] Moreover, the EU argued the American contentions implicated weight of evidence considerations, and should have been raised under Article 11 of the *DSU*.[1140]

[1127] *Id.* ¶ 1056.
[1128] *Id.* ¶ 1064.
[1129] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1052.
[1130] *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1214).
[1131] *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1214).
[1132] *Id.* (citing Appellate Body Report, *US—Upland Cotton*, *supra* note 1001, ¶ 426).
[1133] *Id.* ¶ 1056.
[1134] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1056.
[1135] *See id.* ¶¶ 1059-61.
[1136] *Id.* ¶ 1064.
[1137] *Id.*
[1138] *Id.*
[1139] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1065.
[1140] *Id.*

The Appellate Body sided with the EU. In the Appellate Body view, it had no reason to doubt the Panel assessment, but was concerned such an assessment was not evident.[1141] However, even with this concern, a challenge to the Panel finding should have been brought under Article 11 of the *DSU*.[1142] Additionally, the same could be said with regard to the United States claim that Airbus lost the Icelandair sales campaign because of a failure to submit a formal offer within a specified time limit.[1143] Therefore, the Appellate Body found the Panel did not err in applying Article 6:3(c) of the *SCM Agreement* in its consideration of the sales campaigns involving Ethiopian Airlines, Icelandair, and Kenya Airways with regard to the lost sales finding.[1144]

v. Threat of Displacement and Impedance?

Next, the United States put forth three arguments challenging the Panel finding that the Aeronautics R&D subsidies caused a threat of displacement and impedance of exports of Airbus aircraft in the "third-country markets" of Ethiopia, Kenya, and Iceland. First, the United States alleged that the Panel failed to establish that Ethiopia, Kenya, and Iceland constitute "third-country markets" within the meaning of Article 6:3(b)" of the *SCM Agreement*.[1145] Second, the United States asserted the Panel finding of threat of displacement and impedance in Ethiopia, Kenya, and Iceland contradicted its legal finding that treating a single sales campaign as a "market" nullifies the meaning of that term.[1146] Third, the United States argued the low volume of orders in the relevant sales campaigns demonstrated no trend of Airbus exports being threatened with displacement and impedance.[1147]

The Appellate Body first took the opportunity to recall the meaning of displacement and impedance.[1148] As explained in the 2011 *EC—Airbus* decision, "'displacement' refers to an economic mechanism in which exports of a like product are replaced by the sales of a subsidized product."[1149] In the context of Article 6:3(b) of the *SCM Agreement*, "displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product."[1150] An analysis of displacement should examine trends in data relating to export volumes and market shares over an

1141 *Id.* ¶ 1066.
1142 *Id.*
1143 *Id.* ¶ 1067.
1144 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1068.
1145 *Id.* ¶ 1069.
1146 *Id.*
1147 *Id.*
1148 *Id.* ¶ 1071.
1149 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1071 (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1119).
1150 *Id.* (quoting Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1160).

appropriately relative period.[1151] Additionally, "impedance" involves a broader range of situations than displacement, and while there may be some overlap between the concepts, they are not interchangeable.[1152]

The Appellate Body looked to its consideration of impedance in *EC—Airbus* and stated:

> [I]mpedance arises both in "situations where the exports or imports of the like product of the complaining Member would have expanded had they not been 'obstructed' or 'hindered' by the subsidized product," as well as when such exports or imports "did not materialize at all because production was held back by the subsidized product."[1153]

The United States first took issue with the meaning the Panel attributed to the term "market" in Article 6:3(b) of the *SCM Agreement*.[1154] Using *EC—Airbus* as guidance, the Appellate Body said there was "both a geographic and product market component to the assessment of displacement" and impedance.[1155] The determination of a geographic market is based on a number of factors.[1156] In part, a particular market may exceed national boundaries or encompass a world market.[1157] However, using a plain reading of Article 6:3(b) the *SCM Agreement*, the Appellate Body in *EC—Airbus* explained that even in cases where the geographic dimension of a particular market exceeds national boundaries, a claim under Article 6:3(b) of the *SCM Agreement* should focus on displacement and impedance in the territory of the third countries involved.[1158]

The Panel recognized Article 6:3(b) of the *SCM Agreement* expressly requires the examination of displacement and impedance on the basis of a third-country market.[1159] Thus, the Panel felt it was irrelevant whether a complaining party established the existence of a third-country market.[1160] The Appellate Body saw no error in such an approach.[1161]

In the view of the Appellate Body, the evidence relied on by the EU, coupled with the failure by the United States to point to differences in the competitive condition within the relevant countries, supported the Panel

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[1151] *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶¶ 1165-66, 1170).

[1152] *Id.*

[1153] *Id.* (quoting Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1161).

[1154] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1075.

[1155] *Id.* ¶ 1076 (quoting Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1168).

[1156] *Id.*

[1157] *Id.*

[1158] *Id.* (internal quotation marks omitted) (quoting Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1117).

[1159] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1077.

[1160] *Id.*

[1161] *Id.* ¶ 1078.

finding.[1162] Additionally, the Appellate Body said a secondary argument by the United States—that the Panel finding of threat of displacement and impedance in Ethiopia, Kenya, and Iceland contradicted its legal finding that treating a single sales campaign as a "market" nullifies the meaning of that term—confused definitions of "market" under Articles 6:3(b) and (c), respectively.[1163]

The last argument by the United States was that the volume of orders involved in the relevant third-country markets campaigns was too low to be capable of demonstrating a threat of displacement and impedance, and that there were insufficient trends of Airbus exports.[1164] The Appellate Body first assessed the Panel finding of displacement, then considered its finding of impedance.

Recalling its guidance from *EC—Airbus* with regard to displacement, the Appellate Body recognized that the assessment of a claim of displacement must look at whether trends are discernible.[1165] Additionally, the identification of a trend will be more accurate the larger the data set used in the analysis.[1166] Thus, the Appellate Body said two characteristics would normally be necessary to reach a finding of displacement under Article 6:3(b) of the *SCM Agreement*.[1167] First, at least a portion of the market share of the exports of the "like" product of the complaining Member must have been taken over or substituted by the subsidized product,[1168] and second, it must be possible to discern trends in volume and market share.[1169]

On appeal, the United States challenged the Panel finding that there was a threat of displacement in Ethiopia, Kenya, and Iceland. Though the United States did not appeal the Panel finding with regard to the Australian market, the Appellate Body considered the Australian market a useful tool.[1170] In the Australian market, Boeing had no deliveries in 2006, but progressed to 50 percent of deliveries by 2008 and 100 percent of deliveries by 2011.[1171]

In contrast, in the other three third-country markets at issue, Ethiopia, Kenya, and Iceland, Boeing was the sole supplier in all years for which data was provided.[1172] On this basis alone (namely, the complete absence of Airbus in the Ethiopian, Kenyan, and Icelandic markets), there was no way the Appellate Body could sustain the affirmative finding of the Panel that Boeing threatened to displace Airbus in those third-country markets.[1173] Simply put, it is impossible to

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1162 *Id.*
1163 *Id.* ¶ 1079.
1164 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1080.
1165 *Id.* ¶ 1081 (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1166).
1166 *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1167).
1167 *Id.* ¶ 1082.
1168 *Id.*
1169 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1082.
1170 *Id.* ¶ 1083.
1171 *Id.*
1172 *Id.* ¶ 1084.
1173 *Id.*

displace a product (Airbus LCA) from a market (the other three third-country markets) if that product was never in that market in the first place.

