WTO CASE REVIEW 2004[*]

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Table of Contents **Page**

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* This *WTO Case Review* is the fifth in an annual series on the substantive international trade adjudications rendered by the World Trade Organization's Appellate Body. Each *Review* explains and comments on the Appellate Body reports adopted by the Dispute Settlement Body during the preceding calendar year (Jan. 1 – Dec. 31), excluding decisions on compliance with recommendations contained in previously adopted reports. *See* Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1 (2001); Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 466 (2002); Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143 (2003); Raj Bhala & David A. Gantz, *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317 (2004). We are very grateful to the Editors and Staff of the *Arizona Journal of International and Comparative Law* for their excellent editorial assistance and continuing support of our work. Specifically, we would like to thank Alison Bachus and Robert Hall for their long hours spent editing this article.

The WTO reports we discuss are available on the web site of the WTO, www.wto.org. The texts of the WTO agreements we discuss are available on this web site, and published in a variety of sources. We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

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II. Trade Remedies

PART ONE: INTRODUCTION

I. A YEAR OF MODEST PROGESS (AT BEST) FOR THE WTO?

For the WTO, 2004 was a year of very limited progress, and for 2005, the organization faces many challenges, among them moving the Doha Development Round forward; dealing with the proliferation of regional trade agreements; selecting a new director-general; and admitting a number of impatient new members.

In July 2004, the Members agreed on a "Doha Work Programme," a mild breakthrough that provided, *inter alia*, a framework for action on agriculture, cotton, non-agricultural market access, and services.[1] However, as many trade experts expected, during the final six months of 2004 the Members made relatively little progress on agricultural subsidies, services, or other major issues under the Doha Development Round.[2] For example, a U.S. negotiator was reportedly "encouraged" by services negotiations but indicated concern that an insufficient number of member countries had been "sufficiently engaged" in the talks.[3] Thus, there remains some doubt as of April 2005 whether significant progress can be made by the time of the Hong Kong ministerial meeting scheduled for December 2005.[4]

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1. Decision Adopted by the General Council on 1 August 2004, WTO doc. WT/L/579 (Aug. 2, 2004); *see also* Paul Blustein, *Accord Reached on Global Trade; Talks Aim to Cut Farm Aid, Tariffs*, WASH. POST, Aug. 1, 2004, at A1 (reporting on the General Council meeting in which cuts in farm subsidies by wealthy countries were agreed to).

2. *See* Daniel Pruzin, *Trade Diplomats Expect Slow Start for Next Phase of Doha Round Negotiations*, 21 INT'L TRADE REP. (BNA) 1450 (Sept. 9, 2004) (reporting that even the discussion of a comprehensive work program was to be postponed until October).

3. Gary G. Yerkey, *U.S. Encouraged by Progress in WTO Talks on Services, But No Basis for Deal Seen Yet*, 22 INT'L TRADE REP. (BNA) 73 (Jan. 20, 2005).

4. Although the United States, in theory, could derail the process either by voting to withdraw from the WTO, or by failing to continue the president's Trade Promotion Authority, neither seems to be a significant risk. The existing TPA authority is subject to renewal, to July 1, 2007, provided that neither the House of Representatives nor the Senate adopts a disapproval resolution prior to June 1, 2005. Given that such a resolution would have to be approved by the Senate Finance Committee or the House Ways and Means Committee – both considered highly pro-trade – the likelihood of a resolution reaching the floor in either chamber is remote. Rossella Brevetti, *TPA Rears its Head Again, but Easy Extension Expected this Time,* 22 INT'L TRADE REP. (BNA) 116 (Jan. 20, 2005). Similarly, the Uruguay Round Agreements Act, Pub. L. No. 103-465, 103rd Cong., 2nd Sess., 108 Stat. 4809, (1994), approving the Uruguay Round trade agreements, provides for the

The threat of a deadlock over the selection of a new director-general to replace Dr. Supachi Panitchpakdi had diminished as of the end of April 2005. Four candidates were nominated by the December 31 deadline: Brazilian WTO Ambassador Luis Felipe de Sexias Correa; former Uruguayan WTO Ambassador Carlos Perez del Castillo; Mauritian Foreign Affairs and Trade Minister Jayakrishna Cuttaree; and former EU[5] Trade Commissioner Pascal Lamy. It was feared by some that a slate of three developing country candidates and a single developed nation candidate would result in a North-South divide,[6] as occurred six years ago. The current WTO procedures call for a three month campaign by the four candidates. In April the membership reduced the list of candidates through consultations organized by the chair of the General Council; de Seixas was the first to withdraw, followed by Cuttaree, in the movement toward a single candidate who would receive the unanimous support of the membership, hopefully by the end of May.[7] In the now unlikely absence of consensus, voting remains a possibility.

In the past, however, voting was avoided even as a last resort. Six years ago the Members faced a nearly year-long deadlock, ultimately resulting in a standoff between Dr. Supachi and New Zealander Michel Moore. They reached an *ad hoc* compromise. Mr. Moore was to serve a three-year term as director general, followed by Dr. Supachi for an equal three years. Neither candidate was to be eligible for reappointment or an extension of his term in office.[8] In the end, that compromise ultimately worked, with Dr. Supachi due to complete his three-year term in September 2005. The parallels for today are significant, with the

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possible introduction of a joint resolution of disapproval of U.S. participation in the WTO in 2000 and every five years thereafter. A disapproval resolution introduced in the House in June 2000 – hardly a period of unwavering support for free trade – was defeated, 363-56, and there is no reason to expect that a similar resolution, if introduced in 2005, would fare any better. *See* Daniel Pruzin & Gary G. Yerkey, *WTO in 2005 - A Year of Living Dangerously,* 22 INT'L TRADE REP. (BNA) 94, 98 (Jan. 20, 2005) (discussing the procedures for disapproval and the prospects of approval should a resolution be submitted); Gary D. Yerkey, *USTR Defends U.S. Membership in WTO As House Disapproval Resolution Takes Shape*, 22 INT'L TRADE REP. (BNA) 326 (Mar. 3, 2004) (updating the status of disapproval resolutions in the house).

5. In this article, "EU" for the European Union and "EC" for the European Communities, are used interchangeably. General practice today is to refer to the EU as the common market of twenty-five nations. However, the WTO decisions use the "EC" term in most instances.

6. Daniel Pruzin, *Brazil Puts Forward Ambassador for WTO Director-General Position*, 21 INT'L TRADE REP. (BNA) 2019 (Dec. 16, 2004).

7. *See* Daniel Pruzin, ***Mauritian Cuttaree Withdraws From Race to Head WTO; EU's Lamy Remains Favorite,,*** 22 INT'L TRADE REP. (BNA) 723 (May 5, 2005) (discussing current status of WTO Secretary-General campaign).

8. Daniel Pruzin, *Leadership Contest Wrapped Up; No Agreement on Deputy Issue Yet,* 16 INT'L TRADE REP. (BNA) 1254 (Jul. 28, 1999).

possibility of a deadlock between Pascal Lamy and one of the developing country Member candidates emerging.

At the end of 2004 serious concerns also remained over the proliferation of regional trade agreements (RTAs), with 300 considered likely to be concluded (in the aggregate) by the end of 2005.[9] The director-general conceded that RTAs "can complement multilateral efforts to liberalize world trade" when consistent with WTO rules. "However, by discriminating against third countries and creating a complex network of trade regimes, such agreements also pose a systemic risk to the global trading system that merits closer scrutiny."[10] A recent "Consultative Board" report on the future of the WTO echoed these concerns, criticizing widespread departures (through RTAs and other mechanisms) from the bedrock principle of non-discrimination:

> . . . [N]early five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between major economies is still conducted on an MFN basis. However, what has been termed the "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly, the term might now be better defined as LFN, Least-Favoured-Nation Treatment. Does it matter? We believe it matters profoundly to the future of the WTO . . . . [A]ll of us concerned to support the multilateral approach to international economic cooperation need to weigh carefully current trends and look for some answers if the risks to the system are, indeed, real.[11]

As former WTO director-general Peter Sutherland – now chairman of BP and Goldman Sachs – has opined, "[I]f we are to have a safe and prosperous world . . . it has to be based on a multilateral, global system . . . It cannot be replaced by regional, bilateral or unilateral moves in the world trading system."[12]

The recent popularity of RTAs is driven in significant part by the frustration of some Members, including the United States, at the slow pace of the Doha negotiations. As then U.S.T.R. Ambassador Zoellick stated after the failure

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9. *Quoted in* Daniel Pruzin, *WTO Chief Sounds Alarm Over Rising Number of Bilateral, Regional Trade Deals,* 21 INT'L TRADE REP. (BNA) 2063 (Dec. 23, 2004).

10. *Id.*

11. CONSULTATIVE BOARD, WTO, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHANGES IN THE NEW MILLENNIUM 19 (2004).

12. *Quoted in* Daniel Pruzin, *Advisory Report Calls for WTO Push to End Tariffs to Counter Trade Preferences Threat,* 22 INT'L TRADE REP. (BNA) 71 (Jan. 20, 2005).

of the WTO Doha Development Round negotiations in Cancun in September 2003:

> Many countries – developing and developed – were dismayed by the transformation of the WTO [at Cancun] into a forum for the politics of protest. Some withstood pressure to join the strife from larger developing neighbours. Of course, negotiating positions differed. But the key division at Cancun was between the can-do and the won't-do. For over two years, the US has pushed to open markets globally, in our hemisphere, and with sub-regions or individual countries. As WTO members ponder the future, the US will not wait: we will move toward free trade with can-do countries.[13]

One simple and logical – but politically difficult – solution has been suggested by the Consultative Board: "A commitment by developed country Members of the WTO to establish a date by which all their tariffs will move to zero should now be considered seriously."[14] Clearly, reduction of tariffs of developed nations to zero (if that included sensitive items such as textiles and apparel, footwear, chemicals, processed agricultural products, etc.) would greatly reduce the incentives for developing nations such as those in Central America, the South African Customs Union, and the Andean Group to seek free trade agreements with the United States and other developed nations. At least two caveats are in order, however. First, this suggestion would do little to reduce the pressure to conclude RTAs and customs unions among developing nations, and, second, would not eliminate the importance of RTAs with regard to matters other than trade in goods, including services, intellectual property and foreign investment protection.

Eighteen nations are currently seeking membership in the WTO, the most significant of which (from a trade volume point of view) are Russia, Saudi Arabia, The Ukraine, and Vietnam. The working party processes are at various stages, and the number of new members which will actually achieve WTO membership in 2005 is unclear.[15] For potential members expected to be significant players in the global marketplace, such as Russia and Vietnam, WTO accession has become a long and sometimes difficult process. With Vietnam, for example, the WTO "working party" created to consider Vietnam's application was established in January 1995, more than ten years ago. By most accounts, Vietnam has made enormous progress in meeting the conditions for membership during the past

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13. Robert Zoellick, *America Will Not Wait for the Won't Do Countries*, FINANCIAL TIMES (LONDON), Sept. 22, 2003, at 23.

14. CONSULTATIVE BOARD, *supra* note 11, at 79.

15. *See* WTO, Summary Table of Ongoing Accessions (Dec. 2004), *available at* http://www.wto.org/english/thewto_e/acc_e/status_e.htm (last visited Feb. 8, 2005).

several years, including but not limited to bilateral market access issues.[16] However, according to the (diplomatic) Korean chairman of the working party, "some important tasks remain to be done" relating to such areas as Vietnam's investment regime; subsidies; trading rights that discriminate against foreign interests; the role of state-owned enterprises; and the use of quantitative restrictions.[17]

II. THE DISPUTE SETTLEMENT BODY (DSB) AND APPELLATE BODY

The year 2004 was relatively quiet for both the DSB and the Appellate Body. The total number of consultations under the Dispute Settlement Understanding[18] reached 324 by the end of 2004.[19] During 2004, however, only nineteen new requests for consultations were filed, compared to twenty-seven in 2003, thirty-four in 2002, and twenty-six in 2001.[20] This is the lowest number since the DSB became operable in 1995, when 22 cases were filed; cases peaked at forty-six in 1996.[21] As of October 2004, 82 Appellate Body and/or panel reports had been adopted, 45 "mutually agreed solutions" had been reached, and 26 disputes were considered settled or inactive; at this time there were 24 active panels.[22] In addition, 12 compliance reports had been adopted and 16 arbitration reports on level of suspension had been adopted, with the WTO authorizing

16. *See* WTO News, *Vietnam Membership Negotiations 15 December 2004; Accession Moves Forward as Members Examine the Terms* (Dec. 15, 2004) (reporting on the status of accession negotiations and the issues still under discussion), *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes (last visited Feb. 8, 2005).

17. *Id*. at 80.

18. The Dispute Settlement Body is created by Article 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes; Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization. World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 2 [hereinafter *DSU*] *at* http ://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (last visited Apr. 14, 2005); Marrakesh Agreement Establishing the World Trade Organization [hereinafter Marrakesh Agreement], Annex 2, (1994) *at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

19. WTO Secretariat, Dispute Settlement: The Disputes - Disputes, Chronologically, *at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Apr. 12, 2005).

20. *Id.*

21. *Id.*

22. World Trade Organization, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/22 at ii (14 October 2004) [hereinafter WTO, *Update*]. Totals are affected by the fact that many panel actions involve multiple Parties.

suspension of concessions in seven cases.[23] While it may be too soon to discern a trend, the number of new requests for consultation appears to be declining.

A total of 67 appeals were filed between 1995 and the end of 2004, although none were filed in 1995.[24] The number of appeals peaked in 2000, with thirteen; they increased each year from 1995 to 2000, and have decreased each year since 2000.[25] Over the period 1995-2003, 67% of all panel reports were appealed to the Appellate Body.[26]

The Appellate Body heard five new cases and circulated five new reports (excluding Article 21.5 appeals) in 2004, just as in 2003 and in 2002,[27] although six were adopted by the DSU during calendar year 2004 (and are reviewed herein). Despite the political sensitivity of the softwood lumber dispute in the United States and Canada, these Appellate Body decisions[28] did not result in the level of controversy generated by some recent rulings. However, several potentially explosive actions, among them *US - Upland Cotton*[29] (concerning agricultural subsidies under the Agreement on Agriculture and the Agreement on Safeguards and Countervailing Measures),[30] *EC - Sugar,*[31] and *US - Internet Gambling*[32] (concerning the United States' right to bar access to Internet gambling

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23. *Id.*

24. WTO, Report of the Appellate Body, *Annual Report for 2004*, Annex 2 WTO Doc. WT/AB/3 (Jan. 2005) [hereinafter Appellate Body *2004 Report*.

25. *Id.* at 3.

26. *Id.* at Annex 3.

27. *Id.* at 3.

28. WTO, Report of the Appellate Body, *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada,* WTO Doc. WT/DS257/AB/R (Jan. 19, 2004), *adopted* Feb. 17, 2004 [hereinafter Appellate Body Report, *US – Softwood Lumber CVD*]; *see* case review at Part IIA-B, *infra*; WTO, Report of the Appellate Body, *US - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004), adopted Aug. 31, 2004 [hereinafter *Softwood Lumber Zeroing*] see case review at Part IIA-B, *infra.* The other major softwood lumber action did not reach the Appellate Body: WTO, Report of the Panel, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc. WT/DS277/R (Mar. 22, 2004), adopted Apr. 26, 2004.

29. WTO Report of the Appellate Body, *United States - Subsidies on Upland Cotton,* WTO Doc. WT/DS267/AB/R (Mar. 3, 2005), *adopted* Mar. 21, 2005.

30. WTO Agreement on Agriculture [hereinafter Agreement on Agriculture], WTO Agreement on Subsidies and Countervailing Measures [hereinafter SCM Agreement], *both available at* http://www.wto.org.

31. WTO Report of the Panel, *European Communities - Export Subsidies on Sugar Complaint by Brazil*, WT/DS266/R (Oct. 15, 2004), *European Communities - Export Subsidies on Sugar Complaint by Thailand*, WT/DS283/R (Oct. 15, 2004), notice of appeal, Jan. 13, 2005.

32. WTO, Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling Services*, WT/DS285/AB/R (Apr. 7, 2005), adopted Apr. 20, 2005.

under its Services Agreement[33] annex) are presenting the Appellate Body with significant challenges (and controversy) in 2005.

During 2004, the Appellate Body adopted new working procedures for appellate review,[34] replacing the 2003 version. The changes appear to be relatively minor; for example, Rule 20(2)(d) was amended to clarify what is meant by "brief statement of the nature of the appeal."[35] There were no changes in Appellate Body membership beyond the accession of Professor Merit Janow in January 2004. Yasuhei Taniguchi of Japan was elected Chairman for the term of December 17, 2004 to December 16, 2005, replacing Georges Abi-Saab of Egypt.[36] However, the initial terms of three members, Luis Olavo Baptista (Brazil), John Lockhart (Australia), and Giorgio Sacerdoti (Italy) expire at the end of 2005.[37] It is reasonable to assume that following prior practice, all three will be reappointed if willing to serve second four-year terms.

Discussion of possible Dispute Settlement Understanding (DSU) "clarifications and improvements" continues as part of the Doha Round; a favorable conclusion depends, of course, on the Members reaching agreement on other, more contentious, issues on the Doha agenda. A 1994 Ministerial Decision initially provided for review of the dispute settlement rules by January 1999. This deadline was later extended to July, again with no agreement being reached. As part of the November 2001 Doha conference, the Members agreed to negotiate improvements and clarifications to the Dispute Settlement Understanding. Between February 2002 and June 2003, the "Special Session" of the Dispute Settlement Body (DSB) met on thirteen occasions and received forty-two Member proposals for clarifications and improvements to the DSU.[38] Those negotiations were to be concluded by May 2003, but were extended to May 2004, and then extended even further.[39] In December 2004, the Chairman of the Trade Negotiations Committee noted that no further progress had been made and

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33. WTO General Agreement on Trade in Services [hereinafter Services Agreement], *available at* http://www.wto.org.

34. WTO, Report of the Appellate Body, *Working Procedures for Appellate Review*, WTO Doc. WT/AB/WP/5 (Jan. 4, 2005).

35. *See* Appellate Body, *2004 Report*, *supra* note 24, at 7 (summarizing the changes in the Working Procedures).

36. *See* WTO, Report of the Appellate Body, *Election of the Chairman of the Appellate Body*, WTO Doc. WT/DSB/38 (Dec. 22, 2004), *available at* http://www.wto.org/english/news_e/news04_e/news04_e.htm#ab_22dec04 (last visited Apr. 12, 2005).

37. Appellate Body, *2004 Report*, *supra* note 24, at 1.

38. Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee* para. 3, WTO Doc. TN/DS/9 (June 6, 2003).

39. Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, WTO Doc. TN/DS/10 (June 21, 2004).

proposed a schedule of six meetings of the "Special Session" of the DSB between January and July 2005.[40]

The December 2004 DSB Chairman's Report indicates that the discussions as of December 2004 were focusing on three issues: the possibility of remanding cases from the Appellate Body to panels for further proceedings; "sequencing" of DSU decisions and Member retaliation; and "post-retaliation" issues.[41] The Member proposals include, however, quoting a June 2003 report:

> the enhancement of third-party rights, both at the panel and Appellate stage, as well as improved conditions for Members seeking to be joined in consultations; the introduction of an interim review stage and remand at the Appellate stage; clarification and improvement of the sequence and details of procedures at the implementation stage; enhancement of compensation; strengthening of notification requirements for mutually agreed solutions; and strengthening of special and differential treatment for developing countries at various stages of the proceedings.[42]

III. COMPLIANCE ISSUES REMAIN

For the United States and the European Union, compliance with Dispute Settlement Body decisions remains a significant problem.

The United States made significant progress toward compliance in several outstanding cases. In November 2004, the United States enacted legislation repealing the 1916 Antidumping Act.[43] That law had been held inconsistent with the Antidumping Agreement[44] in *United States - 1916 Act* more than four years ago.[45] The repeal legislation is, however, prospective only – it

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40. Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee*, WTO Doc. TN/DS/11, at para. 5, (Dec. 9, 2004) *available at* http://www.wto.org.

41. *Id.*

42. Special Session of the Dispute Settlement Body, *Report by the Chairman to the Trade Negotiations Committee* para. 5, WTO Doc. TN/DS/9 (June 6, 2003).

43. Section 801 of the Revenue Act of 1916, 15 U.S.C. § 72, *repealed by* P.L. 108-429, Title II, § 2006(a), Dec. 3, 2004, 118 Stat. 2597.

44. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994, ("Antidumping Agreement"), *available at* http://www.wto.org.

45. WTO Report of the Appellate Body, *United States - Anti-Dumping Act of 1916*, WTO Doc. WT/DS136, 162/AB/R (Mar. 31, 2000), *adopted* Sept. 26, 2000; *see* Bhala & Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1, 44-52 (2001) (summarizing the Appellate Body decision).

does not affect any pending litigation brought under the 1916 Act. This is significant because there are at least two court actions pending under the Act. In *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.,*[46] the jury returned a $31 million damages verdict against TKS, a Japanese printing press manufacturer. The Japanese government has shown relatively little concern about the TKS matter at the WTO and has not sought retaliation, probably because under existing Japanese legislation TKS can bring an action for $31 million against a Japanese subsidiary of Goss![47] However, another 1916 Act suit against three Japanese outboard motor producers brought by the bankruptcy trustee of Outboard Marine Corporation would offer a more significant problem for the Japanese defendants if the action were to result in monetary damages, since Outboard Marine has no operations in Japan.[48] In other words, the 1916 Act problem cannot yet be listed as fully resolved.

Also, the Bush Administration, after several years of lobbying Congress and extensive WTO litigation, finally succeeded in obtaining legislation that arguably complies with the United States' obligations to withdraw certain prohibited export subsidies held invalid in *United States - Tax Treatment for "Foreign Sales Corporations"*[49] through a provision in the American Jobs Creation Act of 2004.[50] The EU, however, once again is challenging the adequacy of the new "fix" because the Jobs Act permits certain U.S. firms to continue

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46. 294 F.Supp. 2d 1027 (N.D. Iowa 2003). The case (No. 04-2604, Aug. 19, 2004) has been appealed to the U.S. Court of Appeals for the 8th Circuit, with a decision expected in 2005. (Telephone conversation with Lawrence E. Walders, Esq., counsel for TKS, Jan. 27, 2004.)

47. *See Yamaha, Honda, Suzuki Among Japanese Firms Sued Under 1916 Act*, Inside U.S. Trade (Dec. 10, 2004), at 1.

48. *Id.* at 2.

49. WTO, Report of the Appellate Body, *United States - Tax Treatment for "Foreign Sales Corporations,"* WTO Doc. WT/DS108/AB/R ¶ 65 (Feb. 24, 2000), *adopted* Mar. 20, 2000, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm (last visited Feb. 8, 2005).

50. American Jobs Creation Act of 2004, Pub. L. No. 108-357 (Oct. 22, 2004), 108th Cong., 2d Sess., sec. 101**.** This was not the first "legislative fix" for the FSC; in November 2000, the United States enacted the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519 (Nov. 15, 2000), 106th Cong., 2d Sess. *See* Bhala & Gantz, *WTO Case Review 2000*, *supra* note 45, 18 ARIZ. J. INT'L & COMP. L. 61-63 (discussing the difficult political and economic challenges to United States' compliance). However, the EC successfully challenged the ETI Act as violating the SCM Agreement and the Agreement on Agriculture in a compliance proceeding under DSU Article 21.5; *see* WTO Report of the Arbitrator, *United States - Tax Treatment for "Foreign Sales Corporations"* - Recourse to Article 21.5 of the DSB by the European Communities, WT/DS108/AB/RW (Jan. 14, 2002), adopted Jan. 29, 2002.

enjoying the tax benefits of the program through the end of 2006.[51] While negotiations continue, the EU has agreed to lift the sanctions it imposed in 2004 retroactively to January 1, 2005.[52] It seems likely, however, that there will be at least one more stage of proceedings – further panel and possibly Appellate Body decisions on the EU's latest request – before the issues of compliance in this dispute are finally put to rest.

The most intractable compliance issue for the United States has been the so-called Byrd Amendment, the Continued Dumping and Subsidy Offset Act of 2000, which directs U.S. Customs and Border Protection to pay over anti-dumping and countervailing duties collected on specific products to the domestic producers who were found to be materially injured by the dumped imports.[53] According to the most recent report, $203.3 million was paid out to U.S firms during fiscal year 2004 (ending September 30, 2004).[54] In 2003, the Appellate Body determined that the Byrd Amendment constituted a "non-permissible specific action against dumping or subsidy" in violation of the Anti-Dumping Agreement and the SCM Agreement.[55] In August 2004, a WTO arbitration panel authorized the EU, Japan, Brazil, Canada, Chile, India, Mexico, and South Korea to retaliate against the United States.[56] Based on the formula determined by the arbitrators for the level

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51. WTO, Request for a Panel, *United States - Tax Treatment for "Foreign Sales Corporations,*" Second Recourse to Article 21.5 of the DSU by the European Communities, WTO Doc. WT/DS108/29 (Jan. 14, 2005).

52. *See* Gary G. Yerkey, *EU Decides to Lift Sanctions in Tax Dispute With U.S. Effective Jan. 1 but May Act Again*, 22 INT'L TRADE REP. (BNA) 138 (Jan. 27, 2005) (reporting on the lifting of sanctions after internal EU discussions on possible automatic reinstatement of sanctions January 1, 2006, if the new compliance panel ruled in favor of the EU).

53. Byrd Amendment, Pub. L. No. 106-387, 114 Stat. 1549 (2000) (codified at 19 U.S.C. § 1675c (2000)). Named after its sponsor and impassioned advocate, Senator Robert Byrd (D-W.Va.), the Byrd Amendment is an addition to Title VII of the United States Tariff Act of 1930. Section 1675c is entitled the "Continued Dumping and Subsidy Act."

54. *See* Daniel Pruzin, *Eight U.S. Trading Partners Hold Fire On Sanctions in Byrd Amendment Dispute*, 22 INT'L TRADE REP. 90 (Jan. 20, 2005) (explaining the current state of retaliation plans by WTO members affected by the Byrd Amendment).

55. WTO, Report of the Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R (Jan. 16 2003), *adopted* Jan. 27, 2003, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *Byrd Amendment* Appellate Body Report] *see* Bhala & Gantz, 21 ARIZ. J. INT'L COMP. L. 317, 332-346 (2004).

56. *See* United States - Continued Dumping and Subsidy Offset Act of 2000, Recourse to Arbitration by the United States under Article 22.6 of the DSU, Decision by the Arbitrator, WTO Docs. WT/DS217/ARB/BRA, WT/DS234/ARB/CAN, WT/DS217/ARB/CHL, WT/DS217/ARB/EEC, WT/DS217/ARB/IND, WT/DS217/ARB/JPN, WT/DS217/ARB/KOR, WT/DS234/ARB/MEX (Aug. 31, 2004) (explaining the arbitrators' decision).

of retaliation, the eight nations would have been able to levy trade sanctions in the aggregate amount of $146.4 million for the 2004 fiscal year.[57] However, in January 2005, all eight members decided to defer imposition of penalty duties, apparently preferring to wait and see whether the new Congress would be more amenable to repealing the Byrd Amendment than its predecessor.[58]

The United States is also lagging in compliance in several less high profile cases. In *United States - Section 110(5) of the U.S. Copyright Act,*[59] the United States was directed to make certain changes in its copyright legislation. Following arbitration regarding the level of nullification or impairment of benefits, the United States and the EU reached a temporary agreement for the period through December 20, 2004. The United States advised the DSB in January 2005 that "[t]he U.S. Administration has been consulting with the U.S. Congress, which convened this month, and will continue to confer with the European Communities, in order to reach a mutually satisfactory resolution of this matter."[60]

In the 2002 *Havana Club* case,[61] the United States and the EU have repeatedly agreed on extension of the "reasonable period of time" for compliance, most recently until June 30, 2005.[62] Legislation to clarify that the act applies to all nationals – the focus of the dispute – has been repeatedly introduced into Congress, most recently in 2004.[63] Also, in *US - Hot-Rolled Steel*,[64] certain amendments to U.S. anti-dumping law required for compliance with the decision remain pending; with the concurrence of Japan, the period for U.S. compliance has been extended to July 31, 2005.[65]

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57. Pruzin, *supra* note 54, at 90.

58. *Id.*

59. WTO, Panel Report, *United States – Section 110(5) of the Copyright Act*, WTO Doc. WT/DS160/R (*adopted* July 27, 2000).

60. WTO, *United States - Section 110(5) of the Copyright Act, Status Report by the United States Regarding Implementation of the DSB Recommendations and Rulings in the Dispute*, WTO Doc. WT/DS160/24/Add.2 (Jan. 14, 2005).

61. *See* WTO, Report of the Appellate Body, *United States - Section 211 Omnibus Appropriations Act of 1998,* WTO Doc. WT/DS176/AB/R (Jan. 2, 2002), *adopted* Feb. 2, 2002, *available at* http://www.wto.org. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INTL & COMP. L. 143, 198-221 (2003).

62. WTO, *United States - Section 211 Omnibus Appropriations Act of 1998*, *Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute*, WT/DS176/11/Add.27 (Jan. 14, 2005).

63. *Id.*

64. *See* WTO, Report of the Appellate Body, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Doc. WT/DS184/AB/R, *adopted* Aug. 23, 2001; *see* Bhala & Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).

65. WTO, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel from Japan, Status Report Regarding Implementation of the DSB Recommendations and Rulings in the Dispute*, WTO Doc. WT/DS184/15/Add.27 (Jan. 14, 2005).

For the European Union, the principal compliance issue remains growth hormones. In 1998, in *EC - Hormones*,[66] the DSU determined that the EU's ban on meat grown with certain hormones was inconsistent with EC obligations under the WTO's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), largely because there was insufficient scientific evidence presented by the EC to demonstrate that hormone-fed beef was a danger to human health.[67] Since that time, the EC has effectively refused to comply. In 1999, the DSB authorized the suspension of obligations (imposition of trade sanctions) up to $116.8 million annually; sanctions were imposed beginning in July 1999 and continue to this day.[68] In 2003, the EC adopted a new directive continuing the prohibition, based on new studies that allegedly justified the ban by demonstrating that avoidance of at least one hormone was "of absolute importance to human health," and indicating that the scientific evidence with regard to several other hormones was insufficient to justify removing the ban.[69]

Not surprisingly, the United States remained unpersuaded and declined to terminate the sanctions. The United States "stated to the DSB that it considered the new [EC] Directive to be inconsistent with the European Communities' obligations under the SPS Agreement . . . ."[70] After bilateral consultations, which began in November 2004, failed to resolve the issue, the EC requested formation of a panel.[71] Given that the 2003 Directive appears to be based significantly on the "precautionary principle" (continuing a ban based not on scientific evidence of harm, but on the *lack* of scientific evidence that the hormones are not harmful), it seems unlikely that the Appellate Body will ultimately reach a result a year and a half from now that is significantly different from the 1998 decision, which effectively refused to accept the precautionary principle as applicable in this situation.[72] Nor, given the strong public opinion in the EC against hormone-fed

66. WTO, Report of the Appellate Body, *European Communities - Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc. WT/DS26/AB/R (*adopted* Feb. 13, 1998).