Though the Panel never distinguished between displacement and impedance, it did refer to both jointly throughout its findings.[1174] Thus, the Appellate Body felt it appropriate to consider also the Panel finding of threat of impedance.[1175] The Appellate Body again looked to its decision in *EC—Airbus* as guidance in defining and analyzing the threat of impedance.[1176] As explained in *EC—Airbus*, impedance refers to a situation in which (1) exports or imports of the like product of the complaining Member would have expanded more had they not been obstructed or hindered by the subsidized product, or (2) exports or imports of the like product did not materialize at all because production was held back by the subsidized product.[1177] Additionally, changes in the relative market share in favor of the subsidized product need to occur over a sufficiently representative period to demonstrate "clear trends" in the development of the market concerned.[1178]

In *US—Boeing*, the Appellate Body looked at data provided for Ethiopia, Kenya, and Iceland.[1179] The Appellate Body disposed quickly of any possibility of a clear trend of impedance in Iceland and Kenya.[1180] In Iceland, the market share of Boeing remained at 100 percent.[1181] In Kenya, the delivery numbers did not vary enough to constitute an unequivocal trend.[1182] In Ethiopia, the data was more mixed, but even still, fluctuation was minimal and did not convince the Appellate Body of a clear trend.[1183]

Consequently, the Appellate Body rejected the American appeal that the Panel erred by failing to identify and establish third-country "markets" in Iceland, Kenya, and Ethiopia within the meaning of Article 6:3(b) of the *SCM Agreement*. However, it did reverse the Panel finding that there was a threat of displacement and impedance in those same third-country markets. That was a modest victory for the United States in the case.

vi. Significant Price Suppression

The United States advanced three arguments in favor of reversal of the Panel finding of significant price suppression.[1184] First, "the Panel improperly relied on a perceived coincidence between the launch of the 787 in 2004, and a

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1174 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1085.
1175 *Id.*
1176 *Id.* ¶ 1086.
1177 *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1161).
1178 *Id.*
1179 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1087.
1180 *Id.*
1181 *Id.*
1182 *Id.*
1183 *Id.* ¶ 1088.
1184 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1091.

decline in A330 prices during the reference period."[1185] Second, price suppression could not be found because of insufficient evidence provided by Airbus.[1186] Third, the Panel was required but failed to determine the existence of significant price suppression for the product "as a whole."[1187]

The Americans first argued the Panel improperly relied on a perceived coincidence between the launch of the Boeing 787 and a drop in the Airbus A330 price.[1188] The United States asserted the Panel failed to look rigorously at the evolution of relevant trends showing no discernible correlation between the presence of 787 LCA in the market and the prices of the Airbus A330.[1189]

The Appellate Body took the American argument as a suggestion the Panel should have looked at specific figures during the reference period.[1190] However, the Appellate Body was satisfied with the consideration by the Panel of overall trends demonstrating erosion of the market share of Airbus.[1191] As explained by the Panel, and accepted by the Appellate Body, "[T]he combination of the superior technology and lower operating costs of the 787 clearly affected the comparative value of Airbus' A330 . . . leaving Airbus no other option but to reduce the prices of its aircraft in order to compete."[1192] Additionally, the Appellate Body saw no reason to require the Panel to attach decisive weight to specific data points, in light of the economic reasoning and broad data considerations by the Panel.[1193]

Second, the United States asserted the Panel finding of price suppression for the Original A350 should be reversed because it was not supported by pricing data and used anecdotal evidence covering barely 30 percent (exactly 30.4 percent) of sales of the Original A350 in the 200-300 seat LCA market.[1194] The Appellate Body dispatched of that assertion quickly. It simply disagreed with the American contention that insufficient data and evidence were provided. In its view, one third of sales campaigns for the Original A350 constituted direct and sufficiently representative evidence.[1195] Accordingly, the Appellate Body upheld the Panel finding that the Aeronautics R&D subsidies caused significant price suppression in the 200-300 seat LCA market: the pricing data concerning the Original A350, albeit covering just 30 percent of the market, were sufficient.[1196] Notwithstanding the Appellate Body holding, arguably the Americans had the

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[1185] *Id.* ¶ 1104.
[1186] *Id.* ¶ 1114.
[1187] *Id.* ¶ 1120.
[1188] *Id.* ¶ 1104.
[1189] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1104.
[1190] *Id.* ¶ 1106.
[1191] *Id.* ¶ 1108.
[1192] *Id.* ¶ 1109 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1792).
[1193] *Id.* ¶ 1110.
[1194] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1114.
[1195] *Id.* ¶ 1116.
[1196] *Id.* ¶ 1119.

better argument: drawing a conclusion about price suppression from data for 30 percent of the sales in a market seems rather parlous.

The last argument of the United States was the Panel was required, but failed, to determine the existence of significant price suppression for the product "as a whole."[1197] Using the 2005 *Korea—Commercial Vessels* Panel report as support, the United States argued a finding in favor of the EU would be valid only if the effect of the subsidy was significant price suppression for all three of the 200-300 seat Airbus models.[1198] The EU contended the Panel properly found price suppression based on pricing information for the A330 and the Original A350, but that any data on the A350XWB-800 would be of limited relevance, because there was only one data point.[1199]

The Appellate Body questioned the American reliance on the *Korea—Commercial Vessels* case.[1200] But it said even if it assumed a finding of price suppression should have been made for the Airbus product as a whole in the 200-300 seat LCA market, the United States failed to provide sufficient evidence of its allegation. In particular, the Appellate Body said the United States failed to show that if sales or price levels of the A350XWB-8000 had been taken into account, then they would been sufficiently significant to prevent the Panel from reaching its finding.[1201]

Additionally, the Appellate Body looked to the EU submission of price trend data in respect of all sales of the A330 during the reference period.[1202] Those data showed sales of the A330 accounted for 65.7 percent of total Airbus sales during the reference period.[1203] Taken as a whole, i.e., coupled with pricing data for the Original A350, the Panel considered roughly three quarters of Airbus sales in the 200-300 seat LCA market during the reference period.[1204] That was sufficient for the Appellate Body to agree with the Panel. Therefore, the Appellate Body upheld the Panel finding relating to the treatment of evidence and concluded overall that the effect of Aeronautics R&D subsidies was significant price suppression in the 200-300 seat LCA product market.[1205]

1197 *Id.* ¶ 1120.

1198 *Id.* (citation omitted).

1199 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1121.

1200 *Id.* ¶ 1122.

1201 *Id.* ¶ 1123.

1202 *Id.* ¶ 1124.

1203 *Id.*

1204 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1124. Note the apparent odd mathematical discrepancy. The data for the Original A350 purportedly covered 30 percent of sales in the 200-300 seat LCA market. Thus, the sum should be roughly 90 percent. However, to go from 65.7 percent to roughly three-quarters of the market would entail only 10 percent of the sales. But there was no discrepancy in fact: the 30 percent figure referred to sales to three different companies of A350 aircraft, but as a whole, A350 sales accounted for 10 percent of total Airbus LCA sales. So, as a percentage of total Airbus sales, the A350 (10 percent) plus the A330 (65.7 percent), sums to about 75 percent.

1205 *Id.* ¶ 1125.

4) Price Effects: Step 1 – Proper Causation Analysis?

The next aspect of the American appeal concerned the analysis by the Panel of the price effects of the Tied Tax subsidies. As explained earlier, this appeal concerned the FSC/ETI subsidies, Washington State B&O tax rate reductions, and City of Everett B&O tax rate reductions.[1206] Moreover, the appeal was limited to the 100-200 seat and 300-400 seat LCA markets.[1207]

The Appellate Body assessed the causation analysis of the Panel in three steps. First, it addressed the general aspects of that analysis. Second, the Appellate Body addressed the American contention the Panel committed specific errors in reaching its affirmative finding of significant price suppression, significant lost sales, and displacement and impedance. Third, the Appellate Body considered the elements together to provide an overall assessment of the causation analysis by the Panel.

So, first, did the Panel conduct a proper causation analysis? The Appellate Body checked the American allegations concerning (1) reliance by the Panel on an impermissible presumption, (2) magnitude of the Tied Tax subsidies, (3) counterfactual analysis by the Panel, and (4) consideration of other factors advanced by the United States to explain market effects, i.e., prices and sales of LCA by Boeing and Airbus.

i. Reliance on an Impermissible Presumption?

The United States contended the Panel erred in relying on a presumption that subsidies found to be prohibited under Part II of the *SCM Agreement* cause adverse effects within the meaning of Part III of the *Agreement*.[1208] Though not stated in the Appellate Body report, the United States seemed to be alleging the Panel had characterized the American subsidies as Red Light under the Traffic Light system. In response, the EU did not even address whether such a presumption existed.[1209] Instead, the EU contended the Panel only referred to the FSC/ETI subsidies as export subsidies to support its characterization of the nature of those subsidies. As a general matter, the Appellate Body agreed with the EU.[1210]

In the view of the Appellate Body, when the reasoning of the Panel is considered in its totality, it does not indicate the Panel applied any presumption.[1211] The Appellate Body distinguished the findings of the Panel because in the view of the Panel, the legal status of subsidies under Article 3:1(a) of the *SCM Agreement* (the provision on Red Light, or Prohibited, subsidies) does

[1206] *Id.* ¶ 1149.
[1207] *Id.*
[1208] *Id.* ¶ 1184.
[1209] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1184.
[1210] *Id.*
[1211] *Id.* ¶ 1185.

not determine the characterization of those effects for purposes of Article 6.3 of the *Agreement*.[1212] Instead, the Panel simply stated export subsidies are "*more likely* to cause adverse trade effects."[1213] Thus, the Appellate Body considered the statement of the Panel as giving considerable weight in its analysis to whether there was serious prejudice.[1214]

Further support for this finding came from the Panel's reliance on various other factors. In addition to its characterization of the subsidies as export subsidies, the Panel found that the FSC/ETI subsidies and B&O tax rate reductions increased the profitability of LCA sales because they were tied to sales of individual LCA.[1215] The Panel also considered the amount and duration of the FSC/ETI subsidies.[1216] Furthermore, the Panel referred to statements by Airbus and Boeing executives and the USTR indicating the FSC/ETI subsidies "were essential to enhancing the international competitiveness of Boeing versus its foreign competitors."[1217] None of these aspects were challenged by the United States, and when considered together they support the Panel findings.[1218]

ii. Magnitude of Tied Tax Subsidies?

The Panel aspect of the causation analysis was the magnitude of the Tied Tax subsides. The Panel concluded the evidence showing FSC/ETI benefits amounted to less than one percent of the value of Boeing's sales was not informative or illustrative as to the capacity of the subsidies to affect LCA prices and sales.[1219] The United States contended this conclusion fails to account for the small magnitude of the FSC/ETI subsidies in relation to LCA values.[1220] The EU, however, contended the Panel's qualitative assessment did account for important contextual factors relating to the nature and duration of the subsidies, as well as the conditions of competition.[1221] To state plainly, the Panel decided that in a highly competitive market, including one characterized by duopoly, even a one percent benefit could have a substantial effect on prices and sales throughout the market.

The Appellate Body recalled its own decision in the 2005 *US—Upland Cotton* case. There, the Appellate Body rejected the American contention that Article 6:3(c) requires a panel to quantify precisely the amount of the challenged

1212 *Id.*
1213 *Id.* (alteration in original).
1214 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1185.
1215 *Id.* ¶ 1183 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶¶ 7.1806-07).
1216 *Id.*
1217 *Id.*
1218 *Id.* ¶ 1186.
1219 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1187.
1220 *Id.*
1221 *Id.* ¶ 1188.

subsidy benefiting the product at issue.[1222] The Appellate Body went on to quote what it considered the significant language from *US—Upland Cotton*:

> [I]n analyzing a claim of significant price suppression, "a panel will need to consider the effects of the subsidy on prices" and that, in doing so, "it may be difficult to decide" whether the effect of a subsidy is significant price suppression without having regard to "the magnitude of the challenged subsidy and its relationship to prices of the product in the relevant market." Moreover, although "[t]he magnitude of the subsidy is an important factor," a panel needs to take into account "all relevant factors" in determining the effects of subsidies on prices.[1223]

Here, the Appellate Body explained that an assessment of whether subsidy amounts are significant should not necessarily be limited to a mere inquiry into *what* those amounts are, either in absolute or per-unit terms.[1224]

The Appellate Body gave a list of examples of factors that could be considered for a larger and more relative, i.e., comparative, inquiry.[1225] Examples included:

> [T]he size of the market as a whole, the size of the subsidy recipient, the per-unit price of the subsidized product, the price elasticity of demand, and, depending on the market structure, the extent to which a subsidy recipient is able to set its own prices in the market, and the extent to which rivals are able or prompted to react to each other's pricing within that market structure.[1226]

As it did throughout this report, the Appellate Body here did not pass up an opportunity to critique the decision of the Panel. The Appellate Body felt the Panel should have explained why it dismissed evidence advanced by the parties with regard to the magnitude of the subsidies before it went on to discuss the significance of the FSC/ETI subsidies.[1227] Yet, the discussion by the Panel, and the Appellate Body critique of it, were confusing. The "takeaway" appears to be that both the absolute and relative value of a subsidy is likely to be relevant and, therefore should be considered.

1222 *Id.* ¶ 1192.
1223 *Id.* (footnotes omitted).
1224 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1193.
1225 *Id.*
1226 *Id.*
1227 *Id.* ¶ 1194.

iii. Counterfactual Analysis of Panel?

The United States argued the Panel should have engaged in a proper counterfactual analysis. Specifically, the Panel should have established, absent the Tied Tax subsidies, Boeing LCA prices would have been higher.[1228] The EU contended that absent subsidies, Boeing would not have had the resources to act on commercial incentives.[1229] The EU also stated the United States agreed Tied Tax subsidies have an impact on output and prices.[1230]

The Appellate Body noted that the Panel stated its intent to conduct a counterfactual analysis at the outset of its adverse effect analysis, but never expressly referred to it during its discussion.[1231] So, the Appellate Body criticized the conclusion of the Panel that the Tied Tax subsidies "enabled Boeing to lower its prices beyond the level that would otherwise have been economically justifiable."[1232] This conclusion lacked a sufficient explanation.[1233]

Furthermore, the Appellate Body recognized the counterfactual analysis of the Panel was internally inconsistent. The United States pointed to the Panel discussion of how it was unconvinced Boeing needed the subsidies to price the LCA as it did.[1234] The Panel found the total subsidies amounted only to $5.3 billion, and thus, it was "untenable" that Boeing could not have engaged in the pricing and product development behavior it did without subsidies.[1235] This finding conflicted with the eventual conclusion of the Panel (that adverse effects occurred) and "underscore[s]" the Appellate Body's concern with the Panel's conclusion.[1236]

iv. Effects of Other Factors?

The last American argument relating to the general aspects of the causation analysis of the Panel was a catchall of other factors related to the FSC/ETI subsidies the United States alleged the Panel failed to consider. As a general matter, the Appellate Body made clear:

> [W]hen confronted with multiple factors that may have contributed to the alleged adverse effects, a panel must seek to understand the interactions between the subsidies at issue and the various other factors, and make some assessment of their

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1228 *Id.* ¶ 1196.
1229 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1196.
1230 *Id.* ¶ 1197.
1231 *Id.* ¶ 1198.
1232 *Id.* ¶ 1199 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1818).
1233 *Id.* ¶¶ 1200-01.
1234 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1202.
1235 *Id.*
1236 *Id.* ¶ 1204.