67. *See* Terence P. Stewart & David S. Johanson, *The Beef Hormone Dispute: An Analysis of the Appellate Body Decision*, 5 U.C. DAVIS J. INT'L L. & POL'Y 219, 256 (predicting that because of the "political sensitivity of the issue of beef hormones in Europe" the EC would offer compensation, at least temporarily, rather than complying).

68. *See* WTO, *United States - Continued Suspension of Obligations in the EC - Hormones Dispute, Request for the Establishment of a Panel by the European Communities*, WTO Doc. WT/DS320/6, at 1-2 (Jan. 14, 2005) (providing, *inter alia*, a procedural history of the hormones dispute).

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 4.

72. WTO, Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones),* WTO Doc. WT/DS26, 48/AB/R (*adopted* Feb. 13, 1998).

beef,[73] is the EC likely to change its import prohibition, regardless of the sanctions.

The EC's compliance efforts are also under question with regard to another long-standing dispute*: EC – Bananas,*[74], which involves the United States and a number of Latin American banana producers (Ecuador, Guatemala, Honduras, and Mexico). In this dispute,[75] the complaining Members challenged a complex set of EC preferences for bananas imported from former colonies, largely in the Caribbean, as discriminatory against Latin American producers. After the DSB adopted the Appellate Body Report confirming the position of the Complaining Members in most respects, months of negotiations followed. Ultimately, the DSB authorized retaliation by the United States and Ecuador in the amounts of $191.4 million and $201.6 million, respectively. However, the parties reached a tentative settlement involving significant modifications of the complex EC banana import regime. Complicating the matter, an EC plan to abandon its current multiple tariff-rate quota system in favor of a single tariff of € 230 per ton as of January 1, 2006, formally notified to the WTO early in 2005, has been rejected by the United States, Ecuador, Guatemala, Honduras, Mexico, and Panama.[76] The difference between the EC and United States/Latin America position is huge; the latter are seeking a flat tariff of only €70 per ton.[77] If no agreement is reached after a sixty day consultation period beginning January 31, 2005 – considered likely by observers[78]– arbitration before the Dispute Settlement Body will be sought, and the long-running saga will continue.

IV. COMPLIANCE AND FIGHTING PRECEDENT WITH ZEROING

A troubling and yet-unresolved question in DSB jurisprudence is the extent to which a Member whose particular administrative practice has been found inconsistent with WTO rules in a particular case may continue to follow that

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73. *See* Stewart & Johanson, *supra* note 67, at 255-256, (predicting, very accurately that "Given the political sensitivity of the issue of beef hormones in Europe, the European Communities may decide to offer compensation to the United States and Canada, at least temporarily, for trade lost as a result of the ban rather than remove it").

74. WTO, Report of the Appellate Body, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (Sept. 9, 1997), *adopted* Sept. 29, 1997; *See* Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (2000) (discussing the bananas dispute between the EC, the United States, Ecuador and others).

75. The history of the dispute in this paragraph is based on WTO, *Update*, *supra* note 22, at 60, 152-156, except as otherwise noted.

76. *Latin American Nations Reject EU Proposal for 230 Euro Banana Tariff Notified to WTO*, 22 INT'L TRADE REP. (BNA) 179 (Feb. 3, 2005).

77. *Id.*

78. *Id.*

practice in other domestic proceedings. That issue arises most immediately with regard to "zeroing" as the practice is followed by the U.S. Department of Commerce, discussed in great detail in *US – Softwood Lumber – Zeroing*, Part IIA-B *infra*. Any good lawyer appreciates that there is a line between efforts to modify existing laws that have a *bona fide* chance of success, and highly risky, contentious showdowns with at best a glimmer of hope. Maybe the American thinking, or hope, has been to carve out whatever space possible for zeroing, within defined parameters. However, now is one such time to question whether there is a risk of crossing the line and, thus, to question the American strategy on zeroing.

The concept of zeroing is relatively simple in principle, but more complex in practice. A brief example is given here, with more extensive discussion reserved for our case review of *US – Softwood Lumber Zeroing*. When dumping margins are calculated, there is normally a comparison between "normal value" (usually the adjusted selling price of the product in the home market) and the "export price" (the adjusted price in the importing market). The difference between the two, if the export price is lower, is the dumping margin.[79] Thus, for example, if the adjusted home market price is $50, but the export price is $40, the dumping margin on that transaction would be $10. On the other hand, if the home market price is $50 but the export price is $60, the margin is negative, -$10, and the sale is not "less than fair value," i.e., dumped. When there are many relevant export sales during the period of review, calculations of individual transaction margins are made in this manner (usually taking a weighted average of the home market sales) and comparing that either to a weighted average of the export sales or to export sales on a transaction-by-transaction basis, as is permitted under WTO rules.[80] These individual comparisons are then aggregated to produce an overall dumping margin for the product under consideration.

If, in this example, the margins for the two transactions are combined algebraically, the aggregate margin is zero ($10 in the first transaction, -$10 in the second, aggregate margin, $0). However, if the practice of zeroing is followed, negative margins are treated as zero, so that the combination results in a $10 margin for the first transaction, a $0 margin for the second transaction, and an aggregate margin of $5. It is this obvious distortion that is the focus of recent WTO litigation, including *US - Softwood Lumber (Anti-Dumping)*, discussed in Part II of this review, *infra*.

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79. *See* Anti-Dumping Agreement, *supra* note 44, art. 2.1 (providing that "a product is considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country"). If dumping and material injury are demonstrated, an anti-dumping duty is applied to the affected imports, in the amount of the margin of dumping.

80. *Id*. art. 2.4.2.

This zeroing issue was first addressed and decided by the Appellate Body DSB in *EC – Bed Linen*.[81] There, the Appellate Body found that zeroing practice was inconsistent with the Anti-Dumping Agreement. Since that action, however, the focus has been on U.S. rather than EC zeroing practice. It was, as noted above, a principal issue in the Appellate Body's 2004 decision in US - *Softwood Lumber – Zeroing,*[82] in which the Appellate Body decided against the United States. It was also addressed and questioned (although not decided) in *US - Sunset Review - Japan*,[83] also reviewed *infra*. The WTO community now has two clear precedents against the use of zeroing (and at least one more that questions the practice). It is thus difficult to imagine that the Appellate Body, when confronted with another zeroing case, will change its line of thinking. It is also difficult to conceive why it ought to change its position, because (as yet) no good policy argument has been adduced for a departure from these precedents. Nor is it likely that the Appellate Body would decline to extend its analysis of zeroing to AD investigations using individual-to-individual or weighted average to weighted average comparisons of Normal Value and Export Price.

In any event, a number of related zeroing cases are now pending before panels. In 2003, the EU filed a complaint against U.S. zeroing practice in twenty-one anti-dumping cases targeting European exports to the United States, an action that likely will be decided (without much doubt as to the result) by mid-2005.[84] In November 2004, the Japanese requested consultations regarding U.S. zeroing practice in sixteen anti-dumping actions,[85] and in January 2005 the same issue was raised in a Mexican panel request.[86] In the Japanese case, the EU, Argentina,

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81. WTO, Report of the Appellate Body, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/AB/R (Mar. 1, 2001) (*adopted* Mar. 12, 2001); *see* Bhala & Gantz, *WTO Case Review 2001,* 19 ARIZ. J. INT'L & COMP. L. 457, 518-541.

82. WTO, Report of the Appellate Body, *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (*adopted* Aug. 31, 2004); *see infra*, Part IIA-B.

83. WTO, Report of the Appellate Body, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc. WT/DS244/AB/R (Dec. 15, 2003), *adopted* Jan. 9. 2004.

84. WTO, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WTO Doc. DS294 (June 12, 2003).

85. WTO, *United States - Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. DS322 (Nov. 29, 2004); *see* Daniel Pruzin, *Japan to Request WTO Panel Ruling,* 22 INT'L TRADE REP. (BNA) 234 (Feb. 10, 2005) (explaining the Japanese challenge to zeroing and other U.S. laws and regulations affecting dumping determinations). The United States blocked Japan's initial request for a panel on Feb. 17, 2005, but by Feb. 28, 2005, the Dispute Settlement Body established a panel. Daniel Pruzin, *Japan Secures Establishment of Panel to Rule on WTO Dispute on U.S. "Zeroing,"* 22 INT'L TRADE REP. (BNA) 357 (Mar. 3, 2005).

86. WTO, *United States - Anti-Dumping Determinations Regarding Stainless Steel from Mexico*, WTO Doc. WT/DS325/1 (Jan. 10, 2005).

India, Mexico, Norway, and Taiwan have requested the opportunity to participate in the case as third parties.[87]

Despite growing criticism and the proliferation of DSU actions in which the United States will have to defend itself, the United States continues to utilize the practice. In recent (December 2004) anti-dumping actions against shrimp, where zeroing was again used, then Assistant Commerce Secretary James Jochum reportedly defended zeroing as a long-standing practice that has not been expressly prohibited by the WTO. He asserted that the WTO ruling against the United States in *US - Softwood Lumber (Zeroing)* "was limited to the facts of that case," and noted that the ruling "does not direct us not to use the methodology."[88] (These arguments are both technically correct, but in a narrow sense, and raise concerns about fidelity to WTO outcomes and respect for the DSU process.) The Commerce Department's position is set out in a recent letter:

> The Department conducts its proceedings in accordance with U.S. law and regulations and in compliance with its international obligations . . . . [W]e are in the process of implementing that [Softwood Lumber anti-dumping] decision. Consistent with U.S. law and the scope of the WTO's report, however, that implementation process is limited to the softwood lumber dispute. In implementing the Uruguay Round Agreements, Congress made clear in the accompanying Statement of Administrative Action that reports issued by WTO panels or the Appellate Body in and of themselves have no power to change U.S. law or Department practice unless such a change has been determined to be appropriate under specific procedures . . . . Given the statutory requirements that govern our response to WTO rulings and the fact that this methodology is still the subject of ongoing litigation, it would be premature and inappropriate for the Department to deviate from its current practice, which is entirely consistent with U.S. law.[89]

Some disagree. In a response to Commerce Secretary Donald Evans, the Executive Director of "Consumers for World Trade" strongly criticized the Commerce Department position:

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87. Daniel Pruzin, *Six Trading Partners Seek Seat at Tale in WTO Consultations on U.S. Use of Zeroing,* 21 INT'L TRADE REP. (BNA) 2018 (Dec. 16, 2004).

88. *Commerce Defends Use of Zeroing in Final Duties on Shrimp*, INSIDE U.S. TRADE, Dec. 24, 2004, at 1, 16 (quoting Assistant Secretary Jochum).

89. Letter from Commerce Secretary Donald L. Evans to Erik Autor, President, Consumers for World Trade, Dec. 20, 2004 (on file with author).

> Refusal to abandon zeroing in the face of decisive WTO rulings that the practice itself, regardless of the commodity to which it is applied, violates WTO rules, demeans both the United States as a world trade leader and the WTO as a credible dispute-settlement body. As you know, the WTO first determined that zeroing was inconsistent with world trade rules in a case brought against the European Union regarding bed linens. While the EU might have taken the position that the ruling was applicable only to the facts of the specific case involved, it chose to discontinue zeroing across the board. Your letter indicates that the United States, while tacitly admitting this policy cannot stand international scrutiny, will resort to technical legalisms and procedural delaying tactics to avoid doing the right thing in this situation. The obvious question this attitude raises is how the United States can expect other nations to respect and comply with WTO rulings, and to engage in the "competitive liberalization" that the Administration seeks, when we refuse to do the same?[90]

Notwithstanding the position of Consumers for World Trade, the United States has some legal basis in the WTO agreements for its position (leaving aside its obvious reluctance to seek from the Congress politically-unpopular changes in U.S. anti-dumping law shortly before a possible vote on continued U.S. participation in the WTO[91]). The Appellate Body decisions are not yet widely respected as formal, binding precedents. Regardless of whether the Appellate Body follows its own jurisprudence – and it almost always does[92] – the Marrakesh Agreement Establishing the WTO effectively gives the Ministerial Conference and the General Council "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[93] The Appellate Body has no such authority; rather, the dispute settlement system is designed to "preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements . . . . Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the

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90. Letter from Robin Lanier, Executive Director, Consumers for World Trade, to Commerce Secretary Donald Evans, Jan. 5, 2005 (on file with author).

91. Uruguay Round Agreements Act, *supra* note 4, sec. 125(b).

92. *See* the reviews in this and earlier annual WTO case reviews by these authors, and Raj Bhala's trilogy: *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999); *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication,* 33 GEO. WASH INT'L L. REV. 873 (2001); and *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication,* 9 J. TRANSNAT'L L. & POL'Y 1 (1999).

93. Marrakesh Agreement, *supra* note 18, Art. IX:2. The "Multilateral Trade Agreements" include, of course, the Anti-Dumping Agreement.

covered agreements."[94] Also, to date at least, the Appellate Body has focused on the particular form of zeroing used by EC or U.S. authorities, not the practice of zeroing as a broader whole.[95]

U.S. courts have also provided support under domestic law for Commerce's refusal to change its zeroing methodology. In *Timken Co. v. United States*,[96] the Court of Appeals for the Federal Circuit decided that U.S. law (19 U.S.C. § 1677b(a)) neither required nor prevented the use of the zeroing methodology. Accordingly, under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute."[97] The *Timken* court concluded that "Commerce based its zeroing practice on a reasonable interpretation of the statute."[98] The court also rejected a challenge based on the "persuasive value" of the WTO's *EC - Bed Linen*[99] decision, which one of the parties, Koyo, had argued was applicable to the United States under the *Charming Betsy* doctrine. There, the court stated that U.S. courts "should interpret U.S. law, wherever possible, in a manner consistent with U.S. international obligations."[100] (The United States, of course, was not a party to that WTO action.) The *Timken* court noted that the [WTO] decision "is not binding on the United States, much less this court." Moreover, "we do not find it sufficiently persuasive to find Commerce's practice unreasonable."[101]

The Court of Appeals saw no reason to change the result a year later, after two WTO decisions, one questioning and the other holding the American zeroing practices to be inconsistent with the Anti-Dumping Agreement, *US - Corrosion Resistant Steel Sunset Review* and *United States - Softwood Lumber Zeroing*.[102] Even then, *Charming Betsy* and clear violations of the Anti-Dumping Agreement were not enough to overcome Commerce's discretion; *Timken* was followed.[103]

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94. *DSU*, *supra* note 18, art. 3:2.

95. *See US – Softwood Lumber Zeroing*, *supra* Part IIA-B.

96. *Timken Co. v. United States*, 354 F.3d. 1334 (Fed. Cir. 2004).

97. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842-43 (1984), *quoted in Timken*, 354 F.3d. at 1341.

98. *Timken,* 354 F.3d. at 1342.

99. *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, *supra* note 81.

100. *Timken,* 354 F.3d. at 1344, quoting *Murray v. Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804).

101. *Id.* at 1344. *Accord, Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).

102. *See* this review, *supra* Parts 2.IIB, IIC.

103. *Corus Staal BV*, *supra* note 101. The Court of International Trade followed essentially the same reasoning—the U.S. antidumping laws neither unambiguously require nor explicitly prohibit the zeroing methodology—in *SNR Roulements v. United States,* No. 01-00686 (Slip. Op. 04-100, Aug. 10, 2004).

The approach of the United States remains a debatable policy position nevertheless, particularly with regard to the overall viability of the WTO's dispute settlement system. There is significant strain on DSB resources, and on those of the Members (some of which are developing countries), which are now put in a position of being required to seek DSB adjudication of virtually every U.S. anti-dumping duty order, because all those using a comparison of home market sales and export sales to the United States are likely to follow the zeroing approach. As indicated earlier, about twenty-five U.S. anti-dumping orders using the zeroing methodology are already under challenge in the DSB. It can be hoped that the Appellate Body, however reluctant it may be to set forth general principles that go beyond the particular dispute before it, will opine on zeroing in sufficiently clear and broad terms as to strongly encourage United States compliance across the board.

It can also be hoped that the USTR will encourage Commerce to modify its zeroing practice sooner rather than later. At a minimum, the USTR might announce its intention to do so as part of a Doha Round revision of the Antidumping Agreement, and abandon the one-by-one tilting at the zeroing windmill. Insofar as the authors have been able to determine, zeroing is mandated neither by U.S. antidumping laws, nor by the accompanying Commerce regulations. Rather, it is simply a Commerce practice, admittedly of many years' duration, which Commerce is legally free to modify at any time (notwithstanding the criticism that would come from many in Congress).

Is there merit to the American strategy? Arguably, secretly countenancing the build-up of an adverse body of precedents (*i.e.*, in effect, hoping to lose cases) may produce a tool – case law – for reformists in the United States to persuade recalcitrant members of Congress that zeroing must end if America is to meet her international legal obligations. Or, as noted above, this could be a concession to be saved for an eventual Doha agreement. However, using WTO dispute settlement as a tool for reform has its drawbacks, all the more so for America nowadays.

In an international arena in which America's commitment to the international rule of law is questioned by some of her closest allies, are these fights politically prudent, even if some of them may make sense from a technical, legal perspective? In a domestic setting in which constraints exist on budgetary and human capital resources, should a defense be mounted to every charge? These questions ought to be pondered carefully by the very people charged with the serious responsibility of deciding when to argue and when to concede in the WTO. They might also keep in mind they are the role models, or anti-role models, for future generations of trade lawyers, both in the United States and abroad.

PART TWO: DISCUSSION OF THE 2004 CASE LAW

I. GATT OBLIGATIONS

A. GATT Articles III:4 and XVII:1 and State Trading Enterprises – Canadian Wheat

1. Citation:

Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain, WT/DS276/AB/R (issued 30 August 2004, adopted 27 September 2004) (complaint by the United States).[104]

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104. *See* WTO, Report of the Appellate Body, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. WT/DS276/AB/R (*adopted* Sept. 27 2004) [hereinafter Appellate Body Report, *Canada Wheat Board*]; WTO, Report of the Panel, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R (*adopted as modified* by the Panel Sept. 27 2004) [hereinafter Panel Report, *Canada Wheat Board*].

The case involved two Panels, known as the "March Panel" and the "July Panel." The United States requested establishment of a Panel on March 6, 2003, and on March 18 the Dispute Settlement Body ("DSB") deferred the establishment. In response to the second request from the United States, the DSB agreed to establish a Panel on March 31, 2003. On May 2, Canada asked the Director–General to compose the Panel, and he did so on May 12th. However, on June 30, the United States submitted a new request for the establishment of a Panel. That was because Canada successfully proved to the March Panel that the American request for establishing the Panel failed to meet the requirements of Article 6:2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*DSU*). The March Panel issued a preliminary ruling that the American request did not specify adequately the Canadian laws and regulations that arguably ran afoul of GATT Article XVII. On July 1, 2003, the Chair of the March 2003 Panel told the DSB it had agreed to an American request to suspend the work of the Panel. On July 11, 2003, the DSB established a second Panel – the July Panel. Under *DSU* Article 9:3, the proceedings of the March and July Panels were harmonized. For a discussion of the March Panel, see Appellate Body Report, *Canada Wheat Board*, ¶¶ 3-4; Panel Report, *Canada Wheat Board*, ¶¶ 5:1-6:11, 7:1-7:3; WTO, *Update*, *supra* note 22, at 139. The discussion above focuses on the work of the July Panel.

This discussion of the facts draws partly on Report of the Appellate Body, *Canada Wheat Board*, ¶¶ 1-13; Panel Report, *Canada Wheat Board*, ¶¶2:1-3:2; WTO, *Update*, supra note 22.; Daniel Pruzin & Peter Menyasz, *U.S., Canada Both Claim Victory in WTO Ruling on Canadian Wheat Board Practices*, 21 INT'L TRADE REP. (BNA) 621 (April 8, 2004). For a treatment of the history and litigation surrounding the case, *see* Catherine Curtiss, *Against the Grain: U.S. – Canada Wheat Trade Dispute*, *in* THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA 145-65 (Kevin Kennedy ed. 2004).

For GATT Panel Reports on Article XVII, *see Japan – Restrictions on Imports of Certain Agricultural Products*, B.I.S.D. (35th Supp.) 163, 229 at ¶¶ 5:2:2:1-5:2:2:2

2. Facts and Legal Arguments:

It is easy to designate the *Canada Wheat Board* case as a, if not the, leading case on Article XVII. The GATT–WTO jurisprudence on this Article, and more generally on state trading enterprises ("STEs"), is thin. Nevertheless, the case is significant, as the Appellate Body set out reasonably clear rulings on the national treatment disciplines that apply to STEs.

Operating under the governing statute, the *Canadian Wheat Board Act*, the Canadian Wheat Board ("CWB") is the largest exporter of grain in the world.[105] Indeed, the CWB is one of the largest exporters in Canada. The CWB has the exclusive right to purchase and sell western Canadian wheat for export and domestic human consumption. Each year, the CWB sells over twenty million metric tons of grain to over seventy countries, creating revenue of Canadian $4-6 billion. The CWB has the right (subject to approval of the government) to set the initial price paid to farmers upon delivery of western Canadian wheat. The government guarantees this initial payment on behalf of the farmers to the CWB, as well as any borrowing by the CWB and sales on credit made by the CWB to foreign buyers.

The mission of the CWB is to promote sales of quality wheat, and Section 7(1) of the *Act* enables the CWB to do so at a "reasonable" price, whether or not that price maximizes its profit. Significantly, the aim is not for the CWB to

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(*adopted* March 22, 1988) (1989) (holding Article XI:1 applies to an import restriction effected through an import monopoly, because (*inter alia*) of the Interpretative Note, *Ad Articles XI, XII, XIII, XIV, and XVIII*); *Canada – Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies*, B.I.S.D. (35th Supp.) 37, 90 at ¶ 4:26 (adopted March 22, 1988) (1989) (applying the national treatment obligation of Article III to a STE); *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, B.I.S.D. (39th Supp.) 27, 77-80 at ¶¶ 5:10-5:16 (*adopted* Feb. 18, 1992) (1993) (applying Article III:4 a STE). In *obiter dicta*, the GATT Panel in the 1984 case, *Canada – Administration of the Foreign Investment Review Act*, acknowledged the argument Article XVII:1(a) mandates MFN, but not national, treatment. *See* B.I.S.D. (30th Supp.) 140, 163-64 at ¶¶ 5:15-5:18 (*adopted* Feb. 7, 1984) (1984). This view almost assuredly robs Paragraph 1(a) of much of its force.

105. In the case, the United States defined the CWB as an export regime consisting of three principal components:

- The legal framework of the CWB.
- Canada's provision to the CWB of exclusive and special privileges.
- Actions of Canada and the CWB with respect to purchases and sales involving wheat exports by the CWB.

See Appellate Body Report, *Canada Wheat Board*, ¶¶ 10-13; Panel Report, *Canada Wheat Board*, ¶¶ 2:1-2:2. The Panel and Appellate Body adhered to this definition.

maximize profit for itself. To the contrary, at the end of each crop year, the CWB pools the revenue it obtains from wheat sales, deducts its marketing expenses, and returns the net amount to wheat producers in Western Canada. The CWB is governed by a board of directors. The board is elected by the same wheat and barley producers in Western Canada who produce the grains that the CWB markets.

The United States found this kind of operation not only perplexing, but anti-commercial. In December 2002, it filed a WTO action against Canada. The United States claim focused on three provisions of the GATT–WTO law:

a. Article XVII:1 of GATT:

This provision contains a non-discrimination obligation, and the United States alleged the CWB violated this obligation. Article XVII:1 has three Sub-Paragraphs, as follows:

> (a) *Each contracting party undertakes* that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, *in its purchases or sales involving either imports or exports*, act in a manner consistent with the *general principles of nondiscriminatory treatment* prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
> (b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, *make any such purchases or sales solely in accordance with commercial considerations*, including *price*, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties *adequate opportunity*, in accordance with customary business practice, to compete for participation in such purchases or sales.
> (c) No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (a) and (b) of this paragraph.[106]

106. Emphasis added.

Article XVII:1 is informed by three Interpretative Notes, *Ad Article XVII*, one covering the whole Paragraph, one for Sub-Paragraph (a), and one for Sub-Paragraph (b). They are as follows:

i. Paragraph 1

The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of sub-paragraphs (a) and (b).

The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down regulations covering private trade are governed by the relevant Articles of this Agreement.

The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

ii. Paragraph 1(a)

Governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges."

iii. Paragraph 1(b)

A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.

b. Article III:4 of GATT:

This famous national treatment obligation states:

> 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.

Paragraph 4 applies to non-fiscal measures, and addresses like products. In contrast, Paragraph 2 of Article III covers fiscal measures (namely, internal taxes), and addresses like products (in its first sentence) and directly competitive or substitutable products (in its second sentence, by virtue of the Interpretative Note, Ad Article III, Paragraph 2).

c. Article 2 of the WTO Agreement on Trade Related Investment Measures ("TRIMs"):

This provision essentially incorporates Article III:4 by reference. The two Paragraphs of Article 2 state:

> 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
> 2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.[107]

Clearly, the thrust of the American attack was the CWB violated three different national treatment rules.

What, exactly, did the United States allege under these incarnations of the national treatment rule?[108] First, with respect to Article XVII:1, the United States faulted five specific aspects of the bulk grain handling system of the CWB, as condoned by Section 57 of the *Canada Grain Act* and Section 56 of the *Canada Grain Regulations*:

> ● The CWB failed to comply with the Article XVII:1(a) requirement of "the general principles of nondiscriminatory treatment." The United States believed an entity not legally obliged to earn a profit for itself is motivated to behave in a

107. RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 387 (2nd ed. 2001).
108. *See* Panel Report, *Canada Wheat Board*, ¶ 3:1(a).

manner, with respect to purchases, sales, and pricing, which is inconsistent with "commercial considerations."

- Contrary to Article XVII:1(b), the CWB enjoys privileges that give it greater flexibility with respect to pricing and other terms of sale than a "commercial" actor. The United States pointed to Section 7(1) of the *Canada Grain Act*, which authorizes the CWB to sell at a price it considers "reasonable" rather than at a profit-maximizing price. Surely, urged the United States, if the CWB need not maximize profits, then it does not operate in accordance with "commercial" considerations. The United States contended the pricing flexibility given to the CWB allows it to offer prospective buyers "non-commercial" terms of sale. Truly "commercial" enterprises from other WTO Members are denied an "adequate opportunity" to compete against such terms. Backing the American charge, the American Farm Bureau said the CWB buys Canadian wheat at a subsidized price, and sells it abroad at below market prices. That practice makes American grain exporters less competitive, both in the American and third-country markets.
- Contrary to Article XVII:1(b), the CWB has exclusive, special privileges enabling it to engage in unfair monopolistic practices. For instance, the CWB has the exclusive right to buy Western Canadian wheat for domestic consumption, or for export, at a price jointly determined by the CWB and the Government of Canada. As a second example, the CWB has the exclusive right to sell wheat harvested in Western Canada, for domestic consumption and exports. A third example is a guarantee from the Government for the financial operations of the CWB.
- Contrary to Article XVII:1(b), the legal mandate and organizational structure of the CWB, coupled with its special privileges, give the CWB an incentive to discriminate between markets. It has an incentive to sell at least some grain in a "non-commercial" manner.
- Contrary to Article XVII:1(a), the government of Canada has not undertaken to ensure the CWB acts consistently with non-discrimination principles.

Obviously, Canada disputed these points.[109] Canada argued the CWB purchased and sold wheat for export in a manner consistent with non-discrimination under Article XVII:1. Canada also had a fallback position. Suppose, it said, the purchases and sales of the CWB for wheat exports were found discriminatory under this provision. This discriminatory conduct still was

109. *See id.* ¶ 3:2(a)-(b).

in accordance with commercial considerations under Article XVII:2. Canada appeared to argue that compliance with Paragraph 2 effectively excused any violation of Paragraph 1.

As for the specific allegations under Article III:4 of GATT, and Article 2 of the *TRIMs Agreement*, the United States faulted three Canadian measures:[110]

> ● Canadian Grain Segregation Requirements:
> Imported wheat cannot be mixed with domestic Canadian grain received into or discharged from a grain elevator.[111] Specifically, Section 57(c) of the *Canada Grain Act* and Section 56(1) of the *Canada Grain Regulations* prohibit Canadian grain elevators from receiving foreign grain, unless they obtain special authorization.
> ● Rail Revenue Cap:
> Under Section 150(1)-(2) of the *Canada Transportation Act*, Canadian railway companies are required to impose a limits on the revenue they can earn from shipments of Western Canadian grain. However, the transporters are free to charge higher rates for other types of grain, most notably, imported grain. In other words, Canadian law caps the maximum revenue a railway can earn from shipments of domestic grain, but not on the shipment of imported grain.
> ● Producer Railway Car Allocations:
> Further, Section 87 of the *Canada Grain Act* violates Article III:4 because it prefers domestic grain over imported grain when allocating government-owned railway cars. This preference entails denial to foreign grain producers access to less expensive railway cars available for Canadian producers.[112]

On the first claim, Canada mounted a defense around Article XX(d), the "administrative" exception to GATT.[113] Article XX(d) allows a WTO Member to enact a GATT-inconsistent measure, if that measure is "necessary to secure compliance with laws or regulations which are not inconsistent with this

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110. *See id.* ¶ 3:1(b)-(c).

111. A grain elevator is a warehouse facility, often looking like conjoined missile silos, in which grain is stored, and from which it is bought and sold.

112. At the time of the *Canada Wheat Board* decision, the Federal Government of Canada owned a fleet of 13,000 rail cars, which it used to transport grain from the western provinces to Canadian seaports. In the aftermath of the case, the Farmer Rail Car Coalition proposed they acquire and manage this fleet of grain hopper cars, and the CWB supported the proposal. *See* Peter Menyasz, *CWB Backs Canadian Grain Farmers' Plan for Private Ownership of Western Rail Cars*, 21 INT'L TRADE REP. (BNA) 2000 (Dec. 9, 2004).

113. *See* Panel Report, *Canada Wheat Board*, ¶ 3:2(c).

Agreement, including those relating to . . . the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII . . . ." Plainly, the underlying rule being enforced must be consistent with GATT (and, as a second step, the administrative measure must be proven consistent with the requirements of the *chapeau* to Article XX – briefly, that measure must not be an arbitrary or unjustifiable discrimination, nor a disguised restriction on trade).

As to the second and third claims, Canada argued the United States simply had failed to prove the maximum revenue entitlement provision in the *Transportation Act*, and Section 87 of the *Grain Act*, violates Article III:4 of GATT and Article 2 of the *TRIMs Agreement*.[114]

3. Holdings and Rationale under GATT Article XVII:

The WTO Panel rejected the American claim under GATT Article XVII:1.[115] It held Canada's export regime of the CWB did not result in the CWB making export sales in a manner inconsistent with either Sub-Paragraph 1(a) or 1(b) of this Article. True, said the Panel, the CWB operated under a statutory mandate to sell wheat at "reasonable" prices. Still, the CWB had an incentive to behave like a profit-maximizing commercial actor in all markets, essentially because the Board returned net sales revenues to the grain farmers whose products it sold.