> connection to, as well as the relative contribution of the subsidies and the other factors in bringing about, the relevant effect.[1237]

Thus, an adjudicator need not determine that a subsidy is the sole, or even substantial, cause. That would be an insurmountable test for any complainant and in any event would not be justified by the GATT-WTO texts. But an adjudicator must ensure other factors do not dilute the causal link between the subsidy, on the one hand, and adverse effects, on the other hand.[1238]

On this matter of attribution, the Panel stated it would take "potential non-attribution factors into account simultaneously with the effect of the subsidies and in the context of conditions of competition affecting the market."[1239] However, the actual discussion by the Panel of other factors was limited to a brief recognition that the United States had identified other factors.[1240] The Panel opted not to pursue these factors further because the FSC/ETI program was in effect before the reference period (2001-2003). Thus, it was impossible to determine the effects of the subsidies through direct observation of market share and price trend data.[1241]

The Appellate Body did not like the work of the Panel. The Appellate Body stated that although the mere correlation between payment of subsidies and significantly suppressed prices is insufficient, it is still a relevant inquiry.[1242] The United States pointed to two factors: (1) Airbus undercutting the prices of Boeing in the 100-200 seat and 300-400 seat LCA markets; and (2) Boeing changing its LCA pricing policy in 2004 and 2005 because of the prices of Airbus.[1243] The EU maintained it was Boeing that undercut prices first, yet even if that were not so, the FSC/ETI subsidies gave Boeing an additional pricing advantage.[1244]

The Appellate Body did not consider relevant either of the two factors highlighted by the Americans. The pertinent question was not why Boeing lowered its LCA prices. Instead, the Appellate Body felt the salient question was whether Boeing lowered its prices using the Tied Tax, i.e., FSC/ETI, subsidies.[1245] As the Appellate Body reasoned that the bidding and negotiation process for LCA orders consisted of a series of successively lower bids.[1246] Thus, the identity of the party that first submitted a lower bid price would have had little bearing on the

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1237 *Id.* ¶ 1206.
1238 *Id.*
1239 *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1207 (citing Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1660).
1240 *Id.*
1241 *Id.* ¶ 1208.
1242 *Id.* ¶ 1209.
1243 *Id.* ¶ 1210.
1244 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1211.
1245 *Id.* ¶ 1212.
1246 *Id.* ¶ 1213.

end result as to which party won the bid. Instead, the relevant consideration is what cost factors allowed one party or the other to submit a lower bid.

Yet, even though the Appellate Body rejected these other factors, it did agree there could be other factors that the Panel ought to have considered. For example, perhaps fuel efficiency on disputed aircraft models, or which LCA producer was the incumbent supplier to certain airlines, were factors worthy of analysis.[1247] Moreover, the Appellate Body found it strange that the Panel was able to consider properly other factors with respect to the Aeronautics R&D subsidies, but not with respect to the Tied Tax subsidies. Regardless, the Appellate Body held the Panel erred by not considering other causal factors (some of which the United States advanced).[1248]

5) Price Effects: Step 2 – Proper Analysis of Significant Price Suppression, Significant Lost Sales, and Displacement and Impedance?

The Panel concluded the Tied Tax subsidies enabled Boeing to lower its prices below what was "economically justifiable." However, it also found it impossible to ascertain the effects of the FSC/ETI subsidies during 2000-2006 because the program was in operation prior to 2000.[1249]

The Panel felt it had only two options[1250]:

(1) To decline to make a serious prejudice finding because of the difficulty of calculating with mathematical certitude the precise degree to which Boeing's pricing of two families of aircraft were affected; and

(2) To "deduce" the effects of those subsidies on Airbus' sales and prices during the reference period "based on commonsense reasoning and the drawing of inferences" from its conclusions regarding the nature of the subsidies, the duration of the FSC/ETI subsidies, and the nature of competition between Airbus and Boeing.

The Appellate Body was "puzzled" by the view of the Panel that it was limited to "two diametrically opposed alternatives."[1251]

The Appellate Body did not see the need for "mathematical certitude," nor did it feel the drawing of common sense and inferences to be an exceptional

1247 *Id.* ¶ 1214.
1248 *Id.* ¶ 1216.
1249 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1218.
1250 *Id.* ¶ 1219 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶¶ 7.1820, 7.1822).
1251 *Id.* ¶ 1220.

option.[1252] Instead, it felt drawing inferences from conclusions reached was a typical and acceptable method when supported by clear identification of those conclusions.[1253] Here, it seems the Panel failed to adequately support its findings.[1254]

i. Significant Price Suppression

The United States asserted the Panel failed to consider the effects of other relevant factors on LCA prices and did not assess the degree of price suppression to determine whether it constituted significant price suppression.[1255] The EU argued the Panel did not need to examine price trend data because of its analysis of "various qualitative factors."[1256] However, the Appellate Body did not agree that no analysis could be done, even though there was no data before 2000 on which to compare the data from the reference period.[1257] In its view, there still was sufficient evidence that should have triggered an analysis of the price trend data; particularly, there was the fact prices of subsidized products were lower even during periods of lower subsidization.[1258] As such, the Panel analysis was incomplete.

ii. Significant Lost Sales

Next, the Americans alleged the Panel should have considered specific lost sales from sales campaigns, as was done in the 2011 sister case, *EC—Airbus*.[1259] The EU argued the global sales approach used by the Panel was sufficient because in *EC—Airbus* the Appellate Body concluded such an approach might be permissible if keyed to the nature of the claim.[1260]

Here, the Appellate Body recognized a global sales approach might be permissible, but did not feel the Panel had properly articulated which sales campaigns it was using in its analysis.[1261] Moreover, it did not state whether it was even taking such a broad approach in finding lost sales.[1262] Again, the Appellate Body noted it was strange that the Panel properly concluded its analysis with regards to the technology effects of the aeronautics R&D, yet failed to do so

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1252 *Id.*
1253 *Id.* ¶ 1221.
1254 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1222.
1255 *Id.* ¶ 1223.
1256 *Id.* ¶ 1224.
1257 *Id.* ¶¶ 1225-26.
1258 *Id.* ¶ 1226.
1259 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1228.
1260 *Id.* ¶ 1230.
1261 *Id.* ¶ 1232.
1262 *Id.* ¶ 1233.

with the FSC/ETI subsidies.[1263] In sum, the lack of clear support for the findings of the Panel rendered its findings yet again unreliable.

iii. Displacement and Impedance

Last, the United States contended the Panel failed to determine whether any of the countries in which the EU alleged displacement or impedance occurred constituted a "market" within the meaning of Article 6:3(b) of the *SCM Agreement*.[1264] The United States argued that although the Panel identified the third countries relevant to the 200-300 seat LCA market, it failed to do so with regard to the 100-200 seat and 300-400 seat LCA markets.[1265] The EU contended it was not necessary for the Panel to identify or address individual third-country markets in order to reach its finding.[1266]

The Appellate Body analysis focused on two distinctions. The first distinction was between displacement and impedance and significant lost sales.[1267] The second was between establishing a particular third-country market and determining whether displacement or impedance occurred in a particular third-country market.[1268]

First, the Appellate Body did not agree with the Panel reasoning that the phenomena of displacement and impedance follow from a finding of significant lost sales. The Appellate Body looked to its recent decision in the 2011 *EC—Airbus* case where it acknowledged the potential overlap of lost sales and displacement and impedance because both relate to sales of a firm.[1269] In *EC—Airbus*, the Appellate Body observed the assessment of displacement or impedance had "a well-defined geographic focus," whereas a geographic market for lost sales may extend further, even to the world market.[1270] Additionally, the Appellate Body in *EC—Airbus* noted the assessment of "significant" lost sales must have both quantitative and qualitative dimensions, whereas displacement and impedance require only a quantitative analysis.[1271] Though these phenomena may overlap, they are not interchangeable concepts.[1272]