Regarding making purchases and sales "solely in accordance with commercial considerations," which Article XVII:1(b) requires, the Panel acknowledged the mandate of the CWB is to promote wheat sales, and the legal standard under which it does so is "reasonable pricing." The Panel appreciated the implication of this standard, namely, that in some instances the CWB could sell wheat at a price a commercial actor could not offer. Nevertheless, said the Panel, the inference drawn from these facts by the United States – that the CWB has an incentive to make sales not in accordance with commercial considerations – was too strong. Simply because an entity is not legally mandated to maximize profits does not mean it has no incentive to do so. Canada persuasively noted the existence of many privately-organized agricultural marketing cooperatives with a structure similar to the CWB. These cooperatives do not maximize profits; yet, because they do not have privileges conferred by a government, they make sales on purely commercial considerations.

Thus, held the Panel, Article XVII:1(b) does not stand for the proposition that the only way an STE can satisfy the "commercial considerations" requirement is for its sales operations to be structured to maximize profit. The text of the provision does not force an STE to behave exactly like a privately-held, profit-

114. *See id.* ¶ 3:2(d)-(e).

115. *See* Appellate Body Report, *Canada Wheat Board*, ¶ 5; Panel Report, *Canada Wheat Board*, ¶¶ 6:12-6.151, 7:4(a).

maximizing share-capital corporation. To the contrary, the provision contemplates a different organization – the STE – and lays down basic parameters of non-discrimination and behavior along commercial lines.

Put undiplomatically, the belief animating on the American side reflected capitalistic culture: "commercial considerations" means "profit maximization," and a business either maximizes profits, or is a socialist collective entity that does not care about the commercial "bottom line." That belief is ironic. Under the *Federal Reserve Act of 1913*, the Federal Reserve Bank of New York, an instrumentality of an independent governmental agency, the Board of Governors of the Federal Reserve System, operates on a similar basis for open market and foreign exchange operations. The New York Fed's Board of Directors includes representatives from the commercial banks.

Irony aside, in coming to its conclusion under Article XVII(b), the Panel scrutinized the governance and supervision of the CWB. Western Canadian grain farmers run the CWB, and the CWB returns net sales revenues to this constituency, is the fillip for the CWB to maximize the pool of funds it gives back. That inducement is reinforced by another key fact. While the *Act* of the Canadian Parliament authorizes the CWB, the Canadian Government does not interfere in the sales operations, in particular, of the CWB.

The Panel's findings on Sub-Paragraph (b) led to its conclusions on Sub-Paragraph (a). Because the United States had not proven the CWB, as an STE, operated at variance with "commercial considerations," the Panel held the CWB did not violate the general principles of nondiscriminatory treatment in Article XVII:1(a). Specifically, the governance, statutory mandate, and privileges of the CWB were not bait for the CWB to discriminate between markets for non-commercial reasons. The Panel found no evidence the CWB had done so in its sales behavior, *i.e.*, no proof it had sold (or not sold) wheat in some markets for reasons not solely commercial.

In the words of the USTR, Ambassador Robert Zoellick, "[t]he [Panel's] finding regarding the Canadian Wheat Board demonstrates the need to strengthen rules on state trading enterprises in the WTO."[116] Accordingly, the United States appealed the Panel's conclusion that it had failed to prove its claim the export regime of the CWB violated Article XVII:1(a)-(b). However, the Appellate Body upheld the finding of the Panel, namely, that United States, had failed to prove an Article XVII violation. For its part, Canada appealed against the interpretation of the Panel about the relationship between Sub-Paragraphs 1(a) and 1(b).

On appeal, there were two important issues concerning Article XVII:[117]

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116. *Quoted in* Daniel Pruzin & Peter Menyasz, *U.S., Canada Both Claim Victory in WTO Ruling on Canadian Wheat Board Practices*, 21 INT'L TRADE REP. (BNA) 621-22 (Apr. 8, 2004).

117. Also on appeal were less significant, largely procedural questions. First, the Appellate Body declined to rule on the American argument under *DSU* Article 11 that the Panel failed to examine the Canadian Wheat Board Export Regime in its entirety. *See*

> ● *The Relationship between the Two Sub-Paragraphs:*
> Did the Panel err by not considering the proper relationship between Sub-Paragraph 1(a) and 1(b) of Article XVII? The Panel examined the consistency of the CWB Export Regime under Sub-Paragraph 1(b), without first determining whether that Regime breached Sub-Paragraph 1(a).[118] Was the Panel wrong in doing so?
> ● *The Interpretation of Key Terms in Sub-Paragraph 1(b):*
> Did the Panel err in its interpretation of the phrase "solely in accordance with commercial considerations" and the word "enterprises" in Sub-Paragraph 1(b) of Article XVII?[119]

The Appellate Body answered "no" to the first issue.[120] The Panel was correct not to consider the proper relationship between Article XVII:1(a) and 1(b). On the second issue, the Appellate Body again answered "no."[121] The Panel correctly interpreted the key terms in Sub-Paragraph 1(b).

As to the first issue, not satisfied with this victory at the Panel stage, Canada asked the Appellate Body to state clearly the Panel was wrong in assuming a breach of Sub-Paragraph 1(b) is sufficient to establish a breach of Article XVII:1.[122] As just indicated, the Appellate Body declined Canada's appeal. Unfortunately, it did so only after a dilated, somniferous discussion of this appeal.[123] That discussion is replete with unenlightening comments (*e.g.*, "the ordinary meaning of discrimination can accommodate both drawing distinctions *per se*, and drawing distinctions *on an improper basis*").[124] It ends with a conclusion that rests on nothing more than conjecture, namely:

> [I]n applying its interpretation of subparagraph (b) in this case, *the Panel's examination was essentially the same as the evaluation that the Panel would have been required to make if it had chosen first to interpret the relationship between*

Appellate Body Report, *Canada Wheat Board*, ¶¶ 164-78, 214(a)(ii). The Appellate Body rejected the American argument, also under *DSU* Article 11, that the Panel failed to make an objective assessment of the facts. *See id.* ¶¶ 179-96, 214(a)(iii). Applying *DSU* Article 6:2, and again ruling against the United States, the Appellate Body said the Panel acted correctly in declining to dismiss a preliminary objection by Canada. *See id.* ¶¶ 197-213, 214(b).

118. *See id*. ¶ 76(a).
119. *See id.* ¶ 76(b).
120. *See id.* ¶¶ 125, 214(a)(i), (v).
121. *See id.* ¶ 214(a)(ii), (v).
122. *See* Appellate Body Report, *Canada Wheat Board*, ¶¶ 79-80.
123. *See id.* ¶¶ 84-106.
124. *Id.* ¶ 87 (emphasis in the original).

> *subparagraphs (a) and (b)*, and had explicitly found that the CWB engages in price differentiation between export markets and that such differentiation could constitute *prima face* discrimination falling within the scope of subparagraph (a). Therefore, although the Panel refrained from explicitly defining the relationship between the first two subparagraphs of Article XVII:1, its approach was consistent with our interpretation of that relationship.[125]

What, then, are the contesting views on the relationship between the two Sub-Paragraphs?

In brief, Canada argued the obligations are neither separate nor independent.[126] Rather, Sub-Paragraph 1(b) interprets and tempers the operative obligation in Sub-Paragraph 1(a). Therefore, there is no need, said Canada, to look at Sub-Paragraph 1(b) if there is no violation of Sub-Paragraph 1(a). Stated differently, Canada saw the principal obligation of Article XVII to be in the first Sub-Paragraph, which is about non-discrimination. Canada said any panel must determine first whether a practice of an STE is discriminatory under that Sub-Paragraph. If a particular practice is discriminatory, then a panel should proceed to Sub-Paragraph 1(b), which concerns the commerciality of a practice held to be discriminatory. Canada stated the *Wheat Board* Panel should have held the United States failed to prove the CWB violated Sub-Paragraph 1(a), and then dismissed the American claim solely on that basis without any further inquiry, namely, without examining whether the CWB behaved consistently with Sub-Paragraph 1(b). The *Wheat Board* Panel, of course, did not specifically rule on the correct approach to the two Sub-Paragraphs, because it found that the United States failed to establish the CWB Export Regime violated Sub-Paragraph 1(b). In effect, the Panel said there was no need to worry about the relationship between the two Sub-Paragraphs, because Canada was innocent under the Article XVII:1.

In rebuttal to the Canadian appeal on the first issue, the United States said Sub-Paragraph 1(a) and 1(b) create separate, independent obligations.[127] There is no hierarchy between the two Sub-Paragraphs. Thus, a breach of either of them established a breach of Article XVII:1. The Appellate Body went so far as to opine Sub-Paragraph 1(b) defines and clarifies the non-discrimination requirement of Sub-Paragraph 1(a), and thus is dependent upon – not separate or independent from – Sub-Paragraph 1(a).[128] In other words, in *obiter dicta* the Appellate Body accepted Canada's characterization of the relationship between the two Sub-Paragraphs.

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125. *Id.* ¶ 124 (emphasis added).
126. *See id.* ¶¶ 79-81.
127. *See* Appellate Body Report, *Canada Wheat Board*, ¶¶ 82-83.
128. *See id.* ¶ 91.

Accordingly, the principal lesson from the Appellate Body Report on Article XVII:1 are the following statements:

> *. . . Subparagraph (a) is the general and principal provision, and subparagraph (b) explains it by identifying types of differential treatment in commercial transactions.* It appears to us that these types of differential treatment would be the most likely to occur in practice and, therefore, that most if not all cases under Article XVII:1 will involve an analysis of both subparagraphs (a) and (b).
>
> For all these reasons, *we are of the view that subparagraph (a) of Article XVII:1 ... sets out an obligation of non-discrimination, and that subparagraph (b) clarifies the scope of that obligation. We therefore disagree with the United States that subparagraph (b) establishes separate requirements that are independent of subparagraph (a)*.

Our conclusions regarding the relationship between subparagraphs (a) and (b) imply that *a panel confronted with a claim that an STE has acted inconsistently with Article XVII:1 will need to begin its analysis of that claim under subparagraph (a)*, because it is that provision which [*sic*] contains the principal obligation of Article XVII:1, namely the requirement not to act in a manner contrary to the "general principles of non-discriminatory treatment prescribed in [the GATT 1994] for governmental measures affecting imports or exports by private traders." At the same time, because both subparagraphs (a) and (b) define the scope of that non-discrimination obligation, we would expect that panels, in most if not all cases, *would not be in a position to make any finding of violation of Article XVII:1 until they have properly interpreted and applied both provisions*.[129]

The italicized language is redolent of the two-step test under Article XX that the Appellate Body established through cases like *Reformulated Gas*, *Turtle Shrimp*, and *EC Asbestos* (namely, examine whether an itemized exception works, and if so, then apply the requirements of the *chapeau*). To be sure, there are (or may be) distinctions between the above-quoted *dicta* of the Appellate Body and its more established Article XX jurisprudence, and more may emerge as the jurisprudence on Article XVII:1 develops. Furthermore, as *dicta*, not a great deal of weight ought to be put on these extractions, as the Appellate Body could opt to interpret the STE disciplines in a manifestly different way.

Regarding the second issue on appeal, the meaning of key terms in Sub-Paragraph 1(b), the Appellate Body agreed with the Panel that the order in which the two clauses of this Sub-Paragraph may be analyzed is inconsequential. The first clause calls for making purchases and sales solely in accordance with

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129. *Id.* ¶¶ 99-100, 106 (emphasis added).

commercial considerations. In this clause, the key interpretative issue is what "commercial considerations" means. The Panel ruled that just because an STE is not inherently a "commercial actor" does not necessarily mean that the "commercial considerations" requirement is intended to make STEs behave like a "commercial" actor. The Panel said a different conclusion is justified, namely, that the "commercial considerations" requirement is intended to prevent an STE from behaving like a "political" actor.[130]

The United States appealed against this finding, saying "commercial considerations" in the first clause of Article XVII:1(b) surely means considerations "experienced by commercial actors."[131] Further, argued the United States, commercial actors are entities "engaged in commerce" and "interested in financial return." Therefore, to say an STE should not act on the basis of non-political considerations understates the matter. In truth, if "commercial considerations" means anything, it means an STE must adhere to market-based limits, particularly cost constraints, and must not abuse its privileges as an STE of the disadvantage of commercial actors. In brief, the United States urged the Appellate Body to overturn the Panel's definition of "commercial considerations," and define them as "considerations . . . under which commercial actors must operate."

On this point, the United States lost.[132] The Appellate Body said the United States mischaracterized the finding of the Panel. The Panel did not mean to equate "non-commercial" actors with political actors (as the Panel said in footnote 175 to Paragraph 6:94 of its opinion). That is, the Panel clearly explained that the universe of non-commercial considerations includes, but is not limited to, political considerations. Accordingly, the Panel did not – contrary to the American suggestion – mean to say an STE is free to act in any way it pleases as long as it is not motivated by political considerations. To the contrary, the Panel took pains to explain "commercial considerations" includes a range of factors pertaining to commerce and trade, purchases or sales, and economic factors that motivate actors engaged in business in the relevant market, and implies an STE must enter into buying and selling decisions on terms economically advantageous for itself and its owners, members, and beneficiaries.

Not surprisingly, the Appellate Body did not end its discussion here, as it could not resist the temptation of opining on the meaning of "commercial considerations." In eight additional Paragraphs, it penned *obiter dicta*, from which the following lessons may be gleaned:[133]

> ● Whether an STE acts in accordance with "commercial considerations" must be judged on a case-by-case basis. That

130. *See id.* ¶ 137.
131. *See id.* ¶ 138.
132. *See* Appellate Body Report, *Canada Wheat Board*, ¶¶ 139-43.
133. *See id.* ¶¶ 144-51.

> judgment must involve a careful analysis of the relevant market, specifically how purchases and sales occur, and how actors behave, in that market.
> ● The scope of a "commercial considerations" inquiry under the first clause of Sub-Paragraph 1(b) must be informed by the principles of Sub-Paragraph 1(a). The mandate of a Panel is to inquire whether an STE acts in accordance with those considerations in a market in which, under Sub-Paragraph 1(a), it is alleged to be engaging in discriminatory conduct. The mandate is not to consider whether the Panel acts "commercially" in a general, abstract sense. Put bluntly, the term "commercial considerations" does not impose on an STE a comprehensive set of competition-law type obligations.
> ● The case-by-case analysis as to whether an STE acts in accordance with "commercial considerations" demands an examination of the market in which the STE operates, not merely a check as to whether the STE uses the privileges it has been granted. Nothing in Article XVII:1 constitutes a prophylactic ban on an STE from using exclusive or special privileges to the disadvantage of commercial actors. In particular, the first clause of Sub-Paragraph 1(b) does not obligate an STE to refrain from using a privilege or advantage it enjoys just because it might disadvantage a private enterprise. To the contrary, an STE, like a private enterprise, is entitled to exploit an advantage it may enjoy to its economic benefit.

These points constituted a rejection of the American approach to the first clause of Article XVII:1(b). The Appellate Body said the United States is wrong to view the first clause of Sub-Paragraph 1(b) as prohibiting an STE from using its privileges, and in believing any use of a privilege would cause discrimination or other serious obstacles to trade. According to the American argument, if an STE can use an exclusive or special privilege to the disadvantage of a commercial actor and still be in compliance with Article XVII:1, then that Article has no serious discipline.

However, the Appellate Body said the American argument amounts to a demand for an STE not merely to act as a commercial actor, but also as a "*virtuous*" commercial actor by "tying" its own hands.[134] However, all Article XVII:1(b), in particular, requires, is that an STE not make a purchase or sale on the basis of non-commercial considerations. Other provisions in GATT–WTO texts reinforce this interpretation, including Article VI of GATT, provisions in the *Agreement on Agriculture*, *Agreement on Implementation of Article VI of the*

134. *Id.* ¶ 149 (emphasis original).

General Agreement on Tariffs and Trade 1994, and the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").

The second clause of Article XVII:1(b) speaks of affording enterprises from other GATT contracting parties (WTO Members) adequate opportunity to compete for participation in purchases and sales. In this clause, the key interpretative issue on appeal is what "enterprises" means. The United States said it referred not only to a prospective counterpart of an STE in a transaction, but also to a potential competitor in a transaction. Consequently, the United States said the obligation to afford an adequate opportunity to compete for participation in purchases or sales extends to an enterprise selling wheat in the same market as the Canadian Wheat Board (*i.e.*, wheat sellers). The obligation is not limited only to "enterprises" that compete to buy wheat from the Board (*i.e.*, wheat buyers).

Yet, in the case at bar, the Panel said the term "enterprise" refers only to an entity seeking to buy wheat from the STE seller (the Board) not to an entity that might wish to sell wheat in competition with the Board. The United States said this definition impermissibly narrowed the reach of the disciplines of Article XVII, and called upon the Appellate Body to overturn it and expand the definition.[135] This call fell on deaf ears.[136] The Appellate Body upheld the Panel's definition that "enterprises" in the second clause of Article XVII:1(b) includes an enterprise interested in buying the products offered for sale by an export STE, but excludes an enterprise selling the same product as that offered by the export STE (*i.e.*, not to a competitor of the export STE). True, said the Appellate Body, the ordinary meaning of "enterprise" refers to a business that buys, sells, or both. But the word must be interpreted in its context. The second clause of Sub-Paragraph 1(b) says the provisions of Sub-Paragraph 1(a) obligate an STE to "afford the enterprises of the other . . . [WTO Members] adequate opportunity . . . to compete for *participation* in *such* purchases or sales.[137] The key contextual words are in italics.

The Appellate Body reasoned if Sub-Paragraph 1(b) used the word "any" instead of "such," then the American argument would have greater force. However, the use of the word "such" refers back to the activities in Sub-Paragraph 1(a). Those activities are none other than purchases and sales of an STE involving imports or exports. That is, the second clause of Sub-Paragraph 1(b) refers to purchases and sales transactions where one party in the transaction is an STE, and the transaction involves imports to or exports from the WTO Member maintaining the STE.

Therefore, said the Appellate Body, the requirement to afford an adequate opportunity to compete to participate (i.e., "take part with others," as the *Shorter Oxford English Dictionary* puts it) in "such" purchases and sales (i.e.,

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135. *See id.* ¶¶ 152-53, 158, 160.

136. *See id.* ¶¶ 154-57, 159-61.

137. *Quoted in* Appellate Body Report, *Canada Wheat Board*, ¶ 154 (emphasis added).

import or export transactions with an STE) must refer to the opportunity to be the counterpart to the STE in a transaction. The requirement cannot refer to the opportunity to replace an STE as the participant in the transaction. If the requirement referred to competitors of the STE, rather than or in addition to counterparts to the STE, then the transaction would not be of the kind described by the phrase "such purchases or sales" in the second clause of Sub-Paragraph 1(b). The reason is because the transaction would not involve the STE as a party; rather, it would involve two non-STEs. Therefore, if as in the case at bar, there are two parties to a transaction and the STE (the Canadian Wheat Board) is the seller, then the word "enterprise" in the second clause of Sub-Paragraph 1(b) refers only to buyers. The word "participation" in the Sub-Paragraph reinforces this narrow definition of "enterprise." It is illogical to think of an enterprise selling the same product as an STE engaged in export as "competing for participation" in the relevant sales of the export STE. Rather, an enterprise would compete (or not) directly with the STE.

If there was some consolation in this ruling for the United States, it was that the Appellate Body limited its ruling. The Appellate Body made clear it applied only to a case like the one at bar: one that involves an STE as a seller, i.e., an export STE. The ruling did not apply to the instance in which an STE acted as purchaser (i.e., an import STE), or (presumably) the instance in which it acted as both.[138] Of course, there seemed to be little doubt how the Appellate Body likely would rule in the future if confronted with an import STE, or a multi-function STE. Why would it give a broader definition of "enterprise" in those instances than in the *Canada Wheat Board* scenario of an export STE? Put bluntly, the limiting language the Appellate Body inserted after its holding seemed aimed to placate a cursory or politically-motivated reader looking for examples of judicial activism by the Appellate Body. More seasoned observers of the Appellate Body might find the insertion disingenuous, if not scrupulous to the point of silliness.

4. Holdings under GATT Article III:4 and TRIMs Article 2*:*

As to whether the Canadian Grain Segregation Requirements under Section 57(c) of the *Canada Grain Act* and Section 56(1) of the *Canada Grain Regulations* were consistent with GATT Article III:4, the Panel held in favor of the United States.[139] The Panel also rejected the defense offered by Canada that the requirements were justified as "necessary" to secure compliance with these Canadian laws under the administrative exception of Article XX(d).[140] Simply

138. *See id.* ¶ 160.

139. *See id.* ¶ 5; Panel Report, *Canada Wheat Board*, ¶¶ 6:152, 6:153, 6:155-6:214, 6:252, 6:253-6:297, 6:321, 7:4(b)-(c).

140. *See* Appellate Body Report, *Canada Wheat Board*, ¶5; Panel Report, *Canada Wheat Board*, ¶¶ 6:215-6:252, 6:298-6:321, 7:4(b)-(c).

put, banning foreign grain from Canadian grain elevators, absent special permission, clearly favored Canadian grain in sale, purchase, transportation, distribution, and use, contrary to Article III:4.[141] As to the *TRIMs* Article 2 allegation, the Panel exercised judicial economy, *i.e.*, as Canada had violated Article III:4, there was no need to render a finding on Article 2.[142] Canada did not appeal these findings.[143]

The Panel also agreed the Rail Revenue Cap under Section 150(1)-(2) of the *Canada Transportation Act* violated Article III:4.[144] The revenue cap on only domestic grain shipments was rather obviously incongruous with national treatment. As to the *TRIMs* Article 2 allegation, the Panel again exercised judicial economy.[145] Canada did not appeal this finding.[146]

Only on the producer car allocation scheme did Canada prevail. The Panel said the United States failed to show this scheme, under Article 87 of the *Canada Grain Act*, violated Article III:4 of GATT or Article 2 of the *TRIMs Agreement*.[147] The United States did not appeal this finding.[148]

5. Commentary:

a. One National Treatment Violation Does Not Mean Another

As indicated, the *Canada Wheat Board* Panel held in favor of the United States under Article III:4, even though it ruled against the non-discrimination claim under Article XVII:1. That dichotomy suggests a violation of one national treatment obligation in GATT does not *a fortiori* mean a second obligation also is violated. As with the interpretation of "like products," the text of each national

141. Indeed, it might be queried whether the ban – insofar as it affected American-harvested grain, by virtue of geographic proximity, more adversely than grain from other countries – also violated Canada's MFN duty under Article I:1. The Panel stated this duty is included in the reference in Article XVII:1(a) to "general principles of non-discriminatory treatment prescribed in [the GATT] for governmental measures affecting imports or exports by private traders." Appellate Body Report, *Canada Wheat Board*, ¶ 124 (*quoting* Panel Report, *Canada Wheat Board*, ¶ 6:48).

142. *See* Appellate Body Report, *Canada Wheat Board*, ¶ 5; Panel Report, *Canada Wheat Board*, ¶ 6:378.

143. *See* Appellate Body Report, *Canada Wheat Board*, ¶¶ 76, 215.

144. *See* Appellate Body Report, *Canada Wheat Board*, ¶ 5; Panel Report, *Canada Wheat Board*, ¶¶ 6:152, 6:154, 6:322-6:359, 7:4(d).

145. *See* Appellate Body Report, *Canada Wheat Board*, ¶ 5; Panel Report, *Canada Wheat Board*, ¶ 6:378.

146. *See* Appellate Body Report, *Canada Wheat Board*, ¶¶ 76, 215.

147. *See id.* ¶ 5; Panel Report, *Canada Wheat Board*, ¶¶ 6:12-6.151, 6:360-6:382, 7:4(e).

148. *See* Appellate Body Report, *Canada Wheat Board*, ¶¶ 76, 215.

treatment obligation must be appreciated not only in relation to one another, but it also (and more importantly) must be scrutinized in its particular context.

Furthermore, judicial economy may limit the number of national treatment violations a Panel, or the Appellate Body, is willing to find. In *Canada Wheat Board*, the Panel essentially said "one is enough." That statement may not help economize on allegations. The legal fact that the Appellate Body lacks the power to remand a case to a Panel, coupled with nuanced differences in the various national treatment obligations, remains an incentive to bring multiple allegations.

b. China and Taiwan

It may well be a happy day when China and Taiwan coordinate and collaborate on various WTO matters. Generally, anecdotal evidence suggests the two sides thus far tend to avoid one another as much as possible in the corridors and meeting rooms where work is conducted. Yet they studiously pay attention to one another. In *Canada Wheat Board*, both participated as third parties, and China (though not Taiwan) presented oral appellate arguments and responded to questions.[149] Both can work constructively to shape GATT–WTO law in the future, and it will be one of many interesting research topics in international trade to observe the pattern (if any) of their interaction.

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149. *See id.* ¶ 8. China's arguments, which concerned the relationship between Sub-Paragraphs 1(a) and 1(b) of Article XVII:1, and the interpretation of the latter Sub-Paragraph, are summarized at *id.* ¶¶ 64-69.

Essentially, China urged if an STE satisfies Sub-Paragraph 1(b), then *ipso facto* it satisfied Sub-Paragraph 1(b). That is, if an STE makes purchases or sales solely on the basis of commercial considerations, and affords enterprises of other WTO Members an adequate opportunity to compete (the requirements of Sub-Paragraph 1(b)), then it automatically passes the non-discrimination test (of Sub-Paragraph 1(a)). China also made points about the definition of specific terms. First, China argued the United States mischaracterized the interpretation of the term "commercial considerations" in the first clause of Sub-Paragraph 1(b). The Panel, said China, did not mean to equate the term only to "non-political" considerations, but meant to include non-commercial, non-political considerations as well. As to the term "enterprises" in the second clause of Sub-Paragraph 1(b), China supported the view of the Panel, namely, the term is qualified by the rest of the words in that clause (especially the phrase "to compete for participation in such purchases or sales"). China pointed out that if an STE is involved only in exports, then that term "enterprises" refers only to buyers.

c. The Logic of the American Strategy

Despite losses on various issues, there is compelling logic in favor of the American strategy in the *Canada Wheat Board* case. Imagine a multilateral trading system populated by a number of countries making the transition from command to market economies. China is the obvious example. Other examples, while not having a fully communist past, include India and various Latin American countries. Imagine, also, a system in which important countries – Russia and Vietnam, to name two – are negotiating to join the WTO club. In all such countries, the current and potential future Members have STEs of one kind or another. Some of these STEs have been, are in the process of, or will be privatized – but others will not, or at least not in the foreseeable future.

American trade strategists surely notice these features when they look at the multilateral trading system. What implication does this observation have for their WTO litigation strategy? First, it suggests efforts to make it as easy as possible to impose countervailing duties on pre-privatization subsidies. For a state-owned enterprise ("SOE") receiving such subsidies, the United States would prefer not to have a particularly high threshold to prove the continuation of a benefit in spite of change in ownership from public to private hands. This preference might explain the strong, though ultimately unsuccessful, defenses mounted by the United States in cases like *British Steel* and *Certain Products*.[150]

Second, in STE cases, the United States seeks to empower Article XVII as a discipline on state-trading operations. That explains why, in the *Canada Wheat Board* case, the United States argued Article XVII:1(a) and (b) impose separate, cumulative obligations. It also explains why the United States sought a broad interpretation of "commercial considerations" (namely, that it means more than just the opposite of political considerations, and leads to market discipline in an antitrust sense), and of "enterprises" (namely, that it covers both potential transactors with and competitors of an STE).

Simply put, the United States sought judicial interpretations of GATT disciplines on STEs to be as strict as possible, in the sense of constraining STEs from acting like anything other than private, market-based players. It might be expected the logic of this strategy would appeal to more countries than just the United States. However, unfortunately, the European Union and Australia joined China in opposing, as third party participants, a number of American arguments. The EU and Australia have their own STE-type entities to consider. Query, however, whether their long-term interests lie in advocating weak disciplines on these animals, and more generally in taking anti-free market positions.

150. These cases are discussed in RAJ BHALA, MODERN GATT LAW ch. 32 (Sweet & Maxwell 2005).

d. Canada and the Picker Thesis

Professor Colin Picker of the University of Missouri – Kansas City School of Law has published a provocative article entitled *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*.[151] By "reputational fallacy," he means the incongruity between the international reputation of a country and its actual behavior in international relations. He applies this concept to the reputations and behavior of the United States and Canada in international trade. The conventional reputation is that Canada is better behaved on trade matters than the United States.

The conventional reputations, however, are wrong. Professor Picker marshals evidence on trade negotiations and adjudication to show Canada's behavior in the international trade arena is not as logically connected to its behavior as its reputation suggests. In fact, the substantive difference between the two countries is quite narrow. While neither is a good nor bad actor, America suffers from a "bad rap," and reputation can be an inaccurate, even harmful, tool in international law – contrary to the thinking of some leading public international law theorists.

Statistically, the United States appears as a defendant less often than Canada, at least if data from the WTO, *NAFTA*, and the *Canada – United States Free Trade Area* are included.[152] Canada has also been involved in some of the pivotal WTO cases, including, for example, as a partner with the United States in the *Beef Hormones* case, and the claimant in the *Asbestos* decision. Why did Canada not suffer in the minds of the European public after the *Hormones* decision, and how could anyone possibly look her child in the eye with pride at arguing for increased market access for asbestos? Nevertheless, Canada generally emerges unscathed from such cases, but the United States suffers in world opinion.[153]

One inference that might be drawn is that the Picker thesis is yet more evidence of general anti-American sentiment overseas. That it might spill over into the trade arena, however, is significant. Be that as it may, it is worth considering the application of the thesis to the *Canada Wheat Board* case. Canada does not generally suffer from a reputation of being against the free market (though many outside of Canada, including inauspicious travelers on Air Canada, appreciate there is a higher degree of state involvement in some sectors than in the United States). Accordingly, many would be perplexed to learn this member of the Cairns Group tenaciously defends state trading-type practices in the wheat sector. The United States, meanwhile, gets little credit for trying to end these practices – both through litigation and the Doha Round talks – but plenty of criticism for its farm subsidy practices. The critics might pay heed to what is

151. *See* 30 BROOK. J. INT'L L. 67, 67-116 (2004).
152. *See id*. at 91-92.
153. *See id*. at 93-94.

perhaps Professor Picker's fundamental teaching: think like lawyers and examine the evidence.

B. The 1979 Tokyo Round *Enabling Clause*

1. Citation:

European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, (issued 7 April 2004, adopted 20 April 2004) (complaint by India).

2. Facts:

Among the few reported cases dealing with special and differential treatment is the 2004 Appellate Body Report in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*.[154] India's basic claim in the *EC GSP* dispute was the European GSP scheme violated the most favored nation ("MFN") obligation of Article I:1of GATT.[155] This provision states:

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154. This discussion draws partly on WTO, Report of the Appellate Body, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R ¶¶ 1-4, 7-8 (*adopted* Apr. 20, 2004) [hereinafter Appellate Body Report, *EC GSP*]; WTO Report of the Panel, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R ¶¶ 1:1-2:8 (*adopted as modified* by the Appellate Body Apr. 20, 2004) [hereinafter Panel Report, *EC GSP*; WTO, *Update*, *supra* note 22, at 131-32. It also draws partly on an unpublished Memorandum entitled *EU – GSP Case*, dated November 8, 2004, prepared by Luis Fernando Gomar, Research Assistant and Member, Class of 2005, University of Kansas School of Law, for which I am grateful.

155. The procedural background to the case is as follows. On March 5, 2002, pursuant to Article 4 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*DSU*), Article XXIII:1 of GATT, and Paragraph 4(b) of the Tokyo Round *Enabling Clause*, India requested consultations with the EU on the conditions imposed by the EU to grant tariff preferences to less developed countries. The EU grants favorable treatment under its Generalized System of Preferences ("GSP") program, pursuant to Council Regulation 2501/01, 2001 O.J. (L 346). India's request was circulated to the WTO Members on March 12, 2002. On March 25, 2002, India and the EU held bilateral consultations.

Failing to reach a mutually satisfactory resolution, the adjudicatory proceedings followed. On December 6, 2002, India asked the Dispute Settlement Body ("DSB") to establish a Panel pursuant to Articles 4:7 and 6 of the *DSU* and Article XXIII:2 of GATT, *DSU supra* note 18; GATT art. XXIII:2. Several countries (including Brazil, Bolivia, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mauritius, Pakistan, Panama, Paraguay, Peru, Sri Lanka, United States, and Venezuela) reserved third

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[156]

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party rights. After initial blockage by the EU, India requested for a second time, on January 16, 2002, for a Panel to settle the dispute. On January 24, 2003, the DSB approved creation of a Panel in order "[t]o examine, in light of the relevant provisions of the covered agreements cited by India . . . the matter referred to the DSB by India . . . to make such findings as will assist the DSB in making recommendations." On February 24, 2003, India asked the Director-General, Dr. Supachai Panitchpakdi, to set the composition of the Panel. On March 6, 2003 the Director-General determined the composition of the Panel.

The Panel met with India and the EU on May 14 and 16, 2003, and with third parties on May 15, 2003. The Panel issued an interim Report on September 5, 2003, a final report to the parties on October 28, 2003, and the report was circulated to the WTO Membership on December 1, 2003.

On January 8, 2004, pursuant to *DSU* Article 16:4, the EU notified the DSB of its intention to appeal the Panel's decision regarding certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. It filed a Notice of Appeal pursuant to Rule 20 of the Appellate Body's "*Working Procedures*." On January 19, 2004, the EU filed its appellant's submission. On February 2, 2004, India filed its appellee's submission.

Interest in the appeal was widespread, as evidenced by the number and involvement of third party participants. On January 30, 2004, Pakistan notified its intention to appear at the oral hearing as a third party. On February 2, 2004, Costa Rica, Panama, Paraguay, and the United States each filed a third party submission, and Bolivia, Colombia, Ecuador, Peru, and Venezuela filed a joint third party submission as the Andean Community. On the same day, Brazil notified its intention to make a statement at the oral hearing as a third party, and Mauritius notified its intention to appear at the oral hearing as a third party. In addition, on February 2, 2004, El Salvador, Guatemala, Honduras, and Nicaragua jointly notified their intention to make a statement at the oral hearing as third parties. On February 4, 2004, Cuba notified its intention to appear at the oral hearing as a third party. By letter dated February 16, 2004, Pakistan submitted a request to make a statement at the oral hearing. No participant objected to Pakistan's request, which was authorized on February 18, 2004.

The oral hearing was held on February 19, 2004. The parties and third participants presented oral arguments (with the exception of Cuba and Mauritius), and responded to questions posed by the Appellate Body.

156. The Interpretative Note, *Ad Article I, Paragraph 1*, which follows the textual reference to "Article III," states:

India claimed the violation arose because of differences in treatment given to GSP recipients generally, in comparison with recipients qualifying for the "Special Incentive Arrangement" scheme for combating drug trafficking and production. Put simply, India accused the EC of a divide-and-rule program that lacked legal justification, the division being between less developed countries and a subset of them.

Specifically, under its controversial GSP scheme, the EU provided five preferential tariff arrangements, as follows:

- General Arrangements described in Article 7 of Council Regulation (EC) No. 2501/2001 (the "General Arrangements"), dated December 10, 2001, for the period January 1, 2002 to December 31, 2004.[157]
- Special Arrangements to Combat Drug Production and Trafficking (the "Drug Arrangements"), provided for in Article 10 of the Council Regulation (EC) No. 2501/2001, for the 2002-04 period.
- Special Arrangements for least developed countries.
- Special Incentive Arrangements to encourage protection of labor rights.
- Special Incentive Arrangements to encourage protection of the environment.

All the countries listed in Annex I of the Council Regulation are eligible to receive tariff preferences under the General Arrangements. The products covered are listed in Annex IV to this Regulation. These products are divided into two categories, "non-sensitive" and "sensitive." The tariff preferences take the form of a suspension of Common Customs Tariff duties on products listed as

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> The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.
>
> The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.

The *Ad Article* was not at issue in the case. GATT art. 1:1.

157. The Regulation is published in *Official Journal of the European Communities*, Council Regulation 2501/01 of 31 December 2001, 2001 O.J. (L346) 1.

"non-sensitive," and the reduction of Common Customs Tariff *ad valorem* duties on products listed as "sensitive."[158] That is, pursuant to Article 7 of the Regulation, non-sensitive products enjoy duty-free access to the EU, but sensitive products receive reduced tariffs.

Column G of Annex IV to the Regulation lists the sensitive products. There are three tariff-preference possibilities:

> (1) A flat rate reduction of 3.5 percent from the Common Customs Tariff duties for an *ad valorem* duty (with the exception of products listed in Chapters 50 to 63, where the *ad valorem* rate is cut by 20 percent).
> (2) A 30 percent reduction to the Common Customs Tariff duties for a specific duty (except for products with a so-called "CN code 2207," where the reduction is 15 percent).
> (3) The same reduction as (1) for a hybrid duty (*i.e.*, the ad valorem formula is used for a duty expressed as a combination of *ad valorem* and specific duties).[159]

In brief, how the tariff reduction for a sensitive product is cut depends on the type of tariff for the product.

The four Special Arrangements grant tariff preferences in addition to the favorable treatment under the General Arrangements. The Special Incentive Arrangements concerning labor and the environment, the Drug Arrangements, and the Special Arrangements for least developed countries differ with respect to the products covered, the depth of tariff cuts offered, and the requirements for eligibility.[160]

Significantly, however, only some of the countries benefiting from the General Arrangements also benefit from a Special Incentive Arrangement. For example, the Special Incentive Arrangements for labor rights and the environment are restricted to countries that, according to the EU, have complied with certain labor or environmental policy standards. Obviously, preferences under the Special Incentive Arrangement for least developed countries are restricted to such countries. Finally, the EU grants preferences under the Drug Arrangements only to 12 pre-determined countries: Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela. India receives GSP treatment under the General Arrangements. However, India does not benefit from the Drug Arrangements (or any other Special Incentive Arrangement).

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158. The General Arrangements are described in further detail in Panel Report, *EC GSP*, *supra* note 154, ¶¶ 2:4 - 2:5.

159. *See id.* ¶ 2:5.

160. *See id.* ¶ 2:3.

As indicated earlier, Article 10 of the Council Regulation contains rules on the Drug Arrangements. Article 10 states:

> 1. Common Customs Tariff *ad valorem* duties on products, which according to Annex IV, are included in the special arrangements to combat drug production and trafficking referred to in Title IV and which originate in a country that according to Column I of Annex I benefits from those arrangements, shall be *entirely suspended*. For products of CN code 0306 13, the duty *shall be reduced to a rate of 3.6 per cent*.
> 2. Common Customs Tariff specific duties on products referred to in paragraph 1 shall be *entirely suspended*, except for products for which Common Customs Tariff duties also include *ad valorem* duties. For products of CN codes 1704 10 91 and 1704 10 99 the specific duty shall be limited to 16 per cent of the customs value.[161]

In other words, products subject to *ad valorem* duties receive duty-free treatment, or, at most, 3.6 percent. Products subject to specific duties receive duty-free treatment, or at most, 16 percent of their value.

To the non-specialist in the intricacies of the GSP program, it may appear the Drug Arrangements offer no great benefits to the 12 aforementioned eligible countries beyond the General Arrangements they already receive. After all, under the General Arrangements, these 12 countries get duty-free treatment on non-sensitive products, and reduced tariffs (of 3.5 percentage points, or a 30 percent reduction, on *ad valorem* and specific duties, respectively) on sensitive products. What further benefit do they get from the Drug Arrangements?

The first answer is in Column D of Annex IV to the Council Regulation. Column D lists the products covered by the Drug Arrangements – so-called "covered products."[162] The covered products include not only items eligible under the General Arrangements, but also many product categories not included under the General Arrangements. In other words, the scope of product covered under the General Arrangements is narrower than the scope of products covered under the Drug Arrangements.

To take a hypothetical example, suppose Pakistan and India export cotton and wheat to the EU. Suppose further that cotton, but not wheat, is eligible under the General Arrangements, while Column D lists cotton, but not wheat. The legal implication is that the EU accords duty-free access to both Pakistani and Indian

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161. *Quoted in* Panel Report, *EC GSP* ¶ 2:6 (emphasis added by Appellate Body).

162. As a technical point, three categories of covered products do not enjoy duty-free access to the EU: CN code 0306 13; CN code 1704 10 91; and CN code 1704 10 99. For these three exceptions, the rules of Article 10 of the Council Regulation prescribe different tariff cuts. *See id.* ¶ 2:7.

wheat under the General Arrangements. However, the EU grants Pakistani – not Indian – cotton duty-free treatment under Column D. In sum, Pakistan benefits from the larger number of covered products under the Drug Arrangements, while India must settle for the shorter eligibility list under the General Arrangements.

The second answer is in Column G of Annex IV to Council Regulation. The products in this column, which are sensitive, get duty-free treatment – if they come from one of the 12 countries eligible under the Drug Arrangements. Thus, the Panel provided the overall answer to the question of what additional benefit comes from the Drug Arrangements in relation to the General Arrangements:

> The result of the Regulation is that the tariff reductions accorded under the Drug Arrangements to the 12 beneficiary countries are greater than the tariff reductions granted under the General Arrangements to other developing countries. In respect of products that are included in the Drug Arrangements but not in the General Arrangements, the 12 beneficiary countries are granted *duty free* access to the European Communities' market, while all other developing countries must pay the *full duties applicable under the Common Customs Tariff*. In respect of products that are included in both the Drug Arrangements and the General Arrangements and that are deemed "sensitive" under column G of Annex IV to the Regulation with the exception for products of CN codes 0306 13, 1704 10 91 and 1704 10 99, the 12 beneficiary countries are granted *duty-free* access to the European Communities' market, while all other developing countries are entitled only to *reductions in the duties applicable under the Common Customs Tariff*.[163]

Thus, to continue with the Indo-Pakistani hypothetical from above, suppose India and Pakistan export bed sheets to the EU, but the EU deems this product sensitive. The EU will grant Indian bed sheets a tariff reduction, but Pakistani bed sheets zero-tariff treatment, by virtue of the General and Drug Arrangements, respectively.

With this differential in mind, three preliminary comments should be offered. First, indubitably, the fact Pakistan, but not India, qualified for a Drug Arrangement irked India. The EU (particularly the United Kingdom, with its unique history and knowledge of the Indian Subcontinent) surely ought to have anticipated India's sentiment in this regard. To give a benefit to one country on the Subcontinent without giving it to another evokes primitive rivalries with potentially dangerous spillover effects.

Second, at least one EU member, The Netherlands, has lax laws about drugs and has actually legalized certain kinds of drugs. There was a certain oddity

163. *Id.* ¶ 2:8 (emphasis in original).

about fighting narcotics through trade preferences, and dividing Third World countries while doing so, but not having an EU-wide prophylactic rules against drugs.

Third, as indicated above, the EU's GSP program included schemes for the environmental protection and labor rights. During a 28 February 2003 meeting with the EU and Director General to select Panel members, India informed the EU and Director-General that it would narrow the scope of the dispute to the Special Incentive Arrangement dealing with the combating of Drug Trafficking and Production. India took this decision because the EC had not granted to any country special benefits under the environmental scheme, and had granted only to one country, Moldova, an incentive under the labor scheme. However, India reserved its right to expand the scope to cover the environmental and labor schemes, later on, if necessary.[164] India is to be commended for focusing its arguments.

As discussed below, the arguments at the appellate stage in the *EC GSP* case focused on two major substantive issues, namely:[165]

> ● *The Relationship between the MFN Obligation and the Enabling Clause:*
> What is the relationship between the MFN obligation of Article I:1 of GATT and the 1979 Tokyo Round *Enabling Clause*, particularly Footnote 3 of Paragraph 2(a) of this *Clause*?[166] The

164. *See* Appellate Body Report, *EC GSP*, *supra* note 154, ¶ 4; Panel Report, *EC GSP* ¶ 1:5.

165. *See* Appellate Body Report, *EC GSP* ¶ 78.

166. In connection with its discussion about the burden of proving, as an affirmative defense, consistency with the *Enabling Clause*, the Appellate Body provided a useful history of the *Clause*:

> A brief review of the history of the Enabling Clause confirms its special status in the covered agreements. When the GATT 1947 entered into force, the Contracting Parties stated that one of its objectives was to "rais[e] standards of living." However, this objective was to be achieved in countries at all stages of economic development through the *universally-applied* commitments embodied in the GATT provisions. In 1965, the Contracting Parties added Articles XXXVI, XXXVII, and XXXVIII to form Part IV of the GATT 1947, entitled "Trade and Development." Article XXXVI expressly recognized the "need for positive efforts" and "individual and joint action" so that developing countries would be able to share in the growth in international trade and further their economic development. Some of these "positive efforts" resulted in the Agreed Conclusions of the United Nations Conference on Trade and Development ("UNCTAD") Special Committee on Preferences (the "Agreed Conclusions"), which recognized that preferential tariff treatment accorded under a generalized scheme of

> Clause is a *Decision* of the GATT CONTRACTING PARTIES, taken on 28 November 1979, at the end of the Tokyo Round, entitled "Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries." In its entirety, including the four footnotes, the *Clause* states:

Following negotiations within the framework of the [Tokyo Round] Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

> 1. *Notwithstanding* the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries,[167] without according such treatment to other contracting parties. [The footnote is #1 in the original text.]
> 2. The provisions of paragraph 1 apply to the following:[168] [The footnote is #2 in the original text.]
>
> > (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[169] [footnote #3 in the original text]
> >
> > (b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the

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> preferences was key for developing countries "*(a)* to increase their export earnings; *(b)* to promote their industrialization; and *(c)* to accelerate their rates of economic growth." The Agreed Conclusions also made clear that the achievement of these objectives through the adoption of preferences by developed countries required a GATT waiver, in particular, with respect to the MFN obligation in Article I:1. Accordingly, the Contracting Parties adopted the 1971 Waiver Decision in order to waive the obligations of Article I of the GATT 1947 and thereby authorize the granting of tariff preferences to developing countries for a period of ten years.

Id. ¶ 107.

167. The words "developing countries" as used in this text are to be understood to refer also to developing territories.

168. It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favorable treatment not falling within the scope of this paragraph.

169. As described in the Decision of the CONTRACTING PARTIES of June 25, 1971, relating to the establishment of "*generalized*, *non-reciprocal* and *non-discriminatory* preferences beneficial to the developing countries" (BISD 18S/24) [*i.e.*, GATT B.I.S.D. (18th Supp.) at 24 (1972)] (emphasis added).

provisions of instruments multilaterally negotiated under the auspices of the GATT;

(c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;

(d) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(a) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(b) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favored-nation basis;

(c) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[170] [footnote #4 in the original text]

(a) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(b) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to

170. Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, *i.e.*, the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to

> meet the development needs of developing countries and the objectives of the General Agreement.[171]

a. Justification under the *Enabling Clause*:

Does the *Enabling Clause*, particularly Paragraph 2(a) of the *Clause*, justify the Drug Arrangement?

In summary, in dispute was whether the EU's Special Arrangement to Combat Drug Production and Trafficking was inconsistent with its MFN obligation under Article I:1 and not justified by the *Clause*. On these issues, the Panel held as follows:

> ● Tariff preferences under the Drug Arrangements violate the MFN obligation of GATT Article I:1.[172]
> ● The Drug Arrangements cannot be justified under Paragraph 2(a) of the *Enabling Clause*, because this provision requires GSP benefits to be provided on a "non-discriminatory" basis.[173]
> ● The Drug Arrangements cannot be justified under Article XX(b) of GATT, because they are not "necessary" for the protection of human life or health, and they do not conform to the *chapeau* of Article XX.[174]

Thus, the Panel held in favor of India. The first point reflected the Panel's agreement with the Indian claim. The second and third points were its rejection of the two EC defenses to that claim.

b. Legal Arguments about the Relationship between the MFN Obligation and Enabling Clause:

The first key substantive issue in the *EC GSP* case concerned the relationship between the MFN obligation of GATT Article I:1 and the *Enabling Clause*. As the Appellate Body phrased it:

> the question before us is whether India must raise a "claim" and prove that the Drug Arrangements are inconsistent with the

171. Emphasis added.

172. *See* Panel Report, *EC GSP*, *supra* note 154, ¶¶ 7:21-60, 8(a)-(b).

173. *See id.* ¶¶ 7:61-177, 8(c)-(d). One panelist issued a dissenting opinion on this point, saying the *Enabling Clause* is not an exception to Article I:1, and India had not made a claim under the *Clause*.

174. *See id.* ¶¶ 7:178-236, 8(e).

> *Enabling Clause*, or whether the European Communities must raise and prove, in "defence", that the Drug Arrangements are consistent with the *Enabling Clause*, in order to justify the alleged inconsistency of the Drug Arrangements with Article I:1.[175]

The resolution of the issue, as the above quote intimates, determines allocation of burden of proof in a case involving special and differential treatment that is better for some poor countries than for others.

On appeal, the EU maintained that the Panel made three legal errors:

> ● The Panel was wrong to hold the *Enabling Clause* is an "exception" to Article I:1.
> ● The Panel was wrong to assign the burden of justifying the Drug Arrangements under the *Enabling Clause* to the EU.
> ● The Panel was wrong to hold Article I:1 applies to measures covered by the *Enabling Clause*.

According to the EU, the Panel's principal rationale for deciding the *Enabling Clause* is an exception to Article I:1 was that the *Clause* does not provide "positive rules establishing obligations in themselves."[176] However, said the EU, it is wrong to infer from the fact a developed country is not legally obliged to furnish GSP treatment that the *Enabling Clause* fails to create positive obligations. It also is wrong to infer from this fact that the *Clause* is an exception to Article I:1.

What, then, is the *Enabling Clause* in relation to the MFN obligation? The EU said they are on par with one another:

> On appeal, the European Communities challenges the Panel's finding that the *Enabling Clause* is an "exception" to Article I:1 of the GATT 1994 and that, therefore, the European Communities must invoke the *Enabling Clause* as an "affirmative defence" to India's claim that the Drug Arrangements are inconsistent with Article I:1. The European Communities submits that the *Enabling Clause* is part of a "special regime for developing countries," which "encourages," *inter alia*, the granting of tariff preferences by developed-country Members to developing countries. As a result, the *Enabling Clause* exists "side-by-side and on an equal level" with Article I:1, and applies to the *exclusion* thereof, rather than as

175. Appellate Body Report, *EC GSP*, *supra* note 154, ¶ 87.

176. *See* Panel Report, *EC GSP* ¶ 7:35 (citing WTO, Report of the Appellate Body, *United States – Wool Shirts and Blouses*, WT/DS33/AB/R, 16 (*adopted* 23 May 1997)).

> an exception thereto. The European Communities argues, therefore, that India is required to bring a claim under the *Enabling Clause* if it considers that the European Communities' GSP scheme has nullified or impaired India's rights.[177]

Further, the EU urged consideration of the implication of following the Panel's conclusion that the *Clause* is an exception to Article I:1. In particular, under the Panel's ruling, any WTO provision that applies only when a Member implements a measure that it is not obliged to take cannot create a positive obligation. That provision, according to the Panel, must be an exception to a general rule. The EU said this implication is not consistent with Appellate Body jurisprudence. The EU suggested if the Panel's ruling held on appeal, then Article 27:4 of the WTO *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"), Article 3.3 of the *Agreement on Sanitary and Phytosanitary Standards* ("*SPS Agreement*"), and various other provisions would not impose positive obligations either.

The EU contended that the Panel should have commenced its analysis with an examination of the ordinary meaning of the word "notwithstanding" in Paragraph 1 of the *Enabling Clause*. As the Appellate Body summarized, the Panel did just that:

> The Panel also examined whether Article I:1 applies to a measure covered by the *Enabling Clause*. It looked first to the ordinary meaning of the term "notwithstanding," as used in paragraph 1 of the *Enabling Clause*, and concluded *on that basis that the Enabling Clause takes precedence over Article I "to the extent of conflict between the two provisions*." Nevertheless, *the Panel declined to assume the exclusion of the applicability of a "basic GATT obligation" such as Article I:1 in the absence of a textual indication of Members' intent to that effect*. Thus, it also referred to World Trade Organization ("WTO") jurisprudence relating to other exception provisions, and concluded that the relationship between these exceptions and the obligations from which derogation is permitted is "one where both categories of provisions apply concurrently to the same measure, but where, in the case of conflict between these two categories of provisions, [the exception] prevails." Accordingly, the Panel concluded, on the basis of both the ordinary meaning of the text of the provision and WTO case law, that Article I:1 applies to measures covered by the *Enabling Clause* and that the *Enabling*

177. *See* Appellate Body Report, *EC GSP* ¶ 85.

> *Clause* prevails over Article I:1 "to the extent of the conflict between [the two provisions]."[178]

However, according to the EU, the ordinary meaning of "notwithstanding" does not support the Panel's finding the *Clause* is an "exception" to Article I:1. The EU argued that in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*, the Panel should have considered the relevant "content," context, and object and purpose of the *Clause* in order to identify the relationship between the *Clause* and Article I:1. Instead, the Panel essentially presumed the *Clause* is an exception to the MFN obligation.

In addition to the analysis of "notwithstanding," the EU suggested the words "generalized, non-reciprocal and non discriminatory" in Footnote 3, attached to Paragraph 2(a) of the *Enabling Clause*, are distinct from, and intended to replace, the MFN obligation. The EU argued the *Clause* is not the same as the *chapeau* to Article XX of GATT. The *chapeau* neither regulates the substantive content of measures adopted by WTO Members, nor replaces the substantive rules from which Article XX derogates.

For support of its argument about Footnote 3, the EU relied on the position of the *Enabling Clause* within GATT and the *Agreement Establishing the World Trade Organization* ("*WTO Agreement*"). The EU argued if Paragraph 2(a) of the *Clause* were an exception to Article I:1, then it would be physically located in Article I, or immediately after this Article. Because this *Clause* is a separate *Decision* of the CONTRACTING PARTIES complementing Part IV of GATT, entitled "Trade and Development," it cannot be considered an exception to Article I. Rather, it is proper to regard it as an entirely separate obligation by which the multilateral trading community addresses inequalities within its ranks.

Applying Article 31 of the *Vienna Convention*, the EU argued the object and purpose of the *Enabling Clause* supports its understanding, and not that of the Panel, of the relationship between Article I:1 and the *Clause*. The EU stressed that the *Clause* is "the most concrete, comprehensive and important application" of the principle of special and differential treatment. Further, special and differential treatment is "the most basic principle of the international law of development," and it constitutes *lex specialis* that applies to the exclusion of more general WTO rules on the same subject matter. If not interpreted this way, the EU warned, the *Clause* would be dismissed as a discriminatory measure against developed countries, rather than being embraced as a way to create equality among all WTO Members.

Finally, the EU argued that a GSP program is a fundamental objective of the *WTO Agreement* as suggested by its *Preamble* (the second paragraph of which speaks of "[e]nsuring that developing countries secure a share in the growth of international trade commensurate with the needs of their economic development"). Therefore, "the object and purpose of the *Enabling Clause* clearly

178. *See id.* ¶ 83 (emphasis added).

distinguish it from exceptions such as in Article XX(a) and (b) of the GATT, which generally allow a Member to adopt measures in pursuit of legitimate policy objectives separate and distinct from objectives of the *WTO Agreement*." The EU cited to the *Brazil–Aircraft* Appellate Body Report to support its argument a provision conferring special and differential treatment is highly relevant in determining whether that provision constitutes an exception.[179]

Naturally, India fought the EU characterization of the relationship between the *Enabling Clause* and the Article I:1 MFN obligation on appeal. India called upon the Appellate Body to uphold the Panel's decision that the *Clause* is an exception to the obligation. In particular, India pointed out that Paragraph 2(a) of the *Clause* must be an exception, because a WTO Member must comply with the conditions in this Paragraph only if the Member adopts a measure pursuant to the authorization granted in the Paragraph.[180] India applauded the test constructed by the Panel as to what is an "exception." The Panel held that an exception, such as the *Enabling Clause*, is an affirmative defense. As such, an adjudicator should study whether an exception applies to a measure only if a respondent invokes the exception to justify the measure. This test left WTO Members with the choice of which exception to invoke and prevented an exception from being turned into a rule. India explained this test (i.e., an exception is an affirmative defense) was consistent with previous Appellate Body decisions. In particular, the test squared with the Report in *United States – Wool Shirts and Blouses*, in which the Appellate Body distinguished between "positive rules establishing obligations in themselves" and "exceptions" to those obligations.

In addition, India disagreed with the contention of the EU that the *Enabling Clause* is not an exception to Article I:1 because the *Clause* is *lex specialis*. India pointed to a study by the International Law Commission and certain Appellate Body decisions, and reasoned from them that the maxim *lex specialis derogat legi generali* does not mean that a special rule necessarily excludes the application of a related general rule. Rather, the maxim means "that the two rules apply cumulatively, and the special rule prevails over the general rule only to the extent of any conflict between the two rules." Accordingly, concluded India, less developed countries have not waived their rights to MFN treatment from developed countries by taking advantage of a GSP program.

As intimated, the Panel held the EU's GSP program was inconsistent with the MFN obligation in Article I:1 of GATT. The Panel also held the *Enabling Clause* did not justify the program. In particular, the Panel found:

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179. *See* WTO, Report of the Appellate Body, *Brazil – Export Financing Program for Aircraft*, WTO Doc. WT/DS46/AB/R (*adopted* Aug. 20 1999); Appellate Body Report, *EC GSP* ¶ 84.

180. *See* Appellate Body Report, *EC GSP* ¶ 86.

> (a) India has the burden of demonstrating that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
> (b) India has demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994;
> (c) the European Communities has the burden of demonstrating that the Drug Arrangements are justified under paragraph 2(a) of the *Enabling Clause* . . . .[181]

Having decided in favor of India on these (and, indeed, all) substantive counts, the Panel concluded, pursuant to Article 3:8 of the *DSU*, that because "the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the *Enabling Clause* or Article XX(b) of GATT 1994, the European Communities has nullified or impaired benefits accruing to India under GATT 1994."[182]

What rationale did the Panel give in support of its holding the *Enabling Clause* is an exception to the MFN obligation? The Panel examined the relationship between the *Clause* and Article I:1, and also studied the Appellate Body Report in *United States – Wool Shirts and Blouses*. The Appellate Body summarized the Panel's use of this precedent:

> The Panel observed that the participants disagree on whether the *Enabling Clause* constitutes a "positive rule setting out obligations," or an "exception" authorizing derogation from one or more such positive rules. Based on its understanding of the Appellate Body's decision in *US – Wool Shirts and Blouses*, the Panel determined that the *Enabling Clause*, in and of itself, does not establish legal obligations but, instead, contains requirements that are "only subsidiary obligations, dependent on the decision of the Member to take [particular] measures." The Panel further concluded that the legal function of the *Enabling Clause* is to permit Members to derogate from Article I:1 "so as to enable developed countries, *inter alia*, to provide GSP to developing countries." As a result, the Panel found that the *Enabling Clause* is "in the nature of an exception" to Article I:1.[183]

Put succinctly, the Panel determined the *Clause* does not, by itself, establish legal obligations. Rather, the *Clause* contains requirements solely dependent on, and subsidiary to, the decision of a developed country to implement

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181. Panel Report, *EC GSP*, ¶ 8:1(a)-(c).
182. *Id.* ¶ 8:1(f).
183. Appellate Body Report, *EC GSP* ¶ 80.

a particular measure (namely, a preference program). Furthermore, the legal significance of the *Clause* is to permit a developed country to deviate from the MFN obligation so as to enable it to offer GSP treatment to developing countries.

The Panel said India could have brought the case against the EU solely on the ground that the Drug Arrangement violated the MFN rule. Had India done so, the EU could have used the *Enabling Clause* as an affirmative defense to India's claim. The Panel explained the MFN obligation applies to all goods. However, the plain meaning of the *Clause*, specifically the word "notwithstanding," ensures that the *Clause* preempts Article I:1 in the event of a conflict between the two provisions.[184]

c. Holding and Rationale on the Relationship between the MFN Obligation and the Enabling Clause:

What did the Appellate Body conclude about the relationship between the *Enabling Clause* and Article I:1? The Appellate Body upheld the Panel's holding, saying the Panel's characterization indeed was accurate. That is, on the basic relationship the Appellate Body held:

- The *Enabling Clause* operates as an exception to Article I:1 of GATT.[185]
- The *Enabling Clause* does not exclude the application of Article I:1.[186]

In brief, the *Enabling Clause* is not an all-encompassing exception to the MFN obligation or a provision granting forgiveness from all transgressions against Article I:1. Rather, while the *Clause* allows for some irregularities, this allowance does not preclude an analysis of a challenged measure under the obligation.

The essence of the rationale on the first of these two points offered by the Appellate Body was – not surprisingly – a lexicographic analysis using the *Shorter Oxford English Dictionary* of the word "notwithstanding":

> The ordinary meaning of the term "notwithstanding" is, as the Panel noted, "[i]n spite of, without regard to or prevention by."

184. The Panel also distinguished the case at bar and the *Beef Hormones* and *Brazil Aircraft* disputes. In the other two cases, one clause "clearly excluded the application of the other." In the *EC GSP* case, the *Enabling Clause* constitutes an affirmative defense to which the party raising this defense has the burden of proof of justifying its defense based on the *Clause*. *See also* Appellate Body Report, *EC GSP* ¶ 87 (citing these cases).

185. *See id.* ¶¶ 99, 190(a).

186. *See id.* ¶¶ 103, 190(b).

> By using the word "notwithstanding," paragraph 1 of the *Enabling Clause* permits Members to provide "differential and more favourable treatment" to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally." Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the *Enabling Clause*. As such, the *Enabling Clause* operates as an "exception" to Article I:1.[187]

To buttress this rationale, the Appellate Body added that the purpose of the *Agreement Establishing the World Trade Organization* ("*WTO Agreement*") and *Enabling Clause* support the conclusion the *Clause* is an exception to the MFN obligation. The Preamble of the *WTO Agreement* speaks of a "need for positive efforts" to ensure poor countries secure a share of growth in international trade commensurate with their development needs. The initial authorization for creating GSP-type programs, a 1971 *Waiver Decision on the Generalized System of Preferences* (to which Footnote 3 in the *Enabling Clause* refers) has a Preamble that articulates as a principal aim the promotion of trade and export earnings of poor countries, and joint action to that effect.[188]

As for the second point that the MFN obligation and *Enabling Clause* are not – contrary to the EU view – mutually exclusive, the Appellate Body developed a two-step test:

> Members are entitled to adopt measures providing "differential and more favourable treatment" under the *Enabling Clause*. Therefore, challenges to such measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the *Enabling Clause*. In our view, this is so because the text of paragraph 1 of the *Enabling Clause* ensures that, to the extent that there is a conflict between measures under the *Enabling Clause* and the MFN obligation in Article I:1, the *Enabling Clause*, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with

187. *Id.* ¶ 36.