Prior to the displacement or impedance analysis, the Panel found it reasonable to infer that the effects of the subsidies are significant in terms of lost sales and price suppression, and thus concluded such effects constituted

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[1263] *Id.* ¶ 1236.
[1264] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1237.
[1265] *Id.*
[1266] *Id.* ¶ 1238.
[1267] *Id.* ¶ 1241.
[1268] *Id.* ¶ 1239.
[1269] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1241 (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1218).
[1270] *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1218).
[1271] *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1218).
[1272] *Id.*

significant lost sales and significant price suppression.[1273] However, the Panel felt this was sufficient to conclude such effects also constituted displacement and impedance of exports from third-country markets.[1274] The Appellate Body did not agree with the Panel dependence upon the relationship between lost sales and displacement and impedance. The Appellate Body said the Panel failed to address the relationship between the two phenomena.[1275]

The second distinction discussed by the Appellate Body dealt with when naming particular third-country markets was necessary. The Appellate Body agreed with the EU contention that the Panel did not need to establish the existence of a particular third-country market because the LCA market is a world market.[1276] However, the Appellate Body stated it was still necessary to identify or discuss particular third countries in which displacement or impedance occurred.[1277]

At the onset of the serious prejudice analysis by the Panel, it correctly recognized it was required to determine, "based on evidence occurring in those countries," whether there had been displacement and impedance "in the particular country market."[1278] However, even with particular data submitted by the EU, the Panel only referred in general terms to displacement and impedance in third-country markets. The Appellate Body said that was inappropriate give the "well-defined geographic focus"[1279] of Article 6:3(b) of the *SCM Agreement*.[1280] Moreover, the Appellate Body noted the Panel is entirely capable of conducting a proper analysis because it did so with regards to the Aeronautics R&D subsidies in the 200-300 seat LCA market.[1281]

The Appellate found that taken together, the deficiencies in the Panel reasoning amounted to a legal error in its analysis of serious prejudice in the 100-200 seat and 300-400 seat LCA markets.[1282] The Appellate Body said:

> [T]he Panel did not provide a proper legal basis for its generalized findings that significant price suppression, significant lost sales, and displacement and impedance, within the meaning of Article 6:3(b) and (c) of the *SCM Agreement*, were the effects of: (i) the FSC/ETI subsidies and the Washington State B&O tax rate reduction in the 100-200 seat LCA market; and (ii) the FSC/ETI

1273 *Id.* ¶ 1240.

1274 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1240 (citing Panel Report, *supra* note 814, ¶ 7.1822).

1275 *Id.*

1276 *Id.* ¶ 1242.

1277 *Id.*

1278 *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1674).

1279 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1242 (quoting Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1218).

1280 *Id.*

1281 *Id.* ¶ 1244.

1282 *Id.* ¶ 1249.

subsidies and the Washington State and the City of Everett B&O tax rate reductions in the 300-400 seat LCA market.[1283]

Accordingly, the Appellate Body reversed the Panel findings.[1284]

6) Price Effects:
Step 3 – Appellate Body Completion of Analysis

Having found the Panel legal analysis to be insufficient, the Appellate Body took it upon itself to complete and rule on the EU's claim that the Tied Tax subsidies caused serious prejudice within the meaning of Articles 5(c) and 6.3(b) and (c) of the *SCM Agreement*. Quoting itself in the 2001 *US—Hot-Rolled Steel* case, but citing numerous previous cases, the Appellate Body emphasized it may complete the analysis "only if the factual findings of the panel, or the undisputed facts in the panel record" provided a sufficient basis for it to complete an analysis.[1285]

The Appellate Body began its analysis by recalling findings and uncontested facts on the Panel record, and then made some logical determinations and conclusions. First, it said Tied Tax subsidies are directly tied to the sale of each LCA because they lower the taxes Boeing paid with respect to each sale.[1286] Additionally, the Appellate Body said, "FSC/ETI subsidies are more likely to produce adverse trade effects in the market."[1287] As the Appellate Body reasoned, subsidies contingent on export modify a domestic producer's incentives and reward discrimination in favor of production for export markets over the domestic market, thereby reducing export prices.[1288]

Next, the Appellate Body considered the magnitude of the Tied Tax subsidies.[1289] The Appellate Body said the dollar amounts[1290] appeared to be substantial in absolute terms.[1291] However, as discussed previously, the relative magnitude of subsidies may also be relevant to the effects of subsidies on prices.[1292] Some considerations the Appellate Body felt relevant were: the nature of the Tied Tax subsidies; the dynamics of price competition between Boeing and

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1283 *Id.*

1284 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1249.

1285 *Id.* ¶ 1250 (quoting Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 747, ¶ 235).

1286 *Id.* ¶ 1252.

1287 *Id.* ¶ 1253.

1288 *Id.*

1289 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1254.

1290 Recall that Boeing received $435 million in FSC/ETI subsidies, $13.8 million from B&O tax rate reduction in the State of Washington, and $2.2 million from the B&O tax rate reduction in the City of Everett. *See id.*

1291 *Id.*

1292 *Id.*

Airbus in a duopolistic market; and whether the benefits of the tied tax subsidies Boeing received applied to prices in all sales, or whether the benefits were disproportionately applied to lower prices of only certain sales.[1293]

Having already considered the nature of the Tied Tax subsidies, the Appellate Body turned to the dynamics of price competition between Boeing and Airbus in a duopolistic market. The Appellate Body recalled that Airbus and Boeing each possessed market power and that each manufacturer may influence the other's pricing through its own supply and pricing decisions.[1294] The most significant factors are differences in price, capacity, and direct operating cost of competing LCA.[1295] However, both parties agreed that since performance characteristics are fixed at the initiation of a sales campaign, the principle variables modified during a sales campaign are price and other price-related concessions.[1296]

After summarizing the economics of the competitive relationship between Airbus and Boeing's relationship, the Appellate Body stated:

> [W]here it can be established that Boeing was under particular pressure to reduce its prices in order to secure LCA sales in particular sales campaigns, and there are no other non-price factors that explain Boeing's success in obtaining the sale or suppressing Airbus' pricing, we can conclude that the subsidies contributed in a genuine and substantial way to the lowering of Boeing's prices. We are moreover satisfied that the effect of such price reductions in the markets at issue was that Boeing either won the sale from Airbus, or that Airbus was forced to suppress its own price in order to secure the sale.[1297]

However, unlike the Panel assessment of the effects on a generalized basis, the Appellate Body said a proper analysis demands identification of uncontested facts showing the pricing dynamic described above occurred in particular LCA sales campaigns.[1298]

The parties presented evidence regarding 11 sales campaigns in the 100-200 seat LCA market and four sales campaigns in the 300-400 seat LCA market.[1299] In respect of the campaigns submitted as evidence of lost sales and displacement and impedance, the EU argued the magnitude of the Tied Tax subsides was larger than the difference between the final prices offered by Boeing and Airbus.[1300] The United States rebutted by submitting evidence of what it

[1293] *Id.*
[1294] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1257.
[1295] *Id.* ¶ 1258.
[1296] *Id.*
[1297] *Id.* ¶ 1260.
[1298] *Id.* ¶ 1261.
[1299] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1262.
[1300] *Id.* ¶ 1263.

identified as "other factors," which undermined the causal link between the Tied Tax subsidies and the market effects.[1301] Because the Panel failed to consider these "other factors," the Appellate Body had to consider the facts in dispute.[1302] Therefore, it was not able to complete the analysis in all four sales campaigns in the 300-400 seat LCA market and 9 of the 11 sales campaigns in the 100-200 seat LCA market.[1303]

The United States failed to specifically identify "other factors" contributing to the effects of two sales campaigns in the 100-200 seat LCA market, specifically on orders for Boeing's 737NG. Those sales campaigns were a 2005 order from Japan Airlines and a 2005 order from Singapore Aircraft Leasing Enterprise.[1304] The evidence showed these two sales campaigns were particularly price sensitive. Considering the Appellate Body previous finding that where price was the only factor, Boeing was substantially likely to use the Tied Tax subsidies to lower prices, it found the subsidies contributed in a genuine and substantial way to the lowering of Boeing's prices.