188. The 1971 *Waiver* is published at GATT, B.I.S.D. (18th Supp.) at 24 (*adopted* 25 June 1971).

> Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the *Enabling Clause*. It is only at this latter stage that a final determination of consistency with the *Enabling Clause* or inconsistency with Article I:1 can be made. In other words, the *Enabling Clause* "does not exclude the applicability" of Article I:1 in the sense that, as a matter of procedure (or "order of examination," as the Panel stated), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination—or *application* rather than *applicability* – it is clear that only one provision applies at a time.[189]

To summarize, in a dispute about better trade preferences for some poor countries over others, the first question is whether the challenged preferential measure violates Article I:1. If the answer is "yes," then the second question is whether the measure satisfies the requirements of the *Escape Clause*. If the *Clause* justifies it, then the measure stands. Consequently, the two provisions operate in tandem, one (if appropriate) after the other.

However, on a third point about the relationship between the MFN obligation and *Escape Clause*, the Appellate Body disagreed with the statement of the Panel. The third point concerned burden of proof.[190] The Panel said the EU could have invoked the *Clause* as an affirmative defense. As the Appellate Body put it,

> [w]ith respect to the present dispute, the Panel found that India could make its case against the European Communities solely by establishing the inconsistency of the Drug Arrangements with Article I:1. Having done so, according to the Panel, *it would then be incumbent upon the European Communities to invoke the Enabling Clause as a defence* and to demonstrate the consistency of the Drug Arrangements with the requirements contained in that Clause.[191]

To the contrary, ruled the Appellate Body. It held:

189. Appellate Body Report, *EC GSP* ¶¶ 101-02 (emphasis in original).
190. *See id.* ¶¶ 104-25.
191. *Id.* ¶ 82 (emphasis added).

A complainant is obliged to claim not only an inconsistency with the MFN obligation, but also to raise the relevant provisions of the *Enabling Clause* that the complainant argues are not satisfied by the measure in dispute.[192]

Thus, with respect to India, the Appellate Body said:

> [A]lthough the burden of *justifying* the Drug Arrangements under the *Enabling Clause* falls on the European Communities, India was required to do more than simply allege inconsistency with Article I. India's claim of inconsistency with Article I with respect to the measure challenged here is inextricably linked with its argument that the Drug Arrangements do not satisfy the conditions in the *Enabling Clause* and that, therefore, they cannot be justified as a derogation from Article I. In the light of the above considerations, we are of the view that India was required to (i) identify, in its request for the establishment of a panel, which obligations in the *Enabling Clause* the Drug Arrangements are alleged to have contravened, and (ii) make written submissions in support of this allegation. The requirement to make such an argument, however, does not mean that India must prove inconsistency with a provision of the *Enabling Clause*, because the ultimate burden of establishing the consistency of the Drug Arrangements with the *Enabling Clause* lies with the European Communities.[193]

To put the holding in general terms, a challenge to a GSP-type program must be two pronged. First, the complainant (here, India) must show the scheme is inconsistent with Article I:1. Second, the complainant must show the program does not satisfy the exemption in the *Clause* from compliance with Article I:1.

The Appellate Body admitted this two-pronged approach was special.[194] The Appellate Body stated that its decision in *Wool Shirts* was the applicable precedent -namely, that the burden of proof for an exception normally falls on the respondent (*i.e.*, the party assigning an affirmative defense).[195] Why, then, should India have to go beyond the first stage and bear any burden about the *Clause*, if it is an affirmative defense? The Appellate Body provided three rationales for the special approach.

First, reasoned the Appellate Body, consider the fundamental role of the *Enabling Clause* in the GATT–WTO system and the contents of the *Clause*. The

192. *See id.* ¶¶ 125, 190(c).
193. *Id.* ¶ 118 (emphasis original).
194. *See* Appellate Body Report, *EC GSP* ¶ 106.
195. *See id.* ¶¶ 104-05.

Clause is not the typical exception or defense.[196] It bespeaks the concern of WTO Members that MFN treatment does not accord poor countries adequate market access so as to catalyze their development.[197]

Second, every measure undertaken pursuant to this *Escape Clause* is inconsistent with the MFN obligation. But, every such measure is exempted from compliance with Article I:1, if it meets the requirements of the *Clause*.[198] The requirements are set out in Paragraphs 2(b) through 9 of the *Clause*. They are large in number and serious in nature, both substantively and procedurally. Hence, it would be an unwarranted burden on a respondent if a complainant could say nothing more than "Article I:1 is breached and the *Clause* does not justify the breach." Such an open-ended claim would deny the respondent an adequate opportunity to address and respond, because the respondent would be unable to glean from the complaint the specific claim made against it or its dimensions. As a matter of due process for the respondent, the complainant needs to explain in its pleading why the *Clause* does not justify the breach.[199] Therefore, a complainant challenging a preference scheme taken pursuant to the *Clause* must not only allege inconsistency with Article I:1, but also must argue the measure is not justified under the *Clause*. To allege only an MFN violation would not convey the "legal basis of the complaint sufficient to present the problem clearly."[200]

Third, if a complaining party did not have to complete the second step, and define the parameters within which a respondent has to make an affirmative defense under the *Escape Clause*, then the consequences would be at variance with the *Clause*. The *Clause* is supposed to "encourage" – as the EU put it (at a minimum) – preferential treatment programs. If developed countries fear being targeted by generic claims, then they may be hesitant to sponsor such programs. In other words, the consequences of not putting some burden – identifying the provisions of the *Clause* with which a scheme is inconsistent – are unacceptable.[201]

To be sure, the Appellate Body did not set the bar too high for complainants. It ruled India was required only to identify those provisions of the *Enabling Clause* with which the EC GSP program allegedly was inconsistent. India did not bear the burden of establishing facts necessary to prove such inconsistency. In brief, India needed to make a good faith effort to raise, as part of its argument, the inconsistency of the EU program with the *Clause*. Assuming India did that, the EU bore the burden of proving the Drug Arrangements satisfied the *Clause*.

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196. *See id.* ¶ 106.

197. *See id.* ¶ 109.

198. *See id.* ¶ 110.

199. *See* Appellate Body Report, *EC GSP* ¶ 113.

200. *DSU*, *supra* note 18, art. 6:2. *See also* WTO, Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* WT/DS98/AB/R, ¶¶ 120, 124, and 127 (*adopted* Jan. 12, 2000).

201. *See* Appellate Body Report, *EC GSP* ¶¶ 114-15.

The Appellate Body found India made this argument in good faith, and the EU did not meet its burden of proving the consistency of its regulations with the *Enabling Clause*.[202] The Appellate Body further explained that because it had not reversed any factual finding of the Panel, it need not rule on the conclusion of the Panel that the EU's GSP program was inconsistent with Article I:1. However, as indicated, the Appellate Body modified the conclusion of the Panel that it was incumbent on EU to raise the *Enabling Clause* as an affirmative defense. In place of this conclusion, the Appellate Body substituted its finding that India had to raise the alleged inconsistency of the *Clause*; because India had done so, the EU had to prove otherwise.

3. Legal Arguments about the Meaning of Key Terms in the Enabling Clause:

As to the second key issue in the *EC GSP* case – whether the *Enabling Clause* justified the Drug Arrangements in the EU GSP program – the EU obviously argued in the affirmative. Logically, the EU presented this argument as an alternative to the first one. That is, the EU urged if the Appellate Body were to hold the *Enabling Clause* is an exception to the Article I:1 MFN obligation, then the Appellate Body should rule the *Clause* justifies the Drug Arrangements.[203]

The EU said the Panel based its finding on this issue on two erroneous legal interpretations. The first error concerned the Panel's interpretation of the term "non-discriminatory" in Footnote 3 to Paragraph 2(a) of the *Clause*. The Panel said the term required a GSP program to provide "identical" preferences to "all" less developed countries, without any differentiation among such countries, except with regard to *a priori* import limitations as permissible safeguard measures.[204] The second error alleged by the EU concerned the interpretation by the Panel of the term "developing countries" in Paragraph 2(a) of the *Clause*. The Panel held it meant *all* less developed countries, except as regards *a priori* limitations.[205]

With respect to the word "non-discriminatory" in Footnote 3 of Paragraph 2(a) of the *Enabling Clause*, the EU argued the phrase "generalized, non-reciprocal and non discriminatory" merely refers to the description of the GSP in the 1971 *Waiver Decision*. Consequently, the phrase does not impose a legal obligation on a country granting a preference. The EU said the Panel failed to take into account the context of Footnote 3, and the object and purpose of the *Clause*. The word "non-discriminatory" allows a developed country establishing a GSP program to grant differential tariff treatment in its GSP eligibility criteria to

202. *See id.* ¶¶ 119-25.
203. *See id.* ¶ 126.
204. *See id.* ¶ 127(a).
205. *See id.* ¶ 127(b).

less developed countries that have different development needs. The Appellate Body summarized this argument:

> The European Communities maintains that "'non-discrimination' is not synonymous with formally equal treatment" and that "[t]reating differently situations which are objectively different is not discriminatory." The European Communities asserts that "[t]he objective of the *Enabling Clause* is different from that of Article I:1 of the GATT." In its view, the latter is concerned with "providing equal conditions of competition for imports of like products originating in all Members," whereas "the *Enabling Clause* is a form of Special and Differential Treatment for developing countries, which seeks the opposite result: to create unequal competitive opportunities in order to respond to the special needs of developing countries." The European Communities derives contextual support from paragraph 3(c), which states that the treatment provided under the *Enabling Clause* "shall … be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries." The European Communities concludes that the term "non-discriminatory" in footnote 3 "does not prevent the preference-giving countries from differentiating between developing countries which have different development needs, where tariff differentiation constitutes an adequate response to such differences."[206]

To be sure, agreed the EU, the differential tariff treatment must be based on "objective criteria," and the tariff differentiation must be an "adequate" response to the different development needs of poor countries.

Furthermore, said the EU, to interpret "non-discriminatory," it is imperative to define the terms "generalized" and "non-reciprocal" as well. All three terms express different requirements in Footnote 3 to Paragraph 2(a) of the *Enabling Clause*. Therefore, they must be construed in a mutually compatible way.

The ordinary meaning of the word "generalized," reinforced by relevant negotiating history, indicates GSP programs are not required to cover all less developed countries. Rather, "generalized" is intended to distinguish these preferences from "special" preferences, which may be granted to selected less developed countries for geographical, historical, or political reasons. The EU said consultations in the United Nations Conference on Trade and Development ("UNCTAD") led to a compromise in the *Agreed Conclusions* that developed

206. Appellate Body Report, *EC GSP* ¶ 149.

countries would recognize, "in general," as beneficiaries those countries considering themselves to be developing countries, although a developed country might decide to exclude a country *ab initio* on a ground it considered "compelling." Conversely, the word "non-discriminatory" relates to whether a developed country may grant different preferences to individual less developed countries that already have recognition as beneficiaries in a GSP program.

As for the term "non-reciprocal" in Footnote 3, the EU submitted that when analyzing it in inter-state relations, the term generally refers to an exchange of identical or similar benefits. The term is not intended to prevent a developed country from attaching conditions on the grant of preferences under a GSP program. Rather, "non-reciprocal" only prohibits a developed country from imposing the condition of reciprocity, i.e., of a *quid pro quo*. The EU said the Panel misinterpretation of the word "non-discriminatory" does not allow the imposition of any condition on the grant of preferences. The Panel wrongly equates conditional preferences with discriminatory preferences when, in fact, a preference is not rendered discriminatory by virtue of a condition being attached to it, as long as the condition applies equally to all GSP beneficiaries that are in the same situation. Obviously, the qualifying point – that all beneficiaries are in the same situation – was critical to the EU argument.

Finally, the EU contended the Panel misconstrued the term "developing countries" in Paragraph 2(a) of the *Enabling Clause*. The EU argued that it relied on its erroneous interpretation of the word "non-discriminatory" for the definition of this term. The word "non-discriminatory" in Footnote 3 of Paragraph 2(a) of the *Clause* does, in fact, allow a developed country to differentiate among less developed countries with different development needs. It follows, said the EU, for the same reason that Paragraph 2(a) does not require a developed country to grant the same preferences to all developing countries.

On appeal, India vigorously challenged the EU's view that the *Enabling Clause* justifies the Drug Arrangements. India clarified what the dispute in the case was all about.[207] It was not focused on initial selection by the EU of particular less developed countries as beneficiaries under the EU's GSP program. Rather, the dispute arose because of the EU's treatment of less developed countries that already were beneficiaries under the program. Therefore, said India, the Appellate Body was not required to examine legal issues arising from the initial selection of beneficiaries under the *Enabling Clause*. In turn, India urged the Appellate Body to rule that the term "developing countries" in Footnote 3 of Paragraph 2(a) of the *Clause* includes at least those poor countries that already are beneficiaries under a given GSP program. Concomitantly, India asked the Appellate Body to construe the words "products originating in developing countries" in Paragraph 2(a) refer to products originating in any of those countries.

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207. *See id.* ¶ 128.

India contended the Drug Arrangements were not "non-discriminatory preferences beneficial to the developing countries" within the meaning of Footnote 3 to Paragraph 2(a) of the *Enabling Clause*. Rather, India contended, Articles I, XIII, and XVII of GATT confirm that "non-discrimination" refers to the provision of "equal competitive opportunities" in relation to non-tariff measures and of "formally equal[] treatment" in relation to tariff measures. Similarly, inclusion of the word "unjustifiable" before the word "discrimination" in the *chapeau* of Article XX demonstrates that the reasons of a WTO Member for distinguishing among products of different origin are not relevant to whether such distinction constitutes discrimination.

As for the interpretation advocated by the EU of the terms "generalized" and "non-reciprocal," India argued it was plainly incorrect. The word "generalized" refers to countries that should be included *ab initio* as beneficiaries under a GSP program. The word "non-discriminatory" refers to "treatment of products originating in beneficiary countries." India maintained the concept of "reciprocity" is applicable at the outset of trade negotiations. However, the term "non-discriminatory" deals with implementing negotiation outcomes.

Regarding Paragraph 2(a) of the *Enabling Clause*, India called for an interpretation that would authorize a WTO Member not to comply with the MFN obligation in GATT Article I:1 only when necessary for its GSP program to operate. This approach would allow a developed country to exclude other developed countries from its GSP scheme. However, urged India, the *Clause* does not permit a developed country to differentiate among developing countries as to how tariff preferences under a GSP program can be, and are, granted to developing countries. Rather, as the Appellate Body summarized:

> India's challenge to the Drug Arrangements is based on its submission that the term "non-discriminatory" prevents preference-granting countries from according preferential tariff treatment to any beneficiary of their GSP schemes without granting identical preferential tariff treatment to all other beneficiaries.

India . . . asserts that "non-discrimination in respect of tariff measures refers to formally equal[] treatment" and that paragraph 2(a) of the *Enabling Clause* requires that "preferential tariff treatment [be] applied equally" among developing countries. In support of its argument, India submits that an interpretation of paragraph 2(a) of the *Enabling Clause* that authorizes developed countries to provide "discriminatory tariff treatment *in favor of the developing countries* but not *between the developing countries* gives full effect to both Article I of the GATT and paragraph 2(a) of the *Enabling Clause* and minimizes the conflict between them." India emphasizes that, by consenting to the adoption of the *Enabling Clause*, developing countries did not "relinquish[] their MFN

rights [under Article I of the GATT 1994] as between themselves, thus permitting developed countries to discriminate between them."[208]

According to India, then, a contrary interpretation would be inconsistent with the need to interpret Paragraph 2(a) of the *Clause* and Article I:1 so as to avoid conflict between the two provisions.

The MFN argument that India raises in the last sentence of the above-quoted passage is interesting, yet logically flawed. Essentially, India says developing countries should not be presumed to have waived their MFN rights under Article I:1 vis-à-vis other developing countries. The Appellate Body replies by saying it makes no such presumption, and the right to MFN treatment cannot be invoked by one developing country against a GSP beneficiary, as long as the GSP scheme satisfies the terms of the *Enabling Clause*.[209] The Appellate Body is correct. India's argument would create a kind of endless loop, whereby Article I:1 sets out a general rule, the *Clause* operates as an exception to this rule, but then the exception can be challenged under the general rule. Put differently, India's argument would vitiate the exception.

In any event, India concluded from reading together Paragraphs 2(a) and 2(d) of the *Enabling Clause*, only three distinct categories of countries were permissible. These groupings were "developed," "developing," and "least developed." According to India, developed countries gave up their right to MFN treatment in respect of preferential tariff treatment in favor of developing and least developed countries. However, developing countries gave up their right to MFN treatment only with respect to preferential treatment in favor of least developed countries. India found nothing in the *Clause* stating developing countries surrendered their rights when considering preferential treatment granted by a developed country to other developing countries. India suggested that even the EU recognized this fact before the case at bar.[210] The current EU interpretation of "non-discriminatory" in Footnote 3 would render Paragraph 2(d) redundant, contrary to the "principle of effectiveness in treaty interpretation."[211]

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208. *See id.* ¶¶ 129, 149.

209. *See id.* ¶ 166.

210. India cited the European Commission, *User's Guide to the European Union's Scheme of Generalised Tariff Preferences* (Feb. 2003), *available at* http://europa.eu.int/comm/trade/issues/global/gsp/gspguide.htm.

211. India cited the WTO, Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (*adopted* May 20, 1996).

a. Holding and Rationale on the Meaning of Key Terms in the Enabling Clause:

As to the second principal substantive issue in the case, whether the *Enabling Clause* justified the GSP program of the EU, the Panel responded "no." It stated:

> (d) the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the *Enabling Clause* . . . .[212]

The Appellate Body upheld this conclusion of the Panel, but for different reasons from the Panel. In other words, the Appellate Body agreed with the Panel that the EC had failed to demonstrate Paragraph 2(a) of the *Clause* justified the Drug Arrangements. However, it reversed the legal interpretation rendered by the Panel on Paragraph 2(a) of the Clause and Footnote 3 thereto. Thus, the EC lost the second issue on appeal, but for different reasons from the justification offered by the Panel.

The Appellate Body rightly explained resolution of the dispute about justification depended on the interpretation of the *Enabling Clause*. In particular, it depended on two critical terms: "non-discriminatory" in Footnote 3 to Paragraph 2(a), and "developing countries" in Paragraph 2(a). On the definitions of both terms, the Appellate Body reversed the Panel's interpretations.

First, the Appellate Body overturned the conclusion of the Panel that

> the term "non-discriminatory" in footnote 3 [to Paragraph 2(a) of the *Enabling Clause*] requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of *a priori* limitations.[213]

The Panel rested its conclusion not so much on the text of Footnote 3 (which it said does not reveal whether the "needs of developing countries" refers to all of them, some of them, or certain individual ones), but on the drafting history in the United Nations Conference on Trade and Development (as a clue to the intention of the drafters of the *Enabling Clause* on GSP arrangements). Based largely on the history, the Panel thought Paragraph 3(c) allows for differentiation among beneficiaries when granting preferential treatment to least developed

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212. Panel Report, *EC GSP*, *supra* note 154, ¶ 8:1(d). The Panel also determined the EU had "failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994." *Id.* ¶ 8:1(e). *See also id.* ¶ 7:177.

213. *Id.* ¶ 7:161. *See also* Appellate Body Report, *EC GSP* ¶¶ 174, 190(e).

countries, and for setting *a priori* import limitations originating in particularly competitive developing countries. But, no other differentiation was allowable.[214]

Not quite so, said the Appellate Body. To begin, Paragraph 2(a) of the *Enabling Clause* says that in order for a GSP program to be justified under the Clause, preferential tariff treatment associated with that program must be "in accordance" with the description of the Preamble to the 1971 *Waiver Decision*.[215] "Accordance" (in its dictionary sense) means conformity, specifically with the description in Footnote 3 to Paragraph 2(a). The description quotes the 1971 *Decision* – namely, "generalized, non-reciprocal and non-discriminatory." The point, explained the Appellate Body, is that the word "non-discriminatory" in Footnote 3 of the *Clause* is not a mere reference to the description of the GSP in the 1971 *Decision*. Rather, it imposes a legal obligation on preference-granting countries.

Yet, said the Appellate Body, the text of Paragraph 2(a) of the *Enabling Clause* neither explicitly authorizes nor prohibits the granting of different tariff preferences to different beneficiaries.[216] Like it or not, the Appellate Body thus was in the position of interstitial law-making, and it could not avoid the task of clarifying a text. Acting with circumspection, the Appellate Body sought to narrow the difference between the definitions of "non-discriminatory" in Footnote 3 of the *Clause* proffered by India and the EU. It said India called for a neutral one (as that would mandate formally equal treatment), whereas the EU called for a pejorative meaning (as that would bar only unfair discrimination):

> We examine now the ordinary meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the *Enabling Clause*. As we observed, footnote 3 requires that GSP schemes under the *Enabling Clause* be "generalized, non-reciprocal and non-discriminatory." Before the Panel, the participants offered competing definitions of the word "discriminate." India suggested that this word means "'to make or constitute a difference in or between; distinguish' and 'to make a distinction in the treatment of different categories of peoples or things,'" The European Communities, however, understood this word to mean "'to make a distinction in the treatment of different categories of people or things, esp. *unjustly* or *prejudicially* against people on grounds of race, colour, sex, social status, age, etc.'"
>
> Both definitions can be considered as reflecting ordinary meanings of the term "discriminate" and essentially exhaust the relevant ordinary meanings. The principal distinction between

214. *See* Appellate Body Report, *EC GSP* ¶¶ 133-36.
215. *See id.* ¶ 146.
216. *See id.* ¶ 154.

> these definitions, as the Panel noted, is that India's conveys a "*neutral* meaning of making a distinction," whereas the European Communities' conveys a "*negative* meaning carrying the connotation of a distinction that is unjust or prejudicial." Accordingly, the ordinary meanings of "discriminate" point in conflicting directions with respect to the propriety of according differential treatment. Under India's reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities' reading, differential treatment of GSP beneficiaries would not be prohibited *per se*. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term "non-discriminatory," on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.[217]

The Appellate Body found a common view on both sides: the ordinary, lexicographic definitions of "non-discriminatory" India and the EU proffered required the same (*i.e.*, identical) treatment for GSP beneficiaries that are similarly situated:

> we are able to discern some of the content of the "non-discrimination" obligation based on the ordinary meanings of that term. Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of "discriminate" converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. The European Communities, however, appears to regard GSP beneficiaries as similarly-situated when they have "similar development needs." Although the European Communities acknowledges that differentiating between similarly-situated GSP beneficiaries would be inconsistent with footnote 3 of the *Enabling Clause*, it submits that there is no inconsistency in differentiating between GSP beneficiaries with "different

217. *Id.* ¶¶ 151-52.

> development needs." Thus, based on the ordinary meanings of "discriminate," India and the European Communities effectively appear to agree that, pursuant to the term "non-discriminatory" in footnote 3, similarly-situated GSP beneficiaries should not be treated differently.[218]

That said, the Appellate Body had cast itself in the least law-creating role possible. The point of disagreement was really nothing more than the basis for determining whether beneficiaries are similarly situated.[219]

Examining the context of Footnote 3, particularly Paragraph 3(c), which obliges developed country WTO Members to design and, if need be, modify preferential treatment "to respond positively to the development, financial, and trade needs of developing countries," the Appellate Body found no basis for concluding "identical" tariff preferences must be provided to "all" developing countries.[220] Thus, the Appellate Body reversed the Panel's conclusion that the words "developing countries" in Paragraph 2(a) of the *Clause* referred to all such countries. This conclusion rested on the Panel's erroneous interpretation of "non-discrimination," so overturning this interpretation necessarily led to a holding that "developing countries" may mean "*less than all* developing countries."[221]

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218. *Id.* ¶ 153.
219. *See* Appellate Body Report, *EC GSP* ¶ 153.
220. *See id.* ¶ 156.
221. *Id.* ¶ 176. *See also id.* ¶ 190(f).
In particular, the Appellate Body reversed the Panel's conclusion

> the term "developing countries" in paragraph 2(a) of the *Enabling Clause* should be interpreted to mean *all* developing countries, with the exception that where developed countries are implementing *a priori* limitations, 'developing countries' may mean *less than all* developing countries.

Panel Report, *EC GSP* ¶ 7:174. The Panel premised its interpretation of Paragraph 2(a) on its findings that

> (1) Footnote 3 permits the grant of different tariff preferences to different GSP beneficiaries only for the purpose of *a priori* limitations, and
> (2) Paragraph 3(c) permits the grant of different tariff preferences to different GSP beneficiaries only for the purpose of *a priori* limitations and preferential treatment in favor of least developed countries.

See id. ¶¶ 7:170-171. However, as explained above, contrary to the Panel, the Appellate Body ruled Footnote 3 and Paragraph 3(c) do not preclude the grant of differential tariff preferences to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the *Enabling Clause*. Therefore, the Appellate Body said

The Appellate Body also spoke of the consequences of its interpretation of "non-discrimination" (and, by extension, "developing countries"). It predicted that some differentiation would not lead to the collapse of the GSP system, nor to the resurrection of colonial-era special preferences for selected poor countries.[222] The term "generalized" in Footnote 3 requires a GSP scheme to be generally applicable to all developing countries. The term "non-discriminatory" in the Footnote, however, does not prohibit a developed country from granting different tariffs to products originating in different beneficiaries of a GSP program, provided the differential tariff treatment satisfies the remaining conditions in the *Enabling Clause*.

What, then, is the "bottom line"? The term "non-discriminatory" imposes a basic limitation: if a developed country grants differential tariff treatment, then the preference-granting country must ensure identical treatment is available to all similarly-situated GSP beneficiaries, i.e., to every beneficiary of the GSP program that has the "development, financial and trade needs" to which the treatment in question is intended to address:[223]

> we are of the view that, by requiring developed countries to "respond positively" to the "needs of developing countries," which are varied and not homogeneous, paragraph 3(c) [of the *Enabling Clause*] indicates that a GSP scheme may be "non-discriminatory" even if "identical" tariff treatment is not accorded to "all" GSP beneficiaries. Moreover, paragraph 3(c) suggests that tariff preferences under GSP schemes may be "non-discriminatory" when the relevant tariff preferences are addressed to a particular "development, financial [or] trade need" and are made available to all beneficiaries that share that need.[224]

Thus, it is fine to create sub-categories of developing countries on the basis of needs common to, or shared by, only those countries, and to grant the same preferences to all countries in the sub-category. Indeed, doing so fulfills the mandate of Paragraph 3(c) to respond positively to the needs not necessarily in common or shared by all developing countries, but not to create any kind of response to any claimed need of these countries.[225]

"developing countries" in Paragraph 2(a) should not be read to mean "all" developing countries, as that reading would bar a developed country from offering different tariff preferences to different types of poor countries.

222. *See* Appellate Body Report, *EC GSP* ¶ 156.

223. *See id.* ¶¶ 157-59.

224. *Id.* ¶ 165.

225. *See id.* ¶¶ 162-63.

It would be cynical to characterize this bottom line as permission from the Appellate Body for limited divide-and-rule by developed countries. Besides, as a British official, Sir James Robertson, working to administer the 1899 Anglo–Egyptian Condominium of the Sudan wrote in 1951 in his diary: "They divide and we rule."[226] Viewed dispassionately, the holding is a victory for both sides. The EU won the ability to differentiate a bit among beneficiaries, and India got a ring fence around the extent of differentiation.

To arrive at the interpretation of "non-discriminatory" in Footnote 3 to Paragraph 2(a) of the *Enabling Clause*, the Appellate Body looked not only to the object and purpose of the WTO Agreement, but also displayed its foreign language skills.[227] It looked at the French and Spanish language texts of GATT and the *Enabling Clause*, and argued the relevant terms are stronger and more obligatory in them than in the English language version. Specifically, the Appellate Body said the French and Spanish texts support the view Paragraph 2(a) of the *Clause* covers only preferential tariff treatment that is "generalized, non-reciprocal and non-discriminatory." The French version of Paragraph 2(a) of the *Clause* requires tariff preferences be accorded "*conformément au Système généralisé de preferences*." The English term "in accordance" is thus "*conformément*" in the French version. In addition, the English phrase "[a]s described in the 1971 Waiver Decision" in Footnote 3 is translated in French as "*[t]el q''il est défini dans la décision des PARTIES CONTRATANTES en date du 25 juin 1971*." Similarly, the Spanish version uses the terms "*conformidad*" and "*[t]al como lo define la Decisión de las PARTES CONTRATANTES de 25 de junio de 1971*."

The final step in the Appellate Body's deliberations was to consider whether the *Enabling Clause* justifies the Drug Arrangements. The logical progression to this point had been as follows:

- The *Enabling Clause* is an exception to the MFN obligation of GATT Article I:1.
- The *Enabling Clause* is a special kind of exception, necessitating that a claimant not only allege a violation of the MFN obligation, but also identify the part(s) of the *Clause* with which a GSP scheme is inconsistent.
- India satisfied both prongs of this burden of proof.

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226. *Quoted in* GLEN BALFOUR-PAUL, THE END OF EMPIRE IN THE MIDDLE EAST: BRITAIN'S RELINQUISHMENT OF POWER IN HER LAST THREE ARAB DEPENDENCIES 4 (1991).

227. The discussion of the object and purpose of the *WTO Agreement* essentially recounts the need for positive efforts to help developing, and especially least developed, countries. The Appellate Body found no basis for the Panel's conclusion that this objective and purpose contributed less to the interpretation of the word "non-discriminatory" than the object and purpose of eliminating discrimination in international commerce. The Appellate Body did not go so far as to exalt, in a generic sense, one object and purpose over another. *See* Appellate Body Report, *EC GSP* ¶¶ 168-73.

> ● The term "non-discrimination" in Footnote 3 of Paragraph 2(a) of the *Enabling Clause*, coupled with Paragraph 3(c) of that *Clause*, does not preclude the grant of differential preferences to sub-categories of GSP beneficiaries. However, as a limitation, the sub-category must be defined by development, financial, and trade needs common to or shared by each country in the sub-category, and the same preferences must be granted to each country in the sub-category. In other words, the *Escape Clause* does not impose an affirmative obligation to give formally equal treatment to all developing countries, but allows for some differentiation, subject to constraint.
> ● As a corollary, the term "developing countries" in the *Enabling Clause* need not refer to all such countries, but may refer to a sub-group of them.[228]

With these findings, how did the Drug Arrangements fare on appeal? In short, the answer is "not well," as the Appellate Body upheld the Panel's conclusion that the EU had failed to prove its GSP program was consistent with Paragraph 2(a) of the *Enabling Clause*.[229] The Appellate Body essentially accepted India's arguments that the *Enabling Clause* could not justify the Drug Arrangements. What development, financial, or trade need (to track the language of Paragraph 3(c)) of the *Clause* might justify the EU granting different tariffs to products originating in different sub-categories of developing countries, so long as the EU gives all GSP beneficiaries with that need (*i.e.*, in the same sub-category) identical tariff treatment? The problem of illicit drug production and trafficking in certain GSP beneficiaries is the answer. In consequence, the specific issue is whether the EU provides preferences under the Drug Arrangements to all GSP beneficiaries that are similarly affected by drug production and trafficking.[230]

The EU argued that all developing countries similarly affected by the drug problem are included in the Drug Arrangements scheme. However, to state this argument is to reveal its folly. Even a modicum of street sense is enough to appreciate the 12 Drug Arrangement countries do not exhaust the universe of potential beneficiaries – India is one among the developing countries afflicted by the problem. The Appellate Body knew as much. The fact the EC Regulation (specifically, Articles 10 and 25 thereof, which relate to the Drug Arrangements) neither contains a mechanism for adding beneficiaries, nor sets out clear, objective criteria to allow other developing countries similarly situated to be included as

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228. It must be remarked the Appellate Body would have eased the reader's task by explaining this sequence.

229. *See id.* ¶¶ 177-89, 190(g). No finding under Paragraph 3(a) or 3(c) was rendered by either the Panel or Appellate Body.

230. *See id.* ¶ 180.

beneficiaries (or removed if the problem were resolved) made the EU argument yet weaker.[231]

Thus, the Appellate Body wrote:

> We recall our conclusion that the term "non-discriminatory" in footnote 3 of the *Enabling Clause* requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. *First*, as the European Communities itself acknowledges, *according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a "closed list" of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking*.
>
> *Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries*. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel's request to do so. As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. *Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are "similarly affected by the drug problem," because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not*.
>
> For all these reasons, we find that *the European Communities has failed to prove that the Drug Arrangements meet the requirement in footnote 3 that they be "non-discriminatory."* Accordingly, we *uphold*, for different reasons, the Panel's conclusion … that the European Communities "failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the *Enabling Clause*."[232]

231. *See id.* ¶¶ 182-83.

232. *Id.* ¶¶ 187-89 (emphasis on "uphold" original; other emphases added).

In sum, the EU had no criteria for choosing beneficiaries, nor did it explain the consideration it would or could use to determine the effect of the drug problem in or on a particular country.[233]

4. Commentary:

a. The Jurisprudence of Encouragement versus Obligation

As a legal matter, the Appellate Body probably has the better argument on the key word – "notwithstanding." If that word does not convey an exception, then what word (other than "exception" itself) does? With respect to the object and purpose of the GATT–WTO rules, however, might the EU have the better argument, especially if helping poor countries is a central object and purpose? In other words, in the technicalities of the *Enabling Clause* and perhaps mind-numbing dullness of reading about what "notwithstanding" means, it is easy to lose sight of a deep jurisprudential point. Indeed, that point is the essential question on which the EU and Appellate Body are divided: is it efficacious to pursue a principal objective through an exception?

All agree helping poor countries through trade preferences is a principal objective of GATT–WTO rules. What is the best way to pursue that objective, not in terms of the precise kind of preferences, but in the sense of how the law is interpreted? The EU argues if the *Escape Clause* is seen as an exception to the MFN obligation, then providing preferential trade treatment is not itself an obligation. Rather, it is merely a matter tolerated by GATT–WTO rules, and an option for any one of them to offer, or not, as each pleases. If a Member elects to provide a preference, then it can rely on the "exception" to avoid an MFN challenge. Thus:

> According to the European Communities, the *Enabling Clause*, as the "most concrete, comprehensive and important application of the principle of Special and Differential Treatment," serves "to achieve one of the fundamental objectives of the WTO Agreement." In the view of the European Communities, provisions that are exceptions permit Members to adopt measures to pursue objectives that are "not … among the *WTO Agreement's* own objectives"; the *Enabling Clause* thus does not fall under the category of exceptions. Pointing to this alleged difference between the role of measures falling under the *Enabling Clause* and that of measures falling under exception provisions such as Article XX, the European Communities contends that the *WTO Agreement* does not "merely tolerate"

233. *See* Appellate Body Report, *EC GSP* ¶ 183.

> measures under the *Enabling Clause*, but rather "encourages" developed-country Members to adopt such measures. According to the European Communities, to require preference-granting countries to invoke the *Enabling Clause* in order to justify or defend their GSP schemes cannot be reconciled with the intention of WTO Members to encourage these schemes.[234]

In brief, the EU argued that if the Membership is serious about helping poor countries, it will elevate the *Clause* to the level of an affirmative duty on par with the MFN obligation.

The Appellate Body, of course, has the final say. The Appellate Body is unperturbed by the prospect that its ruling would relegate preference-granting as behavior to be encouraged, but not mandated. The Appellate Body takes comfort from its jurisprudence on Article XX(g) of GATT:

> We note, however, as did the Panel, that WTO objectives may well be pursued through measures taken under provisions characterized as exceptions . . . .

It is well-established that Article XX(g) is an *exception* in relation to which the responding party bears the burden of proof. Thus, by authorizing in Article XX(g) measures for environmental conservation, an important objective referred to in the Preamble to the *WTO Agreement*, Members implicitly recognized that the implementation of such measures would not be discouraged simply because Article XX(g) constitutes a defense to otherwise WTO-inconsistent measures. Likewise, characterizing the *Enabling Clause* as an exception, in our view, does not undermine the importance of the *Enabling Clause* within the overall framework of the covered agreements and as a "positive effort" to enhance economic development of developing-country Members. Nor does it "discourag[e]" developed countries from adopting measures in favour of developing countries under the *Enabling Clause*.

In sum, in our view, *the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive "differential and more favourable treatment." . . . Nor does characterizing the Enabling Clause as an exception detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO*.[235]

In sum, says the Appellate Body, it is not jurisprudentially inconsistent to declare as a serious objective the promotion of trade with poor countries, on the one hand, and achieve that objective through exceptions to non-discriminatory trade obligations, on the other hand.

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234. *Id.* ¶ 93.

235. *Id.* ¶¶ 94-95, 98 (emphasis added).

Which position is correct? There is merit on both sides, which is to say that for all the hypocrisy with which the EU (and other developed WTO Members) are charged by critics of various persuasions, there is cogency in the position of the EU that a serious commitment to trade preferences would mean mandates – not just options unmolested by real duties like MFN treatment. An exception does not bespeak implementation of a principal objective, intones the EU. Perhaps that insight could guide WTO Members as they contemplate new, more forceful, special and differential treatment rules in the Doha Round.

b. Foreign Language Skills

Polyglot skills ought to be prized, but not the scene of confusion at the Tower of Babel (Genesis 11). It might be queried whether the display by the Appellate Body of foreign language skill persuasively supported the legal conclusion that "non-discriminatory" treatment means "identical tariff preferences for similarly situated less developed countries." At best, the reasoning is subtle, and presumes fluency in all three languages. At worst, it is unhelpful.

Legalities aside about whether a WTO text is definitive in one, two, or all three languages, the practical fact is if the English language meaning of a term is not agreed upon, then the solution must be found in English. Recourse to French and Spanish is of little use to most international attorneys and businessmen. For them, English is the working language. Ironically, it is the working language for many EU purposes, too.

II. TRADE REMEDIES

A. Countervailing Duties on Softwood Lumber from Canada

1. Citation

United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R (issued January 19, 2004, adopted February 17, 2004) (complaint by Canada, with the European Communities, India and Japan as Third Participants).

2. Introduction to the Softwood Lumber Dispute[236]

The softwood lumber dispute between the United States and Canada represents what is perhaps the most bitter, and certainly the longest-running, trade dispute between the two nations, spanning twenty-three years. Softwood lumber is important to Canada; exports to the United States in 2003 alone were more than 19 billion board feet worth CDN$6.8 billion.[237] The case discussed herein is effectively the fourth round of countervailing duty actions. The first U.S. countervailing duty case was filed in October 1982. Subsequent countervailing duty investigations were initiated by U.S. authorities in May 1986, October 1991 and, most recently, Countervailing Duty IV in April 2001. In between these various cycles of litigation, settlement agreements were entered into in 1986 (Softwood Lumber Memorandum of Understanding) and again in 1996, each effective for approximately five years. The 1996 Softwood Lumber Agreement[238] expired March 31, 2001, and new countervailing duty and antidumping duty petitions were filed April 2, 2001. Only an extreme optimist would suggest that the latest round of filings, NAFTA panel and WTO panel/Appellate Body reviews constitutes the final chapter in the saga, although at this writing (April 2005) there were reports of yet another round of settlement discussions, initiated in this instance by the Canadian Government.[239]

There are many aspects to this dispute, but the principal one is derived from the fact that in contrast to the United States where most timber is privately owned and the prices are market driven, most timberland in Canada is government owned with the prices for the timber charged to private harvesters, or "stumpage," being set administratively by the provincial governments. In the United States, logging rights on public lands are sold by auction. Canadian stumpage fees, which are based on factors such as transportation and labor costs in addition to the value of the timber, tend to be lower, sometimes significantly lower, than American auction prices for the same timber. United States authorities and the

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236. The chronology and history of the dispute is taken primarily from Helmut Mach (an official of the Government of Alberta), *The Softwood Lumber Dispute*, 27 CAN.U.S. L.J. 287 (2001) (relating the history of the dispute from 1982 to 2001); International Trade Canada, *Softwood Lumber,* http://www.dfait-maeci.gc.ca/eicb/softwood/chrono-en.asp#top_of_page; About® *The Softwood Lumber Dispute*, http://economics.about.com /cs/agriculture/a/softwood_lumber_p.htm (visited Jan. 28, 2005).

237. International Trade Canada, *supra* note 236.

238. Softwood Lumber Agreement, May 29, 1996, U.S.-Can., 35 I.L.M. 1195 (1996) (effective April 1, 1996).

239. *See* Peter Menyasz, *Canadian Trade Minister Unveils Draft Deal on Softwood Lumber Dispute*, 22 INT'L TRADE REP. (BNA) 414 (Mar. 17, 2005) (explaining a settlement proposal based on the imposition of an export tax on Canadian lumber exports); Daniel Pruzin, Peter Menyasz & Rossella Brevetti, *Gutierrez, U.S. Lumber Coalition Welcome Canadian Draft Proposal; Talks Expected*, 22 INT'L TRADE REP. (BNA) 415 (Mar. 17, 2005) (discussing the preliminary U.S. reaction and plans for negotiations).

U.S. timber industry have long held that the prices for such timber harvest rights were below the free market prices for the timber, and thus constituted actionable government subsidies which were the cause of material injury to the U.S. industry.

3. Facts[240]

This particular appeal resulted from a U.S. countervailing duty order published in the Federal Register on May 22, 2002,[241] following a final Department of Commerce (DOC) countervailing duty determination two months earlier.[242] (The May 22 order also followed a final affirmative determination of material injury by the U.S. International Trade Commission, which was also the subject to WTO (and NAFTA) litigation.)[243] The essence of a countervailing duty order is a determination by the administering authorities (in this case, the Commerce Department and the U.S. International Trade Commission, respectively), that an actionable subsidy exists, and that the subsidy causes injury or threat of material injury to the U.S. industry.[244]

240. The principal sources of this review are the Panel Report, the Appellate Body report and other WTO documents as identified herein. Unlike most Appellate Body Reports, *US – Softwood Lumber CVD*, *supra* note 28, is available in International Legal Materials, at 43 I.L.M. 514 (2004).

241. Dep't of Commerce, Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36070 (May 22, 2002).

242. Dep't of Commerce, Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15545 (2002).

243. WTO, Report of the Panel, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WTO Doc. WT/DS277/R (Mar. 22, 2004), *adopted* Apr. 26, 2004 [hereinafter *US – Softwood Lumber ITC Investigation*, Panel Report]; USITC, *Softwood Lumber Industry from Canada Threatens U.S. Industry with Injury, Says ITC*, News Release 02-035 (May 2, 2002), reporting on Invs. Nos. 701-TA-414 and 731-TA-928 (F). *See also* USITC, *ITC Files Response to Softwood Lumber Binational Panel Decision with NAFTA Secretariat,* News Release 04-100 (Sept. 10, 2004) (effectively dismissing the threat of material injury finding in response to the Bi-national Panel directive); USA-CDA-2005-1904-03, Certain Softwood Lumber Products From Canada (USITC Determination under Section 129(a)(4) of the Uruguay Round Agreements Act), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx? DetailID=380 (Bi-national panel proceeding, still shown as "active" as of March 2005).

244. *See* SCM Agreement, *supra* note 30, arts. 10, 11, 15, 19; RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 492 (Lexis 1998) (outlining the legal requirements of a countervailing duty case).

As the Appellate Body summarized the agency proceedings:

> USDOC found that softwood lumber benefitted from countervailable subsidies attributable to a number of Canadian government programs. USDOC found that, by conferring a right to harvest timber through stumpage programs, certain provincial governments provided goods to lumber producers. According to USDOC, these goods were provided at less than adequate remuneration, thereby conferring a benefit. USDOC also found that the subsidies conferred through the stumpage programs were specific to an industry or group of industries.[245]

The Panel had decided, in summary, that the stumpage provided by Canadian provincial authorities constituted a financial contribution through provision of a good or service, consistent with the SCM Agreement, Article 1.1(a)(1); that DOC's determination of the existence and amount of the subsidy violated Article 14 of the SCM Agreement; and that DOC had failed to conduct a required pass through analysis for so-called "upstream" transactions, in violation of the SCM Agreement, Article 10 and GATT 1994, Article VI:3.[246] The Panel also found (in a determination that was not appealed), that the subsidies provided were specific to an industry, in this case, the timber industry.[247]

For those not familiar with the details of countervailing duty cases, it is worth pointing out that an actionable subsidy must meet the definitional requirements of SCM Article 1, which includes the provision of a benefit to the subsidized entity or industry. Also, the precise amount of the benefit must be calculated by the administering authority. Where a subsidy is provided to one industry (e.g., timber producers), it usually must be shown that the benefits are passed through to the "downstream" industry (e.g., lumber producers), the latter of which do not receive the subsidy directly from the government. Also, except for export subsidies, which were not involved in this proceeding, even a subsidy that confers a benefit cannot be countervailed against unless it is specific to an industry or group of industries, rather than "generally available."[248] A key issue here, as in most subsidy actions, is the calculation of the amount of the subsidy. Normally, the amount of the subsidy is determined by comparing the price of a subsidized product with the price of the same product obtained from private

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245. *US – Softwood Lumber CVD*, Appellate Body Report, *supra* note 28, ¶ 2.

246. *Id.* ¶ 4, quoting the Panel's conclusions.

247. WTO, Report of the Panel, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/R ¶ 8.1 (Aug. 29, 2003), *adopted* Feb. 17, 2004. [hereinafter *US – Softwood Lumber CVD*, Panel Report].

248. SCM Agreement, *supra* note 30, art. 2. An investment tax credit available to all businesses in a particularly country would, for example, be considered to be generally available.

sources (the "benchmark" price), the difference being the amount of the subsidy. (That difference is the basis for the imposition of a "countervailing duty" on imports of the product.) In this case, the DOC had rejected all private stumpage in Canada as a benchmark, and had instead used private stumpage prices in the United States.

4. Major Substantive Issues on Appeal[249]

According to the appellate body, three issues were presented by the appeal. First, Canada argued that the panel erred by finding that the Canadian stumpage programs "provide goods" as the term is used in Article 1.1(a) of the SCM Agreement, and thereby made a "financial contribution" to timber producers in accordance with that article. Secondly, the United States challenged the panel's determination that the DOC had acted inconsistently with Articles 10, 14, 14(d), and 32.1 of the SCM Agreement, by failing to use as the basis of comparison a "benchmark" price for private (as distinct from government-provided) stumpage in Canada (rather than prices available in the United States). Third, the United States challenged the panel's determination that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement by failing to conduct an analysis to determine whether the benefits afforded to timber producers were passed through to unrelated purchasers of logs and lumber (i.e., sawmills and lumber remanufacturers) when such logs and lumber were sold to those purchasers.

5. Holdings and Rationale

a. Is Provision of Stumpage a "Financial Contribution?"[250]

The DOC had concluded in its final determination that the Canadian provincial governments made a financial contribution because the stumpage arrangements effectively "provided goods" to timber harvesters. The panel effectively upheld the DOC, concluding that this determination was not inconsistent with the SCM Agreement. The essence of Canada's challenge on appeal was that standing timber – trees attached to the land – are not "goods" under Article 1.1(a) of the SCM Agreement, and that under those circumstances the provinces could not be held to "provide" standing timber through stumpage. Thus, according to Canada, there could be no financial contribution as defined in

249. Discussion drawn from *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 45, unless otherwise noted.

250. *See id.* ¶¶ 46-76.

Article 1.1(a)(1). The United States contended, in response, that "goods" includes "things severable from land, such as standing timber."[251]

The Appellate Body began its analysis by quoting from Article 1:

> *Definition of a Subsidy*[252]
> 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);
> (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 . . .* and
> (b) a benefit is thereby conferred.

As the Appellate Body explained, under Article 1, "First, there must be a financial contribution by a government, or income or price support. Secondly, any financial contribution, or income or price support, must confer a benefit."[253] Canada's focus is on the financial contribution. The Appellate Body observed that this financial contribution with "financial value" does not have to be made in money, but can be furnished "*in kind* through governments providing goods or services, or through government purchases."[254] The italicized language contemplates two types of transactions, the first occurring when the government provides goods or services (which may artificially lower production costs), and the second when the government purchases goods from an enterprise (which may artificially increase revenues).

Canada argued that there was in fact no provision of *goods* through the stumpage programs, because "standing timber" is not a good. Rather, goods are

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251. *Id.* ¶ 49.

252. SCM Agreement, *supra* note 30, art. 1.1 (footnote omitted, emphasis added by Appellate Body).

253. *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 51.

254. *Id.* ¶ 52.

only "tradeable items with an actual potential tariff classification."[255] Moreover, the conferring of an intangible right to harvest timber is not "provision" of the timber. "No," said the Appellate Body, which declined to delve into municipal law definitions of personal property and observed, perhaps in an understatement, "Canada's arguments in this regard are not convincing."[256] It is undisputed that trees are goods once they are harvested. Once again, the Appellate Body turns to the dictionary, which defines goods to include "tangible or movable personal property other than money."[257] Then, interestingly, the Appellate Body considered the scope of the term "bienes" or goods in Spanish, concluding that this term includes real property. Since the various language versions of the SCM Agreement are assumed to have the same meaning, "the ordinary meaning of the term 'goods' in the English version . . . should not be read so as to exclude tangible items of property, like trees, that are severable from land."[258] Nor must "goods" in Article 1.1(a) have the same meaning as "products" in Article II of the GATT; different words do not necessarily carry the same meaning in different contexts.

The Canadian interpretation of "goods" would also frustrate the purpose of the SCM Agreement, said the Appellate Body. If the scope of "goods" were so limited, it would facilitate circumvention of the Agreement by permitting a Member to make financial contributions granted "in a form other than money" as in the case at hand.[259] Nor was the Appellate Body persuaded that for standing timber to be considered "goods," the trees must be specifically and individually identified. This was irrelevant because the trees were fungible and the harvesters paid a stumpage fee only for the trees actually harvested. In this respect, the Appellate Body noted its analogous finding that in *Canada - Dairy*, where the provision of milk at discounted prices was found to constitute "payments" under the Agreement on Agriculture.[260]

Once the Appellate Body held that timber is a "good," a related question remained: do stumpage arrangements "provide" standing timber? Canada said no; only an intangible right to harvest timber is provided, and "provides" means something more – the actual furnishing of goods or services – not just the act of "making available." Not so fast, said the United States. When the government

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255. Canada's other appellant submission, para. 25, quoted in *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 54.

256. *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 62.

257. *US – Softwood Lumber CVD*, Panel Report, ¶¶ 7.23-7.24 (citing BLACK'S LAW DICTIONARY 701-702 (7th ed., B.A. Garner, ed., West, 1999)).

258. *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 59.

259. *Id.* ¶ 64.

260. *Id.* ¶ 66, citing WTO Report of the Appellate Body, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ¶ 13, WTO Docs. WT/DS103/AB/R, WT/DS113/AB/R (*adopted* Oct. 27, 1999).

(Canada) transferred ownership (of timber) by giving a right to take the goods, they were "providing" the goods within the meaning of Article 1.1(a)(1)(iii).[261]

Again, the Appellate Body made short shrift of the Canadian assertions, rejecting the narrow interpretation of the term "providing." It made no difference under Article 1.1(a)(1)(iii) of the SCM Agreement whether "provides" meant "supplies," "makes available," or "puts at the disposal of." The key issue was whether "all elements of the subsidy definition [providing a financial contribution, benefit, specificity] are fulfilled as a result of the transaction, irrespective of whether all elements are fulfilled *simultaneously*."[262] Goods or services that are simply made available by the government would not trigger the SCM Agreement unless these other elements of Article 1.1(a)(1)(iii) were also met. What was being "provided" here? As the Appellate Body noted approvingly, "the Panel found that stumpage arrangements give tenure holders a right to enter onto government lands, cut standing timber, and enjoy exclusive rights over the timber that is harvested."[263] The intangible right to harvest standing timber was effectively the same as providing the standing timber; that is, after all, the *raison d'être* of such stumpage arrangements. Consequently, the Appellate Body affirmed the panel's conclusion: "through stumpage arrangements, the provincial governments 'provide' such goods [standing timber to timber harvesters], within the meaning of Article 1.1(a)1(iii) of the SCM Agreement.[264]

b. Calculation of the Benefit[265]

As noted above, the DOC's preferred methodology in determining the magnitude of a subsidy is to compare the price of the good with the government subsidy to the price of similar or identical goods where determined in accordance with the market. In this instance, the DOC determined that there were "no usable market-determined prices between Canadian buyers and sellers" which could be used as the basis for analyzing whether provincial stumpage programs furnished goods (timber) at less than adequate prices.[266] As an alternative benchmark, DOC used stumpage in certain U.S. states situated near the Canadian border, with adjustments which allegedly accounted for differences in conditions between the Canadian provinces and those states. Canada strongly objected, and argued before the Panel that this use of U.S. stumpage prices as the benchmark violated various provisions of the SCM Agreement. The United States defended the DOC's

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261. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 68.

262. *Id.* ¶ 73.

263. *Id.* ¶ 57, citing *US – Softwood Lumber CVD*, Panel Report, ¶¶ 7.14-7.15.

264. *Id*. ¶ 75.

265. This section is based primarily on *US – Softwood Lumber CVD*, Appellate Body Report, ¶¶ 77-122.

266. DOC Decision Memorandum, *quoted in US – Softwood Lumber CVD*, Appellate Body Report, ¶ 77.

practice on the grounds that there was effectively no commercial stumpage market in Canada because that market was distorted by government intervention. Under such circumstances, the United States was justified in choosing as an alternative benchmark stumpage prices in northern border states in the United States.

The Panel sided with Canada, essentially concluding that in circumstances where a private stumpage market existed in Canada – as no one denied, Articles 10 and 32.1of the SCM Agreement required use of that market to set the benchmark price even if that market is distorted.[267] (The Panel found other less significant violations of those articles, but the use of U.S. stumpage prices as the benchmark was the principal one.) On appeal, the United States contended that the Panel was in error when it effectively required that *any* observed non-government prices in the exporting country be used as the benchmark, even where those prices had been "substantially influenced" or "effectively determined" by the government's financial contribution. The SCM Agreement, when it refers to "market conditions," could only mean the conditions in an undistorted market.[268]

Not so, said Canada. Article 14(d) of the SCM Agreement effectively requires a determination of prevailing market conditions in the country that is providing the subsidy. Use of in-country markets for comparison is not discretionary under the SCM Agreement. Moreover, there are obvious potential distortions when using a cross-border comparison, including a "broad range of other considerations that affect the comparison of forestry resources."[269]

For the Appellate Body, the first question is whether any benchmark other than private prices in the country providing the subsidy is permissible under the SCM Agreement. If so, under what circumstances may the investigating authority use a benchmark other than private prices in the subsidizing country, and what alternative benchmarks are open to the investigating authority? The key to this analysis is Article 14 of the SCM Agreement, which provides in pertinent part as follows:

> c. Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

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267. *US – Softwood Lumber CVD*, Panel Report, ¶ 7.64.

268. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 80, (quoting from the United States' appellant's submission, ¶ 8).

269. *Id.* ¶ 81, (quoting from Canada's appellee's submission, ¶¶ 51-52).

> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. *The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)*. (Emphasis added)

Since a benefit must be conferred through the provision of goods, the existence of a financial contribution alone is not a subsidy under the SCM Agreement. Moreover, as the Appellate Body observes, there is no benefit "unless provision is made for less than adequate remuneration."[270] The Panel had initially concluded, based on a "plain reading" of the highlighted text, that the "market which is to be used as the benchmark for determining benefit to the recipient is the market of the country of provision, in this case, Canada."[271] The Panel also rejected United States' contentions that "market" really means "fair market value" or a market that is undistorted by government intervention. For the Panel, it was sufficient that there existed in Canada "prices determined by independent operators following the principle of supply and demand, even if supply or demand are affected by the government's presence in the market."[272]

The Appellate Body was unwilling to accept the United States' contention that "market conditions" really means an undistorted market. However, the Appellate Body found significance in the "in relating to" language in Article 14(d). This language is not, as the Panel concluded, limited to meaning "in comparison with." It encompasses more than a rigid comparison, implying "relation, connection, reference." This, according to the Appellate Body, means that the language of Article 14(d) "did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision [of the financial contribution]." Of course, private prices in the country of provision cannot be disregarded; an administering authority seeking to use a different benchmark has to show that, "based on the facts of the case, the benchmark chosen relates or refers to, or is connected with, the conditions prevailing in the market of the country of provision."[273]

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270. *Id.* ¶ 84.

271. *US – Softwood Lumber CVD*, Panel Report, ¶ 7.50.

272. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 86, quoting the Panel Report, ¶ 7.60.

273. *Id.* ¶ 89.

The Appellate Body next sought to explain under what circumstances departure from private prices in the country of provision, which will "generally represent an appropriate measure of the 'adequacy of remuneration," is appropriate. The benefit has to be measured consistently with the guidelines set out in Article 14, but this simply establishes "mandatory parameters," and does not require a single methodology. If private prices in the country of provision are the *only* possible benchmark, the objective of Article 14 would be frustrated in circumstances where the government's role "in providing the financial contribution is so predominant that it effectively determines the price at which private sellers sell the same or similar goods." The exclusive use of private prices in the country of provision could lead to situations where "there is no way of telling whether the recipient is 'better off' *absent the financial contribution*," a required distinction requirement set out in *Canada - Aircraft.*[274] If the benchmark so determined is artificially low, or zero, the Member "could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[275]

When may investigating authorities use other members for calculating the benchmark price under Article 14? The Panel itself identified two situations: where the government is the only supplier and where the government administratively controls all prices.[276] The United States, on appeal, had argued for recognition of a third situation, i.e., where private prices are "substantially influenced" or "effectively determined" by the government prices.[277] In principle, the Appellate Body agreed with the United States: "we have some difficulty with the Panel's approach of treating a situation in which the government is the sole supplier of certain goods differently from a situation in which the government is the predominant supplier."[278] Again, this would frustrate the purpose of the SCM Agreement by undermining or circumventing the right of a Member to countervail as a result of a benchmark price that is artificially low or zero.

Consequently, "Article 14(d) permits investigating authorities to use a benchmark other than private prices" in the market of the country of provision. In

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274. *Id.* ¶ 93, citing WTO, Report of the Appellate Body, *Canada - Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/AB/R (Aug. 2, 1999), *adopted* Aug. 20, 1999.

275. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 95.

276. *Id.* ¶ 98, (citing the Panel Report, ¶ 7.57). It is notable that in the latter situation, usually found in non-market economies, the current U.S. policy is not to bring countervailing duty cases at all. *See George Steel Corp. v. United States*, 801 F.2d. 1308, 1315- 1318 (Fed. Cir. 1986) (upholding Commerce's conclusion that subsidies under the U.S. countervailing duty laws could not be determined in non-market economies, and that Congress intended that the American market be protected from unfair competition from non-market economies through the anti-dumping laws).

277. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 99, (citing United States' appellant's submission, ¶ 8).

278. *Id.* ¶ 100.

this sense, the panel was wrong and was reversed. However, the Appellate Body hastened to add that this possibility for using other benchmarks is very limited. An allegation of such distortion alone is not enough. Rather, the determination "must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[279]

What alternative benchmarks are permissible? Canada suggested a cost-of-production analysis similar to that provided in Article 2.2 of the Antidumping Agreement,[280] a proxy based on production costs, or a methodology examining whether government pricing is consistent with market principles. The United States suggested the use of world market prices for the good available in the country of provision, and an examination of the consistency of a proposed benchmark with market principles. The Appellate Body recognizes the possible appropriateness of these methodologies, but notes that it is not required to decide which may be acceptable in appropriate situations. Rather, the only issue before the Appellate Body in this case was whether the "specific alternative method used by USDOC in the underlying countervailing duty investigation" meets the requirements of Article 14(c).[281]

One problem, said the Appellate Body, is that the prices in one Member are not likely to reflect the market conditions in another Member. Thus, there is no presumption that prices in one Member relate or refer to, or are connected with, market conditions in another Member for purposes of Article 114(c). Many different factors may have

> to be taken into account in making adjustment to market conditions prevailing in one country so as to replicate those prevailing in another country . . . [I]t would be difficult to ensure that all necessary adjustment are made . . . so as to reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale in that other country.[282]

Even the Department of Commerce has acknowledged that "it may be difficult to achieve perfect comparability."[283]

What does this mean in the present case? The Panel erred in finding that that Commerce acted inconsistently with Articles 14 and 14(d) of the SCM Agreement, but the Appellate Body is not prepared to find that determination

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279. *Id.* ¶ 102-103.

280. Under Article 2.2 of the Antidumping Agreement, the determination of the margin of dumping is to be based on a comparison of the export price and, in order of preference, the home market price, third country prices, or "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."

281. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 107.

282. *Id.* ¶ 108.

283. *Id.* at n.132.

consistent with Article 14(d). Once again, the lack of remand authority for the Appellate Body – to send the case back to the Panel for additional fact-finding – made it impossible for the Appellate Body to "complete the legal analysis."[284] Because the Panel had already determined that the DOC use of U.S. timber prices was in violation of Article 14 (a determination reversed by the Appellate Body, see above), it did not determine whether DOC had sufficient evidence of price suppression in the Canadian market, analyze the alleged distortion of the dominant government presence, or otherwise establish that the private prices in Canada were distorted. Here, both Canada and the United States agreed that "there would be insufficient findings of fact by the Panel or undisputed facts in the Panel record to enable us to complete the legal analysis of this issue."[285] The facts and evidence necessary for the Appellate Body to complete the analysis are disputed; thus, no completion of the analysis is possible.