In accordance with Article 6:3(c) of the *SCM Agreement*, the lost sales campaigns must also be "significant." In the 2005 *US—Upland Cotton* case, the Appellate Body understood "significant" to mean "something that can be characterized as important, notable or consequential."[1305] Additionally, whether a lost sale is significant can have quantitative and qualitative dimensions.[1306] Here, the Singapore Aircraft Leasing Enterprise order involved 20 firm orders and 20 purchase rights, and the Japan Airlines order involved 30 firm orders and 10 options.[1307] In addition to this quantitative consideration, the Appellate Body said the sale had qualitative significance because of the important of securing a sale from a particular customer.[1308]

In sum, after completing the analysis where the uncontested facts allowed, the Appellate Body concluded only two sales campaigns included a genuine and substantial causal relationship between the FSC/ETI subsidies and the Washington State B&O tax rate reduction, through their effects on Boeing's prices and the significant lost sales experienced by Airbus.[1309]

1301 *Id.* ¶ 1264.
1302 *Id.*
1303 *Id.* ¶¶ 1268-69.
1304 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1271.
1305 *Id.* ¶ 1052 (citing Appellate Body Report, *US—Upland Cotton*, *supra* note 423, ¶ 426).
1306 *Id.* ¶ 1272.
1307 *Id.*
1308 *Id.*
1309 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1275.

7) Collective Assessment of Subsidies and Their Effects

The last appeal considered by the Appellate Body was the EU challenge of two decisions taken by the Panel to assess separately the alleged effects of different groups of subsidies.[1310] The EU asserted the Panel erred in its interpretation and application of Articles 5(c) and 6:3 of the *SCM Agreement* by failing to conduct an integrated assessment of the effects of relevant subsidies, specifically: (1) the refusal of the Panel to assess collectively the effects of the B&O tax rate reductions and the effects of the aeronautics subsidies; and (2) the Panel failure to assess collectively the effects of the Tied Tax subsidies and the effects of the eight other remaining subsidies.[1311]

The Appellate Body discussion of this matter may well prove to be one of the most important and oft-cited features of the 2012 *US—Boeing* case. Simply stated, with the *US—Boeing* report, the Appellate Body made clear that when multiple controversial subsidies are challenged, there are two approaches in respect of causation, i.e., to analyze whether those subsidies cause adverse effects (such as serious prejudice). One comes from the 2005 *US—Upland Cotton* case, and the other from the 2011 *EC—Airbus* case. As the Appellate Body stated in *US—Boeing*, there are "two distinct means of undertaking a collective assessment of the effects of multiple subsidies."[1312] Manifestly in so declaring, the Appellate Body was making law and establishing, in a *de facto* sense, a precedent.

In particular, in the *US—Boeing* case, the Appellate Body found it important to begin by addressing the different approaches taken by the Panels in the 2005 *US—Upland Cotton* and 2011 *EC—Airbus* cases, with respect to the collective assessment of the effects of multiple subsidy measures.

The approach in *US—Upland Cotton*, referred to as the "aggregate" approach was defined as, "an *ex ante* decision taken by a panel to undertake a single analysis of the effects of multiple subsidies whose structure, design, and operation are similar and thereby to assess in an integrated causation analysis the collective effects of such subsidy measures."[1313]

Whereas the second approach, used in *EC—Airbus*, is referred to as the "cumulation" approach and defined as "an examination undertaken by a panel *after* it has found that at least one subsidy has caused adverse effects as to whether the effects of other subsidies complement and supplement those adverse effects."[1314]

The structure chosen by a panel may vary by case, but some considerations of the appropriateness of the approach include design, structure, and operation of the subsidies at issue; the alleged market phenomena; and the

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[1310] *Id.*
[1311] *Id.*
[1312] *Id.* ¶ 1282.
[1313] *Id.* (footnote omitted).
[1314] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1282.

extent to which the subsidies are provided in relation to a particular product or product.[1315]

i. Should Effects of Aeronautics R&D Subsidies and B&O Tax Rate Reductions Have Been Assessed Collectively?

In examining the price effects of the subsidies within the 200-300 seat LCA market, the Panel declined to consider the effects of the R&D subsidies together with the effects of the B&O tax rate reductions on the grounds that "the two groups of subsidies operate through entirely distinct causal mechanisms."[1316] In the EU view, because the Panel found the Aeronautics R&D subsidies were a genuine and substantial cause of significant price suppression in the 200-300 seat LCA market, and the B&O tax rate reductions had a genuine (though not substantial) causal relationship with the same kind of adverse effect, the Panel was required to consider how the B&O tax rate reductions complemented or supplemented the Aeronautics R&D subsidies.[1317] Further, the EU argued that cumulation was appropriate because the Aeronautics R&D subsidies and the B&O tax rate reductions allegedly had the same effects on Airbus' pricing and sales, even if they were produced pursuant to different causal mechanisms.[1318]

The United States counter-argued that the Panel was correct in focusing on whether the various subsidies operate through the same casual mechanism to cause adverse effects, and such a decision was within the Panel's discretion.[1319] Here, the Aeronautics R&D subsidies were alleged to enhance Boeing's ability to launch the 787, whereas the B&O tax rate reductions were alleged to affect Boeing's prices.[1320] In the American view, the EU's position would wrongly require a cumulative assessment in all cases.[1321]

The Appellate Body favored the EU position. As it stated:

> We do not see any *a priori* reason—such as, that different subsidies operate through distinct causal mechanisms—why cumulation would be precluded outright. We are particularly hesitant to set out a rigid benchmark against which panels should test whether or not cumulation is appropriate based on the facts of this dispute or of [*EC—Airbus*].[1322]

1315 *Id.* ¶ 1284.
1316 *Id.* ¶ 1302 (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1824).
1317 *Id.* ¶ 1304.
1318 *Id.* ¶ 1305.
1319 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶¶ 1306-07.
1320 *Id.* ¶ 1307.
1321 *Id.* ¶ 1308.
1322 *Id.* ¶ 1319.

The Appellate Body then said there might be cases, especially ones not involving duopolies, where the "product" or "technology" effects of subsidies can be examined separately from their "price" effects.[1323] In the Appellate Body view, the Panel should have considered whether it would have been appropriate to cumulate the effects of the B&O tax rate reduction and the Aeronautics R&D subsidies.[1324]

Thus, the Appellate Body rejected what it considered a narrow approach by the Panel to only consider distinct casual mechanisms and found:

> [T]he Panel erred in failing to consider whether the price effects of the B&O tax rate reductions complement and supplement the technology effects of the aeronautics R&D subsidies in causing significant lost sales and significant price suppression, and a threat of displacement and impedance, in the 200-300 seat LCA market.[1325]

However, perhaps by mistake during appellate arguments, the EU did not request for the Appellate Body to complete the analysis.[1326]

ii. Should Effects of Tied Tax Subsidies and Remaining Subsidies Have Been Assessed Collectively?