Moreover, even if the Appellate Body were to assume the DOC was justified in rejecting Canadian private timber prices, it would still have to determine whether the benchmark used by the DOC was consistent with Article 14(d). Again, the Panel made no findings of fact that would assist the Appellate Body in this determination, and Canada has challenged "most aspects of USDOC's decision to use cross-border prices, including the adjustment factors."[286]

d. The Requirement for a Pass-Through Analysis[287]

This issue, too, relates to calculation of the benefit of a subsidy under the SCM Agreement. In most instances, the process of harvesting standing timber, processing the logs into softwood lumber, and further processing lumber into remanufactured lumber products, is conducted by a vertically integrated enterprise. When a subsidy is directly paid to such an enterprise, the benefit of the subsidy accrues to that enterprise, and there is no need to conduct a pass-through analysis. However, in some instances, a log-producing enterprise receives the direct benefit of stumpage, and then sells some of the logs to an unrelated enterprise the processes the logs into lumber. In others, a producer of logs and lumber sells the lumber to an unrelated enterprise that produces remanufactured lumber products. Where such arm's-length transactions exist, a question arises as to whether the subsidy received by the timber harvester is passed-through to the unrelated lumber producer and/or remanufacturer.

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284. *Id*. ¶ 113.

285. *Id.* ¶ 114.

286. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 117.

287. The discussion in this section is based upon *US – Softwood Lumber CVD*, Appellate Body Report, ¶¶ 123-166, except as otherwise noted.

The Panel found that the DOC was required to conduct such a pass-through analysis both when timber harvesters sold logs to unrelated sawmills, and when integrated harvester/sawmills sold lumber to unrelated remanufacturers.[288] The United States agreed that in circumstances where a harvester did not produce lumber, but sold all of the logs it harvested to an independent lumber producer, a pass-through analysis would have been required. Canada had conceded that no pass-through analysis is required where there are no unrelated purchaser transactions as among harvesters, sawmills and remanufacturers.[289] However, the United States appealed the Panel's findings, noted above, that a pass-through analysis is required where the timber harvester is a producer of lumber (even where some of the logs are sold directly to independent lumber producers), and when that harvester/lumber producer sells to unrelated lumber remanufacturers. These situations, the United States contended, did not require a pass-through analysis; where both entities involved in the transaction produce products subject to the investigation (softwood lumber), the pass-through of the stumpage subsidy from the enterprise receiving the subsidy can be presumed.[290] Canada, of course, disagreed, asserting that a pass-through analysis was required whether the harvester sells logs or lumber to unrelated sawmills or lumber remanufacturers.[291]

In analyzing the claims, the Appellate Body relied both on Article VI of the GATT, and on Part V of the SCM Agreement. It noted that in *Brazil - Dessicated Coconut,* the Appellate Body ruled that countervailing duties must be imposed in accordance with both, and that "[i]f there is a conflict between the provisions of the SCM Agreement and Article VI of the GATT 1994 . . . the provisions of the SCM Agreement would prevail as a result of the general interpretative note to Annex 1A."[292] Here, as usual,[293] the Appellate Body found no conflict.

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288. *US – Softwood Lumber CVD*, Panel Report, ¶ 7.99.

289. *US – Softwood Lumber CVD*, Appellate Body Report, ¶ 127.

290. *Id.* ¶¶ 128-129.

291. *Id*. ¶ 132, (citing Canada's appellate submission, ¶ 65).

292. *Id.* ¶ 134, (quoting from WTO Report of the Appellate Body, *Brazil - Measures Affecting Desiccated Coconut*, WTO Doc. DSR 1997:I, 167,181 (Feb. 21, 1997), *adopted* Mar. 20, 1997, at 16). The Agreement Establishing the World Trade Organization, *General Interpretative Note to Annex IA* provides:

> In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA . . . the provision of the other agreement [e.g., the SCM Agreement] shall prevail to the extent of the conflict.

293. *See* Felix Mueller, *Is the GATT Article XIX "Unforeseen Developments Clause" Still Effective Under the Agreement on Safeguards?*, 37 J. WORLD TRADE 1119 (2003) (discussing the potential conflict between Article XIX and the Safeguards Agreement, the latter of which is totally silent on the possible requirement of "unforeseen circumstances"

In this particular instance, neither the SCM Agreement, Articles 10 and 32.1, nor Article VI of the GATT, provide any very specific guidance regarding the need for a pass-through analysis. Article 10 simply provides in pertinent part that:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement . . . .

Article 32.1 states that "[n]o specific action against the subsidy of another member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[294]

Article VI:3 of the GATT is slightly more helpful:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been *granted, directly or indirectly*, on the manufacture, production or export of such product in the country of origin or exportation . . . .[295]

The Appellate Body observed that the United States, according to Canada, failed to take "all necessary steps" under Article 10 of the SCM Agreement, violated Article 32.1 by imposing a subsidy in violation of the GATT, and imposed duties "without establishing the existence of indirect subsidization and failing to ensure that countervailing measures are not in excess of the subsidy found to exist."[296] The issue, according to the Appellate Body, is whether Article VI:3 of the GATT requires a pass-through analysis. If so, there is also a violation of the SCM Agreement provisions.

The Appellate Body stated the issue succinctly as follows:

> The phrase "subsid[ies] bestowed . . . *indirectly*" as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing

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before safeguard measures can be imposed, and noting the refusal of the Appellate Body to find a conflict).

294. Footnote omitted.

295. Italics added by the authors.

296. *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 136.

> products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the processed product. Where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed, however, that the subsidy bestowed on the input passes through to the processed product.[297]

Otherwise, there would be a possibility of levying countervailing duties in excess of the total amount of the subsidy accrued on the product. Thus, no countervailing duties can be assessed on the downstream product – lumber or reprocessed lumber in this instance – unless a pass-through of the benefit has been demonstrated.

The Appellate Body found additional support for its position in the definition of a subsidy in Article 1.1 of the SCM Agreement, which requires both a financial contribution and a benefit. If the subsidy is granted to the input product (here, timber) but the countervailing duties are to be imposed only on the processed product,

> it is not sufficient for an investigating authority to establish only for the *input* product the existence of a financial contribution and the conferral of a benefit to the input producer . . . The investigating authority must establish that a *financial contribution* exists; it must also establish that the benefit resulting from the subsidy has passed through, at least in part, from the input downstream, so as to *benefit* indirectly the processed product to be countervailed.[298]

In this situation, there is a possibility that the recipient of the subsidy, and the producer of the countervailed product, may not be the same. Nor will the precise amount of the subsidy be determined other than using a pass-through analysis; as indicated in *US - Countervailing Measures on Certain EC Products*, the "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation . . ."[299]

Therefore, where countervailing duties are to be imposed to offset subsidies granted to import product producers but benefiting processed products where the import producers and processors operate at arm's-length, it is the responsibility of the investigating authority to demonstrate "that the benefit conferred by a financial contribution directly on the input producers is passed

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297. *Id.* ¶ 140.

298. *Id*. ¶ 144.

299. WTO, Report of the Appellate Body, *US - Countervailing Measures on Certain EC Products,* WTO Doc. WT/DS212/AB/R (Dec. 9, 2002), *adopted* Jan. 8, 2003, ¶ 139.

through, at least in part, to producers of the processed product subject to the investigation."[300]

The discussion does not end here, however. The United States had defended its failure to conduct a pass-through analysis on the grounds that its investigation was carried out on an aggregate basis, covering vertically integrated firms as well as those which sold timber to unrelated sawmills, or sawmills which sold to unrelated lumber remanufacturers. Since exporters not investigated on an individual basis are nevertheless subject to countervailing duties, it follows that it was unnecessary (through a pass-through analysis) to determine if individual producers or exporters actually received the subsidies.[301] If a pass-through analysis was required for certain non-integrated log producer-sawmill transactions, or sawmill-remanufacturer transactions who were not individually investigated, the appropriate vehicle was an expedited review as provided under Article 19.3 of the SCM Agreement. Canada disagreed, contending that an aggregate investigation does not excuse the United States from conducting a pass-through analysis where that is necessary to establish the existence of a subsidy, and its amount.[302]

The United States was correct, says the Appellate Body, in asserting its right to perform the investigation on an aggregate basis based on Article 19.3 of the SCM Agreement, with the availability of an expedited review for an exporter whose exports were not individually investigated.[303] However, this fact "does not exonerate a Member from the obligation to determine the total amount of subsidy and the countervailing duty rate consistently" with the SCM Agreement and Article IV of GATT.[304]

In contrast, a pass-through analysis is *not* required in the case of all arm's length transactions affecting timber, sawmills and remanufacturers. All agree that

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300. *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 146.

301. *Id*. ¶ 148, (citing United States' appellant's submission, ¶¶ 31, 45-47).

302. *Id.* ¶ 150, (citing Canada's appellee's submission, ¶ 61).

303. Article 19.3 provides:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

304. *US – Softwood Lumber CVD,* Appellate Body Report, ¶ 154.

where a timber harvester which owns no sawmill sells logs to a sawmill, a pass-through analysis is needed. Why should it make a difference if that timber harvester uses some of its logs in its own sawmill, and sells other logs to unrelated sawmills? Where there is an arm's length sale of logs – products not subject to the investigation – to unrelated sawmill purchasers, even if the log seller also owns a sawmill, it may not be presumed that the benefits of the timber subsidy are passed through to the lumber; a pass-through analysis is required.

On the other hand, the situation in which timber harvesters process their logs into lumber and then sell the lumber to unrelated lumber remanufacturers is different. Here, both the harvester/sawmills and the remanufacturers are subject to the investigation. In requiring a pass-through analysis in this instance, "the Panel's reasoning confuses pass-through questions that may arise when individual enterprises are investigated, with questions arising in the calculation of the total amount and the rate of the subsidization on an aggregate basis."[305] If it can be shown that the benefits of a subsidy received by the input producers are passed through to the producers of the products subject to investigation, no further pass-through analysis, as *between* producers of the subject products, should be necessary. Thus,

> [i]n this situation, it is not necessary to calculate precisely how subsidy benefits are divided up between the producers of subject products in order to calculate, on an aggregate basis, the total amount of subsidy and the country-wide countervailing duty rate for those subject products.[306]

6. Commentary

a. The Overall Result - A Resounding Victory for the United States?

Despite the political and economic significance of this case, the actual issues on appeal, as discussed above, are rather prosaic to anyone but an experienced international trade lawyer. However, to many in the United States government, particularly those who had been dealing with softwood lumber for years or decades, the Appellate Body decision must have been welcome indeed. For years, Canadian authorities had been arguing that stumpage was not really a subsidy at all, but rather, a practice that simply reflected the differences in the timber market between Canada and the United States.[307] The Appellate Body

305. *Id*. ¶ 163.

306. *Id*.

307. *See, e.g.,* Statement by the Honorable Pierre Pettigrew [Minister of Foreign Affairs and International Trade] on U.S. Decisions on Softwood Lumber, Aug. 10, 2001

essentially agreed with the United States (and the EC and Japan as Third Participants) that stumpage was a subsidy that conferred a benefit under the SCM Agreement. While the Appellate Body did not endorse the DOC's methodology of using U.S stumpage prices (rather than private Canadian prices) as the benchmark, it allowed that such practice might be reasonable under circumstances under which the price of a relatively small volume of private stumpage in Canada could be distorted by the widespread availability of government-provided stumpage in the same market. The United States even won part of its appeal on the question of whether DOC erred in not doing certain pass-through calculations. The authoritative Appellate Body has vindicated the basic U.S. position advocated for more than two decades!

Of course, neither the United States nor Canada has yet prevailed in the CVD action. In April 2004, the United States and Canada announced that they had agreed on a date (December 17, 2004) for the United States to comply with the recommendations and rulings of the DSB.[308] At nearly the same time as Canadian lumber producers succeeded in obtaining a reduction of the countervailing duty rates from 19.34% to 1.88% as part of the NAFTA process, discussed in part b, below, DOC issued on December 16, 2004 a notice purporting to comply with the DSB recommendations. In that new determination, the CVD margins had been calculated based on DOC's conduct of a pass-through analysis of "certain sales of subsidized Crown logs, which Canadian parties claimed were sold at arm's length, to determine if the subsidy benefit 'passes through' to the purchasing sawmill."[309] Based on the recalculation, the new CVD rate was 18.62%! However, the revised rates from the original Commerce investigation were academic, because a few days later Commerce published the results of its first "administrative review," which superseded those determined by Commerce in March 2002. (Under the SCM Agreement and U.S. law, countervailing duty margins are reviewed periodically, usually on an annual basis.)[310] The new rate was 17.18%.[311] In other words, Canadian producers are back to square one, at

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(stating that "Canadian softwood lumber exports to the U.S. are not subsidized by federal and provincial programs), *available at* http://webapps.dfait-maeci.gc.ca/minpub/Publication.asp?FileSpec=/Min_Pub_Docs/104449.htm (last visited Feb. 10, 2005).

308. WTO, *Update*, *supra* note 22, at 187.

309. Dep't of Commerce, *Notice of Implementation Under Section 129 of the Uruguay Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75305 (Dec. 16, 2004). The reference is to a provision of the Uruguay Round Agreements Act, because under U.S law DOC's obligation to comply with the DSB ruling is based on a request by the U.S. Trade Representative to Commerce, "to issue a revised determination not inconsistent with the findings of the Appellate Body." *Id.* at 75306.

310. SCM Agreement, *supra* note 30, art. 21.2; 19 U.S.C. § 1675.

311. Dep't of Commerce, *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company -Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75917, 75919 (Dec. 20, 2004).

least insofar as the CVD rates are concerned. Of course, this Commerce re-determination is also going back to the WTO DSB, along with a request for sanctions in the amount of CDN$200 million![312] Absent a settlement, the case is again likely to be before the Appellate Body in 2005. The new administrative review rates are likely to reach the DSB as well.

Even if the United States methodology for calculating countervailing duties wins over the Appellate Body the second time around, the United States still does not necessarily get to keep applying countervailing duties to Canadian softwood lumber. Another WTO panel – in a decision that was not appealed – faulted the U.S. International Trade Commission's threat of material injury determination.[313] To assess countervailing and/or anti-dumping duties, there must be a finding not only of subsidization and dumping, but also that the subsidized or dumped imports constituted material injury or a threat of material injury.[314] With a defective injury finding, any application of countervailing or anti-dumping duties could no longer stand, and the United States agreed that it would "implement the recommendations and rulings of the DSB in a manner that respected its WTO obligations."[315] In November 2004, the USITC issued a determination purportedly consistent with the DSB's directions. This new USITC determination affirmed the original finding of threat of injury as a result of dumped and subsidized imports of softwood lumber for Canada.[316] Canada, not surprisingly, disagreed, and, in February 2005, a dispute panel was created to consider a Canadian request to impose CDN$ 4.25 billion (USD $3.4 billion) in sanctions as a result of the United States' alleged refusal to comply with the DSB ruling.[317]

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312. *See* Daniel Pruzin, *Canada to Seek WTO's Okay for $164 Million In Sanctions on U.S. Imports in Lumber Case,* 22 INT'L TRADE REP. (BNA) 25 (Jan. 6, 2005) (explaining Canada's plans and the legal basis for challenging the new U.S. determination).

313. *US – Softwood Lumber ITC Investigation*, Panel Report, *supra* note 243; *See* WTO, *Update*, *supra* note 22, at 141 (Indicating that the USITC acted inconsistently with the SCM Agreement in finding the likelihood of an imminent substantial increase in imports, and a causal link between imports and a threat of material injury to the U.S. domestic industry).

314. GATT, 1994, Art. VI:6.

315. WTO *Update, supra* note 22, at 187.

316. Rosella Brevetti & Peter Menyasz, *ITC Finds Threat of Injury from Softwood Lumber in Consistency Ruling,* 21 INT'L TRADE REP. (BNA) 1962 (Dec. 2, 2004); *see* USITC, Softwood Lumber from Canada Injures U.S. Industry, Says ITC, News Release 04-120, Nov. 24, 2004 (summarizing the Commission's determination).

317. *See* Daniel Pruzin, *Canada Seeks February 25 WTO Meeting to Consider Lumber Retaliation Request,* 22 INT'L TRADE REP. (BNA) 265 (Feb. 17, 2005) (summarizing the status of the dispute between the United States and Canada over implementation); Daniel Pruzin, *WTO Panel to Rule on U.S. Compliance In Softwood Lumber Row, Sanctions Request*, 22 INT'L TRADE REP. (BNA) 352 (Mar. 3, 2005) (noting the WTO action and Canada's assertions regarding the second USITC threat of injury determination).

b. WTO and NAFTA: Parallelism, Compliance and Convergence?

For unfair trade (anti-dumping, countervailing duty) disputes that involve two or more NAFTA partners, there is effectively a second international process for challenging actions of investigating authorities such as the U.S. Department of Commerce and the U.S. International Trade Commission, beyond the remedies offered by the DSB. Under NAFTA, the "interested parties" [primarily the softwood lumber producers on both sides of the border in this instance] may challenge DOC and USITC determinations in a unique[318] "binational panel" process that is effectively a surrogate for the national court system.[319]

The NAFTA system is not duplicative of the remedies available under the WTO's Dispute Settlement Understanding. In particular, NAFTA panel proceedings are initiated by the private interested parties in the administrative proceeding, and the applicable law is not the WTO agreements, but each country's domestic unfair trade laws.[320] The softwood lumber dispute is not the only one in which parallel remedies have been sought under the DSB and under NAFTA. Other instances include the dispute between the United States and Mexico over high fructose corn syrup (HFCS) which to date has resulted in actions before the DSB, a Chapter 19 NAFTA panel, and a pending request for a NAFTA Chapter 20 panel, the latter effectively blocked to date by the United States.[321]

Thus far, with respect to softwood lumber, both the Canadian interested parties and the Canadian government have availed themselves of both NAFTA and WTO remedies at every opportunity, keeping dozens of government and private sector lawyers busy. For example, Commerce's final countervailing duty determination was challenged almost immediately after its publication, before both a binational panel and the WTO DSB. That panel proceeding continued from June 2002 through December 2004, involving an initial panel decision and two remands to the DOC with directions to recalculate the countervailing duty rate in accordance with the panel's instructions.[322] In each instance the CVD rate has

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318. Although the NAFTA Chapter 19 process originated as Chapter 19 of the United States – Canada Free Trade Agreement, no Chapter 19 equivalent has been included in any of the subsequent free trade agreements negotiated by the United States, Canada or Mexico.

319. North American Free Trade Agreement, Dec. 8, 1993, U.S.-Can.-Mex., ch. 19, 32 I.L.M. 289 [hereinafter NAFTA].

320. NAFTA, Arts. 1904:1, 1904:2.

321. WTO, Report of the Appellate Body, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WTO Doc. WT/DS132/AB/RW/DSR 2001: XIII, 6675 (Oct. 22, 2001), *adopted* Nov. 21, 2001; NAFTA, *Final Decision: Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Court Syrup, Originating from the United States of America*, Case No. MEX-USA-98-1904-01 (Aug. 3, 2001).

322. NAFTA, *Decision of the Panel, In the Matter of Certain Softwood Lumber Products from Canada*, File USA-CDA-2002-1904-03 (Aug. 13, 2003); *see* NAFTA,

been reduced, from 19.34% in the amended final determination, to 13.23% after the first panel decision (January 12, 2004), to 7.82% after the ensuing remand (July 30, 2004), and to 1.88% after the second remand.[323]

However, the NAFTA panel process was at best a phyrric victory for Canada and its lumber producers. Because of the issuance of new rates through an annual review, as noted in part 1, above, of 17.18%, Canadian producers are back to where they began under NAFTA, at least insofar as future CVD rates are concerned. However, the case may not be moot with respect to the cash deposits already collected. In theory, based on NAFTA, Art. 1904, all cash deposits assessed for countervailing duties on Canadian source softwood lumber imports into the United States in excess of the 1.88% rate should be refunded. But the United States is balking.[324] Of course, this latest DOC determination was immediately appealed to a binational panel under NAFTA, Chapter 19.[325]

Decision of the Panel on Second Remand Decision of the Panel In the Matter of Certain Softwood Lumber Products from Canada, File USA-CDA-2002-1904-03 (Dec. 1, 2004), at 4 (reviewing the procedural history of the decision and two remands).

323. *Decision of the Panel on Second Remand*, *supra* note 322, at 4; Dep't of Commerce, *Third Remand Determination In the Matter of Certain Softwood Lumber from Canada; Final Affirmative Countervailing Duty Determination*, File no. USA-CDA-2002-1904-03 (Jan. 24, 2005) (copy on file with author). Such an extended series of remands may seem surprising, but results in part from a severe limitation on binational panel authority: a panel "may uphold a final determination, or remand it for action not inconsistent with the panel's decision." NAFTA, Art. 1904:8. Unlike a court, the panel has no authority to reverse the administrative determination. As a result, if the panel continues to believe that the methodology used by the administering authority is inconsistent with law, it may only continue to remand until the administering authority complies fully, in the panel's view, with the panel decision.

324. The United States is arguing that the excessive cash deposits cannot be refunded because the Chapter 19 Panel, unlike the Court of International Trade, has no authority to order the suspension of liquidation of entries pending litigation before the Panel, which would allow liquidation at the lower rate and refund of the deposits with interest. *See Canadian Trade Minister Criticizes U.S. Stance on Softwood Lumber Duties*, 22 INT'L TRADE REP. (BNA) 187 (Feb. 3, 2005) (quoting Canadian Trade Minister Jim Peterson as terming the U.S. position "wrong and invalid"). The U.S. position is questionable legally, if understandable as a negotiating ploy, since such entries with outstanding cash deposits are normally not liquidated until an annual review is concluded, as occurred here on December 20, 2004 (see above), and Commerce issues specific liquidation instructions to Customs and Border Protection. Also, under NAFTA, Article 1904(15), the NAFTA Parties were obligated to amend its laws to "give effect to a final panel decision that a refund [of antidumping or countervailing duties] is due."

325. Dep't of Commerce, *North American Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review*, 70 Fed. Reg. 4093 (Jan. 28, 2005).

B. Anti-Dumping Duties on Softwood Lumber from Canada – Zeroing Methodology

1. Citation:

United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (issued 11 August 2004, adopted 31 August 2004) (complaint by Canada).

2. Facts – A More Detailed Explanation of How Zeroing Works:

In September 2002, Canada commenced an action to challenge the American practice of "zeroing" when calculating a dumping margin in antidumping ("AD") cases. The case, known as *United States – Final Dumping Determination on Softwood Lumber from Canada* ("Softwood Lumber Zeroing"), was part of a larger war between the two countries that had raging since the mid-1980s – what may be called the "Lumber War."[326] Most of the battles in this war involved countervailing duty ("CVD") issues, principally, whether the Canadian government illegally subsidized softwood lumber exports.[327] However, the imposition of AD duties by the United States on this merchandise in May 2002, and the use by the Department of Commerce ("DOC") of the zeroing methodology, triggered this battle. The AD duties ranged from 2.18% to 12.44%, with an average of duty of 8.43%.

Those duties were imposed following the filing of an AD petition in April 2001 by the Coalition for Fair Lumber Imports Executive Committee, the Paper, Allied-Industrial, Chemical and Energy Workers International Union, and the United Brotherhood of Carpenters and Joiners, a final affirmative dumping margin by the DOC, and a final affirmative injury determination by the International Trade Commission ("ITC"). The subject merchandise was certain softwood lumber products imported from Canada, such as those used for floors and siding in the construction of residential homes and other edifices. A large number of Canadian companies exported the subject merchandise, so the DOC

326. The facts of the case are drawn from WTO, Report of the Panel, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc. WT/DS264/R ¶¶ 2:1-2:6 (*adopted as modified* by the Appellate Body Aug. 31, 2004) [hereinafter Panel Report, *Softwood Lumber Zeroing*]; WTO, *Update supra* note 22, at 137-39.

327. *See, e.g.*, *US – Softwood Lumber ITC Investigation*, Panel Report, *supra* note 243, (holding the United States violated Articles 3:5 and 3:7 of the *AD Agreement*, and Article 15:5 and 15:7 of the SCM Agreement in its final affirmative threat of injury determination, because the finding of likelihood of substantially increased imports was not consistent with these provisions, and the conclusion a causal link between imports and threat of injury rested on this inconsistent finding).

limited its dumping margin investigation to the six largest Canadian producer-exporters: West Fraser; Slocan; Tembec; Abitibi; Canfor; and Weyerhaeuser Canada. The period of investigation ("POI") was one year, specifically, April 1, 2000, to March 31, 2001.

Given the 2001 *EC Bed Linen* precedent, the outcome of the case was predictable.[328] To be sure, the Appellate Body discussed the relevance of the *Bed Linen* Report, quoting from its Reports in *Japan Alcoholic Beverages* and *Turtle Shrimp*, and noting the United States said it was not a party to that case (India and the EC were complainant and respondent, respectively), while Canada argued against the suggestion that each case stands on its own (because, said Canada, a major achievement is coherence in case law, even if there is no strict doctrine of *stare decisis*).[329] The fact is, as the Appellate Body said, it took account of the holding and rationale from *Bed Linen*.

More directly, the Appellate Body surely looked at *Bed Linen* as a precedent it could not avoid, an in effect a controlling case. In *Softwood Lumber Zeroing*, Canada made a number of claims under Articles VI and X of GATT, as well as under Articles 1-2, 5-6, and 9 of the WTO *Antidumping Agreement*. The Panel ruled against Canada on all claims, with one exception. The Panel held that the DOC violated Article 2:4:2 of the *Antidumping Agreement*, because it did not take into account all export transactions when it used the zeroing methodology to calculate the dumping margin. (Interestingly, one Panel member issued a dissenting opinion.) The United States appealed this finding, unsuccessfully in the end.

However, before discussing the outcome, it is critical to understand the facts of the case, in particular, how zeroing is performed and how it differs from "multiple averaging." Conceptually, the methodology the DOC employed involves eight steps, as follows.[330] A hypothetical illustration is provided, with all prices in U.S. dollars.

a. Step 1: Division into Product Groups

The subject merchandise, here softwood lumber, typically consists of several different types of product. While these groups are "like" products, they

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328. *See* WTO, Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, *supra* note 81; WTO, Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶¶ 2.1-2.11, 6.49-6.87, 6.102-6.119 (*adopted as modified* by the Appellate Body Report, Mar. 12, 2001). The *Bed Linens* case is discussed in RAJ BHALA, MODERN GATT LAW, *supra* note 150, ch. 26.

329. *See* Appellate Body Report, *Softwood Lumber Zeroing*, *supra* note 28, ¶¶ 109-112.

330. *See id.* ¶¶ 64-65; Panel Report, *Softwood Lumber Zeroing*, *supra* note 326, ¶ 7:185.

may not all be identical. Accordingly, the subject merchandise is divided into groups of identical or broadly similar product types.[331]

As a hypothetical example, suppose there are three product types of softwood lumber:

> (1) Siding Boards:
> Boards of dimension 2 inches thick by 4 inches wide, used for the siding of buildings.
> (2) Flooring Boards:
> Boards of dimension 2 inches thick by 2 inches wide used for interior floors.
> (3) Deck Posts:
> Pressure treated wood of dimension 4 inches thick by 4 inches wide used as posts for exterior decks.

In this hypothetical, the DOC would divide the general like product – softwood lumber – into these three product categories.

b. Step 2: Adjustments

Within each product group, the raw price data for Normal Value and Export Price (or, if required, Constructed Export Price) is assembled. Adjustments to Normal Value and Export Price are made. These adjustments assure (or, at least, enhance) the comparability of the price data on Normal Value from the home market of the exporter (here, Canada) and the price data on Export Price of the importing country (here, the United States).

Adjustments were not the prime focus of the appeal. Accordingly, in the hypothetical it is assumed all necessary adjustments are made and have not engendered controversy.

c. Step 3: Computation of Weighted Average Normal Value and Export Price Within Each Group (Multiple Averaging)

Within each product group, a weighted average Normal Value and weighted average Export Price is calculated. Neither the Appellate Body nor Panel Report chronicles the weighting process; presumably it concerns weighting for the volume or value of sales within the groups. The weighted average

331. The Panel refers to the different categories as groups, while the Appellate Body uses the term "sub-groups." There is no material difference, and the Panel's usage is followed above for the sake of brevity.

calculation yields Normal Value and Export Price in each group on a per unit basis, i.e., per unit of the product in that group.

Accordingly, the task performed in Step 3 is referred to as "multiple averaging." As the Appellate Body in *Softwood Lumber Zeroing* aptly described it, the task refers to "sub-dividing the product under investigation into sub-groups of comparable transactions and determining a weighted average normal value and a weighted average export price for the transactions in each sub-group."[332]

To continue the hypothetical, assume the results of Step 3 are:

(1) Siding Boards:		
Weighted Average Normal Value	=	$200
Weighted Average Export Price	=	$100
(2) Flooring Boards:		
Weighted Average Normal Value	=	$150
Weighted Average Export Price	=	$100
(3) Deck Posts:		
Weighted Average Normal Value	=	$110
Weighted Average Export Price	=	$250

The fact there are several weighted averages, namely, one set (Normal Value and Export Price) for each product category shows the rationale of the term "multiple averaging."

d. Step 4: Computation of Dumping Margin within Each Group

Within each product group, a dumping margin, if it exists, is calculated. This calculation is the simple comparison of the weighted average Normal Value against the weighted average Export Price. The result of Step 4 is multiple values, one for each group, which follow logically from multiple averaging in Step 3.

In the hypothetical illustration, this calculation yields the following results:

(1) Siding Boards:		
Weighted Average Normal Value	=	$200
Weighted Average Export Price	=	$100
Dumping Margin	=	+ $100
(2) Flooring Boards:		
Weighted Average Normal Value	=	$150
Weighted Average Export Price	=	$100
Dumping Margin	=	+ $50
(3) Deck Posts:		

332. Appellate Body Report, *Softwood Lumber Zeroing*, ¶ 68.

Weighted Average Normal Value	=	$110
Weighted Average Export Price	=	$250
Dumping Margin	=	– $140

Here, the multiple values are + $100, + $50, and – $140.

e. Step 5: Determination as to Whether Dumping Exists

An assessment as to whether dumping occurs – that is, whether there is a dumping margin – is needed. Thus, in Step 5, a positive dumping margin, i.e., where the weighted average Normal Value exceeds weighted average Export Price, is regarded as an instance in which dumping occurs. This occurrence is within the relevant product group. A negative dumping margin, i.e., where the weighted average Normal Value is less than the weighted average Export Price, connotes that no dumping exists. In the case, the DOC deemed that in such instances, no dumping margin exists for purposes of comparing prices from the investigated transactions.

Taking this approach in the hypothetical, there would be dumping in the first two groups, but not in the third group:

(1) Siding Boards:

Weighted Average Normal Value	=	$200
Weighted Average Export Price	=	$100
Dumping Margin	=	+ $100

Dumping exists.

(2) Flooring Boards:

Weighted Average Normal Value	=	$150
Weighted Average Export Price	=	$100
Dumping Margin	=	+ $50

Dumping exists.

(3) Deck Posts:

Weighted Average Normal Value	=	$110
Weighted Average Export Price	=	$250
Dumping Margin	=	– $140

No dumping occurs.

f. Step 6: Volume Weighting

The volume of export transactions is likely to differ from one product group to another. Suppose 75% of the transactions are in one product category, and 25% split across five other categories. The dumping margin (if any) in the

high-volume category should have greater weight in a final, overall dumping margin calculation than the dumping margin in the other five categories.