The EU contended the Panel erred by declining to undertake a collective assessment of the remaining subsidies and the Tied Tax subsidies. According to the EU, both subsidies had a nexus with the subsidized LCA and with Boeing prices.[1327] The United States contended there was virtually no evidence as to how the remaining subsidies were used, so it would not be possible to establish a sufficient nexus.[1328]

The Appellate Body was unsure of whether the Panel declined to collectively assess the two groups of subsidies because it felt they operated through distinct causal mechanisms or for some other reason.[1329] However, it concluded that the Panel did not act outside its scope of discretion, as far as it relates to the aggregated analysis. The Appellate Body found the discussions by the Panel of the Tied Tax subsidies and remaining subsidies "strongly suggest[ed]" it considered them to be different in nature.[1330] Additionally, the

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1323 *Id.*
1324 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1320.
1325 *Id.* ¶ 1321.
1326 *Id.*
1327 *Id.* ¶ 1323.
1328 *Id.* ¶ 1324.
1329 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1325.
1330 *Id.* ¶ 1326.

Appellate Body felt the arguments put forth by the EU supported this conclusion.[1331]

But the Appellate Body felt the Panel erred in "failing to make a cumulative assessment of whether the remaining subsidies affected Boeing's prices in a way similar to the tied tax subsidies."[1332] According to the Appellate Body, the "cursory analysis" by the Panel of the alleged effects of the remaining subsidies should not have been limited to whether these subsidies constituted a genuine and substantial cause of serious prejudice "*on their own*."[1333]

iii. Appellate Body Completion of Analysis

Having found the Panel erred with regard to the remaining subsidies and the Tied Tax subsidies, the EU requested the Appellate Body to complete the analysis and find that the subsidies caused adverse effects when assessed collectively.[1334] The Appellate Body opted not to conduct an aggregated assessment because it previously found the Panel did not err in failing to conduct such an analysis. Instead, it addressed the EU alternative request: a cumulation assessment.[1335] The United States contended the EU failed to identify facts that would enable such an analysis, nor were there any present, but the Appellate Body still moved forward with the analysis.[1336]

As discussed above, the Appellate Body already had found that the FSC/ETI subsidies and the State of Washington B&O tax rate reduction were a genuine and substantial cause of significant lost sales in the 100-200 seat LCA market.[1337] Accordingly, the sole question remaining before the Appellate Body was whether the effects of the remaining subsidies complemented and supplemented the FSC/ETI subsidies and the State of Washington B&O tax rate reductions.[1338]

Recall the relevant test developed in the 2011 *EC—Airbus* case asks whether the effects of one group of subsidies is shown to have a genuine causal connection with the relevant effects and market phenomena cause by the second group of subsidies.[1339]

In *US—Boeing*, it was "undisputed that none of the remaining subsidies were contingent upon the production or sale of particular LCA."[1340] However, as

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[1331] *Id.*
[1332] *Id.* ¶ 1327.
[1333] *Id.* ¶ 1328 (emphasis added).
[1334] Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1331.
[1335] *Id.*
[1336] *Id.* ¶¶ 1332, 1334-35.
[1337] *Id.* ¶ 1334.
[1338] *Id.*
[1339] *See* Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1335 (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶¶ 1378-79).
[1340] *Id.* ¶ 1336.

the United States and the EU both accepted, receipt of such subsidies "may still affect the behavior of the recipient of the subsidy in a manner that causes serious prejudice, depending upon the context in which it is used."[1341] Moreover, the Appellate Body accepted several factors that also affected the affirmative serious prejudice finding with regard to the Tied Tax subsidies.[1342] Those factors were equally relevant to the analysis of whether the remaining subsidies had a genuine causal link to the prices of Boeing 737NG aircraft in its 2005 Japan Airlines and 2005 Singapore Aircraft Leasing Enterprise sales campaigns.[1343]

The eight remaining subsidies were categorized as benefiting the 787 only, multiple aircraft families (including the 737NG at issue here), or benefiting Boeing LCA business in general.[1344] Of those categories, only the second potentially could be linked to production of the 737NG.[1345] Those subsidies and their amounts were:

> (i) [T]he Washington State B&O tax credits for preproduction development, and for computer software and hardware ($41.3 million);
>
> (ii) [T]he Washington State sales and use tax exemptions for computer hardware, peripherals, and software ($8.3 million); and
>
> (iii) [T]he property and sales tax abatements provided to Boeing pursuant to IRBs issued by the City of Wichita ($475.8 million).[1346]

There was "no indication in the record that Washington State B&O tax credits were received in connection with expenditures related to the 737NG."[1347] Additionally, there was no indication the Washington State sales and use tax exemptions were received or expected to be received in connection with expenditures related to the 737NG.[1348]

In other words, the B&O tax credits and the sales and use tax exemptions were not specifically linked to the 737NG. Absent such a link, these subsidies cannot be added to other subsidies (like the FSC/ETI support) that do cause serious prejudice in respect to this LCA model. Doing so would overstate the serious prejudice done to Airbus in trying to compete with the 737NG and would be unfair to Boeing. Put bluntly, there should be no commingling of subsidies that

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1341 *Id.* (quoting Panel Report, *US—Boeing*, *supra* note 814, ¶ 7.1828).
1342 *Id.* (citing Appellate Body Report, *EC—Airbus*, *supra* note 758, ¶ 1271).
1343 *Id.* ¶ 1337.
1344 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1340.
1345 *See id.* ¶¶ 1341-42.
1346 *Id.* ¶ 1343 (footnotes omitted).
1347 *Id.* ¶ 1344.
1348 *Id.* ¶ 1345.

do not cause serious prejudice with those that do. Here, the B&O tax credits and sales and use tax exemptions from Washington State did not exacerbate the serious prejudice caused by other subsidies, and so they should not be included in the causation analysis with those other subsidies.

That was not true of the City of Wichita IRBs. The Wichita IRBs issued to Boeing were used for the purpose of enhancing Boeing facilities in Wichita, in which parts for the 737NG were produced.[1349] This last point was critical: because 737NG parts were made in those plants, there was a nexus between the IRBs and the 737NG model. Indeed, Boeing's own website stated that 75 percent of the airframe for the 737 was produced in Wichita. In the view of the Appellate Body, this fact revealed a close connection between the IRBs and production of the Boeing 737NG.[1350]

Accordingly, the Appellate Body found that the effects of the City of Wichita IRBs complemented and supplemented the price effects of the FSC/ETI subsidies and the State of Washington B&O tax rate reduction (but not Washington State B&O tax credits, nor sales and use tax exemptions), and thereby causing serious prejudice in the form of significant lost sales within the meaning of Articles 5(c) and 6:3(c) of the *SCM Agreement* in the 100-200 seat LCA market.[1351]

In sum, through a painstaking analysis, the Appellate Body looked at three broad categories of Tied Tax subsidies: FSC/ETI, the Washington State B&O tax rate reductions, and the eight so-called "remaining subsidies." Following the standard analysis for adverse effects, namely, serious prejudice, in a Yellow Light (Actionable) subsidy case, the Appellate Body asked whether any of these subsidies caused serious prejudice to Airbus. It held that the first two categories of Tied Tax subsidies (FSC/ETI and Washington State B&O tax rate reductions) did cause serious prejudice to Airbus.

As for the eight remaining subsidies, the Appellate Body eliminated five because the category into which the EU put them could in no way have a causal nexus to serious prejudice. Of the remaining three, only one—the Wichita IRBs—had the requisite nexus. In coming to this conclusion, the Appellate Body offered an important innovation, namely: it blessed two tests for causation of serious prejudice in a multiple-subsidies examination: aggregate (from the 2005 *US—Upland Cotton* case) and cumulation (from the 2011 *EC—Airbus* case). Might there be yet more such tests? The Appellate Body certainly did not rule out this possibility.

1349 Appellate Body Report, *US—Boeing*, *supra* note 814, ¶ 1347.
1350 *Id.*
1351 *Id.* ¶ 1348.

5. Commentary

a. Less Obvious Comment

Reading between the lines of large tracts of the Appellate Body report suggests that the judges of Geneva might well have been pre-disposed against the United States. This bias is most clear in the Appellate Body discussion of joint ventures. It hardly analyzed the American counter-arguments to a characterization that NASA procurement contracts and USDOD assistance agreements were collaborations akin to a joint venture, and a joint venture counts as a financial contribution. It is not even clear that the EU strongly pushed this argument; the Appellate Body seems to have grabbed onto statements from the Panel. On this point, at least, the Appellate Body report suffers from a considerable amount of "build up" to a conclusion, which is nothing more than a re-hash of what the Panel said and then a dreadfully short few paragraphs that justify the conclusion. The Appellate Body might have just as well said "Affirmed."

Another, and blunter, way to put this comment is as follows: the Appellate Body could be faulted for a bias against what it saw as the American military-industrial complex (a term coined by President Dwight D. Eisenhower, which in its full form includes Congress). It showed no understanding of how research is conducted in America in terms of the relationship between the Pentagon, industry, and (for that matter) universities. Rather, it seems the Appellate Body had a conclusion in mind that it wanted to reach: to "nail" Boeing for its ties to NASA and USDOD, and thus give the EU a victory in this case as it had given the United States a victory in the 2011 *EU—Airbus* case of the previous year. All it had to do was concoct a chain of logic, however thin, to get there.

b. Betraying Kansas

In January 2012, Boeing announced the closure of its Wichita plant. The plant had been at issue in the *US—Boeing* case because the city's IRBs were found to violate Articles 5(c) and 6:3(c) of the *SCM Agreement*. As Boeing stated on its website, 75 percent of the 737NG was produced at the Wichita plant.

Boeing had promised to bring thousands of jobs to Kansas after government officials had lobbied on behalf of the company for an Air Force contract. Boeing planned to use the plant manufacturer for the defense contract work, but stated in January 2012 that the market for such work had changed dramatically in the last 18 months.[1352] So, it was anticipated that the end of 2013

[1352] *See* John Hanna, *Kansas Leaders Pursuing 2 Paths in Next Step After Boeing Announces Plant Closure*, LAWRENCE J. WORLD (Jan. 7, 2012), http://www2.ljworld.com/news/2012/jan/07/kansas-leaders-pursuing-2-paths-next-step-after-bo/.

would leave 2,160 workers out of work.[1353] Kansas officials felt betrayed, as they had worked hard to keep Boeing jobs in the state.[1354]

To be sure, the underlying cause of the job loss went far beyond conditions in Kansas. Boeing has been disadvantaged for years, owing to its relatively higher labor costs. Airbus has used up-to-date production facilities requiring minimal human labor for decades. In contrast, many of the struggles of Boeing in the 1990s could be attributed to its failure to update its production facilities. For years, Airbus had no answer to the Boeing 747, and Boeing could not keep up with demand for the 747. Consequently, Boeing had neither the time to update facilities, nor felt the inclination to do so. With an air of complacency amidst chaotic demand, Boeing let the 747 be its cash cow. In subsequent years, Boeing had to admit halcyon days do not last forever: it continually reduced its labor force in Washington as it began updating its facilities.

Kansas was just one part of a global picture. Though unfortunate for Kansas workers, arguably the Wichita plant closure was overdue. As Boeing continues to attempt and regain its market share, it must continually improve its production efficiency.

c. To What End?

The punch-counter-punch rulings in the 2011 *EC—Airbus* and 2012 *US—Boeing* cases now both have been issued and adopted by the WTO Dispute Settlement Body. But aircraft noise has nowhere near abated. Perhaps predictably, the United States and the EU, and their corporate drivers, Boeing and Airbus, respectively, dispute each other's compliance with the applicable Appellate Body recommendations.

So, the United States requested $7-10 billion annually in retaliation. The United States Trade Representative said the EU provided "no evidence" of compliance and asserted that the EU "has not removed its WTO-inconsistent subsidies and has even provided new ones."[1355] The new support of which the USTR spoke was Launch Aid, aimed at assisting Airbus develop the A350-XWB, which is the response of Airbus to the Boeing 787 "Dreamliner." The WTO Panel organized to assess EU compliance asked the EU to provide information on its A350. The EU did so, but said no Launch Aid for the aircraft existed when the WTO dispute settlement started in 2005; hence, the ruling does not apply to this Aid.[1356]

Conversely, the EU asked for a compliance Panel to be established and sought $12 billion in annual retaliation from the United States, the most ever

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[1353] *Id.*

[1354] *Id.*

[1355] Daniel Pruzin, *U.S. Requests WTO Panel to Rule on EU Compliance Claims in Airbus Case*, 29 INT'L TRADE REP. (BNA) 529 (Apr. 5, 2012).

[1356] Daniel Pruzin, *EU Admits WTO Panel Seeking Information on A350 Actions in Airbus Compliance Check*, 29 INT'L TRADE REP. (BNA) 1617 (Oct. 11, 2012).

requested in WTO adjudication history.[1357] That figure was dubious as the relevant reports in *US—Boeing* and *EC—Airbus*, respectively, suggested the EU be awarded significantly less in damages than the United States. But the EU claims such a number is justified "by the WTO panel confirmation that the effect of the subsidies is significantly larger than their face value in light of their 'particularly pervasive' nature."[1358] According to the EU, language from the Panel report suggested Boeing never would have been able to launch the 787 without illegal subsidies, and the 787 is the most subsidized aircraft in the history of the industry. In response, the Americans said the EU claims were plain wrong and included in its damages calculation compensation for subsidies that clearly were no longer available. Equally bad, the EU alleged subsidies in South Carolina that were not part of the WTO dispute should be included in a non-compliance determination.

It is difficult to imagine a solution to this modern trade war in the LCA industry. The Appellate Body rulings were not dispositive in that both sides claimed victory in each case and in that both sides allegedly continued use of illegal subsidies. Perhaps, as stated by the EU Spokesperson for Trade, "only negotiations at the highest political level can lead to a real solution [.]"[1359] On the one hand, that statement may be especially correct in an industry like LCA, which has features that distinguish it from run-of-the-mill manufacturing, for instance: large capital expenditures, oligopoly, and political champions.

On the other hand, how likely is an enduring diplomatic solution? The previous Bilateral Agreement in 1992 failed and both multinational giants competed as fiercely as ever. Boeing ultimately opted not to compete head on against the Airbus super-jumbo A380. Instead, Boeing developed and launched the new 787 "Dreamliner." However, delays plus Launch Aid allowed Airbus to develop a direct competitor to the Dreamliner, Airbus' A350-XWB. The climate seems even more competitive than it was when the original Boeing complaint was filed at the WTO. So, this may be one trade war—that is, air war—that is far from over.

[1357] Daniel Pruzin, *WTO Establishes Dispute Panel to Rule on U.S. Compliance with Boeing Verdict*, 29 INT'L TRADE REP. (BNA) 1723 (Nov. 1, 2012).

[1358] Daniel Pruzin, *EU to Request $12 Billion in WTO Retaliation if U.S. Found Not Complying in Boeing Case*, 29 INT'L TRADE REP. (BNA) 1579 (Oct. 4, 2012).

[1359] Daniel Pruzin, *WTO Appellate Body Issues Confidential Ruling on Boeing Subsidies*, 39 INT'L TRADE REP. (BNA) 364 (Mar. 8, 2012).