Consequently, it is necessary to adjust the results from each product group in Step 5 by putting weights on these results commensurate with the export volumes associated with each result. That is the purpose of Step 6. It is achieved by multiplying the difference in each category between the weighted average Normal Value and weighted average Export Price, *i.e.,* the Dumping Margin, by the volume of export transactions in that category.

For the sake of simplicity in the hypothetical example, assume that the volume of export transactions in the three product groupings – siding boards, floor boards, and deck posts – is equal. Therefore, the differences in each category calculated in Step 5 are per unit and reflect volume.

g. Step 7: Aggregation of Dumping Margins and Zeroing

To arrive at a single, overall dumping margin for the subject merchandise (in the case, softwood lumber), it is necessary to aggregate the results from the calculation of the differences between weighted average Normal Value and weighted average Export Price (Steps 4 and 5), as corrected for volume (Step 6). That is, it is necessary to sum up the results of the dumping margin calculation performed previously for each product group. This process is known as "aggregation," because it involves getting a single result for the subject merchandise by cumulating the results across all groups. The key point to note about this process is that zeroing occurs as part of the process.

In particular, for any product category in which the dumping margin is positive, i.e., where the weighted average Normal Value exceeds the weighted average Export Price, no change is made to that result. However, for any product category in which the dumping margin is negative (or zero), i.e., the weighted average Export Price exceeds the weighted average Normal Value, the result is set at a zero value. There is no dumping in these groups, as per Step 5, and zeroing literally refers to the change in the negative dumping margin value for such groups to a zero value. As the *Softwood Lumber Zeroing* Panel nicely put it, "zeroing" is "the process of attributing a 'zero' value to the individual product type comparisons where the weighted average export price is greater than the weighted average normal value for the same product type . . . ."[333]

Consider, then, the hypothetical example. The result for the first two categories is left alone. But, the result for the third category is zeroed.

(1) Siding Boards:
Weighted Average Normal Value = $200
Weighted Average Export Price = $100

333. Panel Report, *Softwood Lumber Zeroing*, ¶ 7:186.

Dumping Margin	=	+ $100
Dumping exists.		
Result left alone.		
(2) Flooring Boards:		
Weighted Average Normal Value	=	$150
Weighted Average Export Price	=	$100
Dumping Margin	=	+ $50
Dumping exists.		
Result left alone.		
(3) Deck Posts:		
Weighted Average Normal Value	=	$110
Weighted Average Export Price	=	$250
Dumping Margin	=	– $140
No dumping occurs.		
Result set to zero (0).		

With these facts, aggregation produces a dumping margin of + $150, which is the sum of $100 (siding boards), $50 (flooring boards), and zero (deck boards). It is crucial to appreciate that without zeroing, the aggregate dumping margin would be + $10. That amount, depending on other facts in the case, might be *de minimis*. Obviously, it is also possible to construct an example, without zeroing, in which the aggregate dumping margin is zero or negative, indicating that the non-dumped sales of deck posts offset the dumped sales of siding and flooring boards.

h. Step 8: Computation of Overall Dumping Margin

The final stage of the process is computation of a single figure for the dumping margin for the subject merchandise. Step 7 yields an aggregate dumping margin, based on adding the margins of the individual product categories and zeroing any negative margins. However, this aggregate margin is not corrected for the value of export transactions of subject merchandise. It is not clear whether it is based on a billion or a million dollars worth of imports, and thus has to be put into the perspective of the value of all export transactions. Therefore, the formula for the overall weighted average dumping margin is:

Weighted Average = $\frac{\text{Aggregate Dumping Margin (}i.e.\text{, sum of price comparisons across all product groups, setting as zero the result of any comparison in which the weighted average Export Price exceeds the weighted Overall average Normal Value)}}{\text{Overall average Normal Value}} \times 100$

Dumping Margin

Total Value of all Export Transactions of the Subject Merchandise

(*i.e.*, sum of the value of transactions in each product group, regardless of the result of price comparisons in the group)

In the *Softwood Lumber Zeroing* case, the Appellate Body pointed out the DOC included in the denominator of this formula the value of export transactions from all product categories. In other words, the DOC counted transactions not included in the aggregate dumping margin figure in the numerator by virtue of the zeroing methodology.

In the hypothetical example, suppose the value of export transactions in each product grouping is as follows:

Siding Boards:	$500
Flooring Boards:	$300
Deck Posts:	$400

(To be sure, by assumption in Step 6, the volume amounts are the same for each group. The differences in value, therefore, would be due to differences in per unit prices.) Inserting these figures, along with the hypothesized dumping margins for siding and flooring boards, and the zero value for deck posts, into the formula, the result is:

Overall Weighted Average Dumping Margin = Aggregate Dumping Margin (i.e., sum of price comparisons across all product groups, setting as zero the result of any comparison in which the weighted average Export Price exceeds the weighted average Normal Value) / Total Value of all Export Transactions of the Subject Merchandise (i.e., sum of the value of transactions in each product group, regardless of the result of price comparisons in the group) x 100

Overall Weighted Average Dumping Margin = $150 / ($500 + $300 + $400) x 100

Overall Weighted Average Dumping Margin	=	$150 / $1,200 x	100
Overall Weighted Average Dumping Margin	=	12.5 percent	

It is worth observing that if the value of transactions in product groups in which dumping does not occur, i.e., the zeroed groups, is excluded, then the denominator would be smaller. Consequently, the overall dumping margin would increase. In the hypothetical, it would be $800, which would mean an overall margin of 18.75%.

In sum, in the *Softwood Lumber Zeroing* case, the DOC applied a weighted average-to-weighted average comparison of Normal Value and Export Price, beginning with a division of products into groups of identical or similar softwood lumber products. Then, within the groups, the DOC made multiple comparisons of prices in the home market (Canada) and United States. To get weighted averages and compute a dumping margin, the DOC aggregated the results of the individual comparisons. However, using zeroing in aggregating the results, the DOC set a zero value wherever dumping did not occur, i.e., when Normal Value (the Canadian price, converted into U.S. dollars) was below Export Price (the American price).

3. Issue and Panel Findings:

Canada charged that zeroing inflated the margin of dumping and, consequently, the level of AD duty imposed. In brief, the comparison was unfair. The United States responded, unsuccessfully, with two arguments. First, adjustments to Normal Value and Export Price (such as for conditions and terms of sale) ensure a fair comparison. Second, it is permissible to exclude results of multiple comparisons in which the weighted average Normal Value is less than the weighted average Export Price, because such comparisons do not involve dumping.

Both the Panel and the Appellate Body eschewed a rush into the zeroing methodology. They asked, first, whether multiple averaging (Step 4) is permissible under Article 2:4:2 of the WTO *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*Antidumping Agreement*" or "*AD Agreement*").[334] This provision states:

334. *See* Appellate Body Report, *Softwood Lumber Zeroing*, ¶¶ 68-72.

> Subject to the provisions governing *fair comparison* in paragraph 4, the existence of margins of dumping during the investigation phase *shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions* or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.[335]

The Panel held that Article 2:4:2 permits multiple averaging. It focused on the word "comparable," and from it inferred the intent of the drafters of the *Antidumping Agreement*. Suppose the drafters meant to require a dumping margin always be calculated by comparing a single weighted average Normal Value against a single weighted average of prices from all export transactions. They would then have excluded the word "comparable" from the text of Article 2:4:2. That is, if every export transaction was to be included in calculating a dumping margin in every case, then the word "comparable" would serve no purpose in the text and the drafters would have left it out. However, the ordinary meaning of "comparable" suggests a weighted average Normal Value must not be compared to a weighted average Export Price that is derived (in whole or part) from non-comparable export transactions.

The Panel said a WTO Member may compare only comparable export transactions, but the Member must compare all comparable transactions. Aside from a bit of circularity and creating a false sense of profundity, the Panel may be criticized for creating an issue. As the Panel admitted and as the Appellate Body affirmed, neither Canada nor the United States thought Article 2:4:2 prohibits multiple averaging.[336] The key issue, of course, was whether this Article allows zeroing. The Panel said "no."[337]

The Panel applied the precedent in *EC Bed Linen*. In that case, the Appellate Body held that zeroing violated Article 2:4:2 because it excluded from

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335. Emphasis added.

336. *See* Appellate Body Report, *Softwood Lumber Zeroing*, ¶¶ 72, 80-82 (quoting the Panel's conclusion, which "*agreed with the parties to the dispute* . . . . [emphasis added by Appellate Body]")

337. *See id.* ¶¶ 67, 73-74.

consideration prices of some export transactions that are otherwise comparable. Specifically, the Appellate Body interpreted Article 2:4:2 as requiring consideration of all comparable export transactions when comparing weighted average Normal Value of the foreign like product to the weighted average Export Price of subject merchandise. Zeroing excludes the entirety of prices from export transactions in which the weighted average Export Price is greater than the weighted average Normal Value. Therefore, zeroing violates the Article 2:4:2 mandate to account for all "comparable" transactions involving all types of the product under investigation.

4. American Defenses of Zeroing:

What were the American arguments in defense of zeroing, and why did they fail to persuade the Appellate Body?[338]

a. "All Comparable Export Transactions":

First, the United States urged that the term "all comparable export transactions" in Article 2:4:2 of the *Antidumping Agreement* refers only to all comparable transactions with each product group. It does not refer to comparable transactions for the subject merchandise as a whole. Therefore, once all comparable export transactions are taken into account at the group level, the Article is satisfied, and the obligation to consider all such transactions does not extend to the aggregation stage. To interpret the Article differently, said the United States, would mean it is necessary to compare dumped and non-dumped transactions, as determined at the group stage, at the aggregation stage. Yet, non-dumped transactions are not "comparable." Indeed, Article VI:1 of GATT condemns dumping explicitly, and the *Agreement* does not recognize a negative dumping margin. If the results of non-dumped comparisons had to be included at

338. *See id.* ¶¶ 78-84, 88.

The United States offered two further arguments, each of which the Appellate Body dismissed in short order. First, the United States said it was reasonable to infer from the history of negotiations on the *Antidumping Agreement* that the drafters meant to permit zeroing. That is because they knew, at the time, that asymmetrical comparisons (*i.e.*, between individual export transactions and weighted average Normal Values) occurred in some AD investigations. They also knew zeroing took place. The drafters agreed (in Article 2:4:2 of the *Agreement*) to deal with asymmetric comparisons (essentially, constraining their use), but did not modify the *Agreement* to deal with zeroing. The Appellate Body said it was not reasonable to infer from this silence that the negotiators intended to condone zeroing. *See id.* ¶¶ 107-108. Second, the United States argued the Panel, in holding Article 2:4:2 prohibits zeroing, failed to apply the correct standard of review under Article 17:6 of the *Agreement*. The Appellate Body declined to find error by the Panel in this respect. *See id.* ¶¶ 113-16.

the aggregation stage, the effect would be to give offsets, without justification, to dumped amounts from non-dumped amounts.

b. "Dumping" and "Margin of Dumping":

Second, said the United States, the term "margin of dumping" in Article 2:4:2 refers to the results of comparing weighted averages for each product category in investigations in which multiple averaging is used. It does not refer to the dumping margin for the subject merchandise as a whole. Indeed, the term "margins of dumping" concerns the results of multiple comparisons in which Normal Value exceeds Export Price, and Article 2:4:2 does not address how to aggregate results from multiple comparisons in order to calculate an overall dumping margin for the product as a whole.

As explained below, the Appellate Body rejected both American defenses.[339] For now, it is interesting to observe the United States did not mount two other possible defenses of zeroing.

Arguably, as a policy matter, zeroing may be a useful tool to combat targeted dumping (i.e., dumping in certain markets of an importing country, but not other markets), geographic dumping (i.e., dumping in certain locations of the country, but not other places in that country), or sporadic dumping (i.e., dumping for certain periods, but not other periods). Likewise, the United States did not mount a jurisprudential defense of zeroing. For example, in some areas of the law, including felonies like homicide and misdemeanors like speeding, the fact an

339. Also on appeal were two technical points. First, the Appellate Body reversed a Panel finding the United States acted consistently with Article 2:2:1:1 (as well as Articles 2:2, 2:2:1, and 2:4) of the *Antidumping Agreement* when it calculated the amount of financial expense attributable to softwood lumber production by one Canadian company under investigation (Abitibi Consolidated Inc.). The DOC did not assess the pros and cons of alternative asset-based methods for allocating costs. Canada argued Article 2:1:1:1 requires the DOC to compare its own cost allocation methodology with the method used by producers, and expresses a preference for choosing an allocation methodology historically used by producers. The Panel held an investigating authority never is required to compare alternative allocation methods and analyze their advantages and disadvantages. The Appellate Body overturned this holding, saying simply Article 2:2:1:1 requires consideration of all available evidence, but how this obligation applies varies from case to case. However, the Appellate Body deemed it unnecessary to decide whether the United States violated the *Agreement* on this calculation. That is, it did not express a view as to whether the DOC should have compared methodologies. *See id.* ¶¶ 118-45, 183(b).

Second, the Appellate Body agreed with the Panel the United States did not act inconsistently with various provisions of the *Agreement* (specifically, Articles 2:2, 2:2:1, 2:2:1:1, and 2:4) when it calculated the amount for by-product revenue from the sale of wood chips by another investigated Canadian company (Tembec). *Id.* ¶¶ 146-82, 183(c); Rossella Brevetti & Peter Menyasz, *WTO Appellate Body Faults Commerce's "Zeroing" Methodology in Softwood Case*, 21 INT'L TRADE REP. (BNA) 1338, 1339 (Aug. 12, 2004).

accused did not commit a violation previously (e.g., did not kill or speed last month) does not offset the allegation it committed a violation on a different occasion (e.g., killed or sped today). Whether the Appellate Body might have been persuaded by such arguments is not the point. Rather, it is that the reader sets down the *Softwood Lumber Zeroing* Report with the half-empty feeling that no consideration of the practical or philosophical dimensions of zeroing has been given.

5. Appellate Body Holding and Rationale:

The Appellate Body upheld the Canadian claim and the Panel's conclusion that the United States did not act consistently with Article 2:4:2 of the *Antidumping Agreement* by calculating dumping margins using the zeroing methodology.[340] With respect to the first defense, the Appellate Body observed Article 2:4:2 of the *Antidumping Agreement* requires establishment of a dumping margin by comparing cross-border prices, usually by checking the weighted average Normal Value against the weighted average of prices from all comparable export transactions.

As the Panel had reasoned, the text of Article 2:4:2 uses the word "results," in respect of multiple comparisons of Normal Value and Export Price on all comparable export transactions. All of the results must be considered to calculate a dumping margin for a product type as a whole. As Canada argued, the word "all" operates to ensure every transaction is fully included in the calculation of a dumping margin, and the word "comparable" must relate to the entire product subject to investigation.[341] But with zeroing, only some of the comparisons in the process of calculating margins are accounted for, while others are disregarded. The effect is to pre-judge the outcome of an analysis that is supposed to determine whether dumping exists for the product, as whole, under the investigation.

The Appellate Body further said that the second American argument, that non-dumped sales may be excluded precisely because they do not involve dumping, rests on a faulty assumption. The argument assumes the terms "dumping" and "margins of dumping" used in Article VI of GATT and the *Antidumping Agreement* may be applied at the level of product groups. In truth, counseled the Appellate Body, the terms apply to a product as a whole, and calculation of a dumping margin for a product requires consideration of all the results from price comparisons.

Looking at the definition of "dumping" in Article VI:1 of GATT ("*products* of one country are introduced into the commerce of another country at

340. *See* Appellate Body Report, *Softwood Lumber Zeroing*, ¶¶ 117, 183(a); Rossella Brevetti & Peter Menyasz, *WTO Appellate Body Faults Commerce's "Zeroing" Methodology in Softwood Case*, 21 INT'L TRADE REP. (BNA) 1338, 1339 (Aug. 12, 2004).

341. *See* Appellate Body Report, *Softwood Lumber Zeroing*, ¶ 83.

less than the normal value of the *products*"), and the definition in Article 2 of the *Agreement* ("a *product* is . . . dumped . . . if the export price of the *product* . . . is less than the comparable price for the like *product* . . . ."), the Appellate Body focused on the word "product."[342] "Product" means dumping can "be found to exist only for the product under investigation as a whole, not to a type, model, or category of that product." Put simply, the American defense stressed the term and concept of "dumping" in Article VI:1 and Article 2. The Appellate Body opinion countered by focusing on what is dumped, and thus emphasized the word "product" in those texts.

If "dumping" refers to the entirety of subject merchandise, then *a fortiori* calculation of a margin of dumping, by whatever methodology, refers to the whole product also. Indeed, that was a holding in the *EC Bed Linen* case, and in *Softwood Lumber Zeroing* the Appellate Body cited this precedent:

The Appellate Body found in *EC – Bed Linen* that "[w]hatever the method used to calculate the margins of dumping . . . these margins must be, and can only be, established for the *product* under investigation as a whole." While "dumping" refers to the introduction of a product into the commerce of another country at less than its normal value, the term "margin of dumping" refers to the magnitude of dumping. As with dumping, "margins of dumping" can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.[343]

Another way the Appellate Body explained the point was that the results of multiple comparisons at the level of product groups, based on multiple averaging, do not establish a "margin of dumping" as that term is used in GATT Article VI:2 and Article 2:4:2 of the *Antidumping Agreement*.[344] Rather, comparisons at the group level are intermediate calculations. Only by aggregating all of the intermediate values is a "margin of dumping" for a product as a whole established.

In this line of reasoning, the logical final step was to reject the American position that the relevant texts do not address aggregation of the results of multiple comparisons.[345] To the contrary, said the Appellate Body, there is no textual basis in Article 2:4:2 of the *Antidumping Agreement* to justify taking into account results from only some multiple comparisons in calculating a dumping margin, but disregarding other results. The Appellate Body intoned:

> Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not taken into account the *entirety* of the *prices* of *some* export

342. *See id.* ¶¶ 92-93 (emphasis added by Appellate Body).
343. *Id.* ¶ 96 (emphasis original).
344. *See id.* ¶ 97.
345. *See id.* ¶ 98.

> transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.[346]

In brief, to establish a dumping margin in a proper manner, margins for all results must be aggregated, because the terms "dumping" and "margins of dumping" as used in GATT Article VI and the *Antidumping Agreement* apply to a product under investigation as a whole, not to sub-categories of subject merchandise.

To support this final step, the Appellate Body pointed out that in an injury determination, and in an investigation into the causal link between dumped imports and injury to a domestic industry, a product as a whole is considered.[347] Separate injury and causation determinations are not rendered for specific product groupings, but rather for subject merchandise as a whole. Why, then, the Appellate Body queried, should it be any different for the dumping margin?

Thus, in *Softwood Lumber Zeroing*, the Appellate Body essentially ruled as it had in *EC Bed Linens*: zeroing is inconsistent with the *Antidumping Agreement*. However (as discussed in the Commentary below), zeroing is not (yet, anyway) illegal in all instances. In *Softwood Lumbering Zeroing*, the Appellate Body said its ruling was limited to the use of zeroing in the context of a weighted average Normal Value-to-weighted average Export Price comparison. Whether zeroing could be used when an investigating authority applies the individual transaction-to-individual transaction, or the individual transaction–to–weighted average comparison, remains uncertain.

6. Commentary:

a. Facts and Redundancy

In *Softwood Lumber Zeroing*, the Appellate Body committed two easily observable stylistic errors. To be fair, these errors plague many writers (including the present authors!). Their cure is better editing with a view to focusing on the purpose for which the publication is intended. For the Appellate Body, presumably that purpose is to advance the impressive and growing body of its jurisprudence, making it more persuasive to an ever-wider audience.

First, the *Softwood Lumber Zeroing* decision is replete with redundancies. To take one of several instances, Paragraph 90 of the Report explains that the participants in the case agree all comparable export transactions must be accounted for to establish a dumping margin. The Appellate Body offers

346. Appellate Body Report, *Softwood Lumber Zeroing*, ¶ 101.
347. *See id.* ¶ 99.

essentially the same explanation in Paragraphs 72 and 80-82. The cumulative effect of recounting this and other points by the Appellate Body is to cross the line delineating a helpful reminder from *ad nauseum* repetition.

Admittedly, editing for redundancy is not easy, particularly when the written product must be finished under a tight deadline (a deadline made yet tighter by the obligation to translate the product into French as well as Spanish). Further, as any law teacher appreciates, there is value in repetition, especially in slightly different formulations. But reading an Appellate Body Report is not the same as being in a foreign language class, where practice and drill is the indispensable pedagogical method. When the purpose is persuasion, sometimes less is more.

Second, in *Softwood Lumber Zeroing*, both the Panel and the Appellate Body seem to have forgotten a discussion of "facts" in the Introduction to a Report ought to be just that. The reader must sift through far too many pages, and consult a number of journalistic accounts, to figure out what the facts of the case are. Lawyers are trained in the first year of law school how to brief a case. Briefing requires an organized mind. Typically, the brief includes some (or all) of the following headings: facts; issue; judgment; holding; rationale; and commentary. Sometimes, in briefing a particular case, it is useful to merge a few of the categories. At times, it is advisable to consider categories for the winning and losing arguments, as legal argumentation is dialectical, but that is another matter. Yet, virtually all the time, it is useful to think in these categories.

To be sure, a judge is not paid to write opinions to ease the task of briefing for first year law students. But a judge ought not to fail at the task of organizing the elements of a case into widely understood cognitive categories, and the starting point of any case, in any country, at any time, is the category of "Facts." A statement at the outset of the opinion of what exactly transpired yields a document that is more by virtue of its clarity and efficiency. In turn, the interest of justice – for the parties to the case and for lawyers advising clients in the future based on the jurisprudence of the case – is served.

b. The Narrow Legal Issue and Judicial Incrementalism

The Appellate Body took pains to narrow the legal issue.[348] It stressed that the issue was not a broadside attack against the methodology of zeroing, i.e., the methodology as such was not at issue. Rather, the issue was whether zeroing was permissible in a specific context: a comparison of weighted average Normal Value against weighted average Export Price. Article 2:4:2 establishes three ways to compute a dumping margin: comparing weighted averages (the average-to-average method), comparing individual transaction prices (the individual-to-individual method), or, in rare cases, comparing average-to-individual prices (the

348. *See id.* ¶¶ 63, 76-77, 104.

average-to-individual method). The Appellate Body said the use of zeroing in the other two contexts was not within its current subject matter jurisdiction.

True enough, and perhaps the Appellate Body softened the blow against the United States. But, only a naïve observer could view the ruling as anything less than dramatic. For the second time in just over three years, the Appellate Body struck down zeroing methodology, once as used by the one major trade hegemon, the EU, and the second[349] and third times as employed by the other major power and strategic trade competitor of the EU, the United States.[350] The Appellate Body had not provided any strong basis in either case to believe that, if confronted with a zeroing problem in the context of the individual-to-individual or average-to-individual methodology, it would rule differently from either *Bed Linens* or *Softwood Lumber Zeroing*. Thus, the Appellate Body, through the accretion of precedents, was dismantling zeroing. This incremental approach is politically savvy, perhaps, insofar as it is some evidence the Appellate Body is not an activist adjudicator ruling on issues not strictly in front of it.

At the same time, the Appellate Body is not incrementalist in all respects. Consider that the following sentence, in support of its reasoning that "dumping" and "margins of dumping" (as used in Article VI of GATT and Article 2:4:2 of the *Antidumping Agreement*) can be established only for a product under investigation as a whole:

> Thus, having defined the product under investigation, the investigating authority *must* treat that *product* as a whole for *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping.[351]

As a proposition, this statement makes sense and supports the reasoning of the Appellate Body. However, it is put more as an imposition. The word

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349. See also the discussion of *US – Carbon Steel Sunset Review*, *infra* Part IIC of this Case Review.

350. The EU sided with Canada in the case (as did Japan, which like the EU, was a third party on appeal), arguing (*inter alia*) there is in principle no difference between its methodology at issue in *Bed Linens* and the zeroing practiced by the DOC, and (in rebuttal to the first American argument discussed above) that once multiple averaging occurs, all transactions are "comparable." Why, exactly, the EU felt compelled to "pile it on" the United States is not apparent. To be sure, this forum is not the place to evaluate the degree to which the two powers are "strategic competitors" on trade issues, nor to consider what it means and what the implications are. The point is to suggest the label, which seems reasonable enough given the pattern of disputes and negotiations in the WTO, and efforts at regional trade agreements, over the last many years.

351. *See* Appellate Body Report, *Softwood Lumber Zeroing*, ¶ 99 (emphasis on "must" added).

"must" imparts to the sentence the character of a holding, yet the other purposes were not at issue in the case. In a Report plagued by redundancy, the Appellate Body might have done better to pen this sentence more carefully to ensure jurisprudential consistency with its incremental approach to zeroing. Whether a broader dismissal of zeroing would have altered U.S. government policy on zeroing, discussed in the introduction to this 2004 WTO Case Review, is a more difficult question.

C. Challenging Sunset Reviews I – Carbon Steel Flat Products

1. General Introduction to Sunset Reviews

A Sunset Review (also called an "Expiry Review") of an antidumping ("AD") or countervailing duty ("CVD") order is all about the duration of punishment. The baseline rule is five years, *i.e.*, that punishment for the condemned practice of dumping (condemned, that is, by GATT Article VI), or for receipt of an illegal subsidy (illegal, that is, under the WTO *Agreement on Subsidies and Countervailing Measures*) ought not to last longer than five years. The baseline may be fudged, however, if lifting an order would lead to the recurrence of unfair trade.

When that allegation is made, a Sunset Review is a battle about extending the duration of punishment. One side says the punishment has not yet reformed the violator, and the other side says it has. In *Oil Country Tubular Goods* ("*OCTG*"), as in *United States – Carbon Steel Flat Products, supra,* this battle was fought.[352]

By way of legal background, GATT is silent as to the permissible duration of punishment – or, what is more familiarly referred to in the trade bar as "relief" – in an AD or CVD case. By inference from the first sentence of Article VI:2, the relief ought not to outlive the practice of dumping. Article 11 of the WTO *Antidumping Agreement* takes up that inference, with Paragraph 1 stating as a general rule: An anti-dumping duty shall remain in force *only as long as and to the extent necessary* to counteract dumping which is causing injury.[353]

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352. *See* WTO, Report of the Panel, United States – Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina, WTO Doc. WT/DS268/R (*adopted as modified* by the Appellate Body Nov. 29, 2004) [hereinafter Panel Report, *OCTG*]. The Appellate Body Report is United States – Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina, WTO Doc. WT/DS268/AB/R (adopted Nov. 29, 2004) [hereinafter Appellate Body Report, *OCTG*].

353. Emphasis added. *See also* JUDITH CZAKO, JOHANN HUMAN & JORGE MIRANDA, A HANDBOOK ON ANTI-DUMPING INVESTIGATIONS 7-8 (2003). For a detailed discussion of not only Sunset Reviews, but also Changed Circumstance (or Interim) Reviews under Article 11:2 and New Shipper Reviews under Article 9:5, *see id*. at 88-91.

Article 11 also clarifies that any party can request the relevant authority to review the continuation of an AD order. This request is likely whenever market prices, or pricing strategies, have changed in a manner to affect the dumping margin.

Significantly, pursuant to Article 11:3 of the *AD Agreement*, no AD order can continue beyond five years from the date of its original imposition, *i.e.*, there is a five-year "sunset" on every AD order. This provision states:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty *shall be terminated on a date not later than five years from its imposition* (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), *unless* the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty *would be likely to lead to continuation or recurrence of dumping and injury*. The duty may remain in force pending the outcome of such a review.[354]

The exception is if a "Sunset Review" is conducted and shows that dumping and injury would be likely to recur if the order is lifted.[355] This Review requires a prospective, counter-factual determination – what would happen if, by hypothesis, the order terminates? Notably, the Review can be self-initiated, and (however initiated) is supposed to be finished within one year.

Sunset Reviews are new to multilateral AD law and to the statutes of most, if not all, WTO Members being introduced after the Uruguay Round. Not surprisingly, therefore, the jurisprudence on them is small and certain to evolve in

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354. Emphasis added. A footnote at the end of the first sentence states:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under sub-paragraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

355. *See United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, *supra* note 83, ¶ 104, 111, (stating the conditions under Article 11:3 for extending the life of an AD or CVD order beyond five years are determinations that expiry of the order would be likely to lead to continued or recurred dumping and injury, and emphasizing the words "review" and "determine" in Article 11:3 mandate a "reasoned conclusion" as part of a process of "reconsideration and examination"); Appellate Body Report, *OCTG*, ¶¶ 177-81, *supra* note 352, (recalling its findings from *Japan Carbon Steel*).

the future. At least initially during the Uruguay Round, the United States opposed inclusion of a Sunset Review rule in either the *Antidumping Agreement* or the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").[356] Perhaps not surprisingly, after the Round concluded, other WTO Members contemplated formal challenges against the American Sunset Review law.[357]

In a 2002 Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, the Appellate Body held the United States Sunset Review rules did not violate Article 21:3 of the *SCM Agreement*.[358] The Panel (with one of its members dissenting) ruled the United States violated this provision by applying a 0.5 percent *de minimis* standard to Sunset Reviews, but the Appellate Body overturned this finding. The second and third cases are discussed herein.

2. Citation

United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R (Dec. 15, 2003), adopted Jan. 9, 2004 (Complaint by Japan, with Brazil, Chile, EC, India, Korea and Norway as Third Participants)

3. Facts[359]

This case is a relatively narrow and technical challenge to aspects of two broader and more troublesome issues, that is, the proper methodology for the conduct by the Department of Commerce ("DOC") of the "Sunset Review"

356. *See* Daniel Pruzin, *Argentina Seeks WTO Dispute Talks with U.S. on Steel Antidumping Duties*, 19 INT'L TRADE REP. (BNA) 1801 (Oct. 17, 2002).

357. The United States Sunset Review law is set forth at Sections 751(c) and 752 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1675(a), (c). The implementing regulations of the International Trade Commission and Department of Commerce, *Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, are published at 19 C.F.R. 207.60-69 and 351.218. The Commerce Department also publishes a Sunset Policy Bulletin, formally titled *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*, 63 Fed. Reg. 18, 871-01 (Apr. 16, 1998).

358. *See* WTO, Report of the Appellate Body, *Corrosion-Resistant Carbon Steel Flat Products from Germany*, WTO Doc. WT/DS213/AB/R (*adopted* Dec. 19, 2002). This case is discussed in detail in Raj Bhala & David A. Gantz, *WTO Case Review 2002*, 20 ARIZ. J. INT'L. & COMP. LAW 143-289 (2003).

359. WTO, Report of the Appellate Body, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc. WT/DS244/AB/R ¶¶ 2-8 (Dec. 15, 2003), *adopted* Jan. 9, 2004, [hereinafter *US – Carbon Steel Sunset Review*, Appellate Body Report].

required by Article 11.3 of the Anti-Dumping Agreement, and the reliance, in such proceedings, of margins earlier determined with the "zeroing" methodology, the latter discussed in detail in the Introduction to this Case Review and in the analysis of *US - Softwood Lumber Zeroing*.

The DOC has frequently been criticized for its methodology regarding Sunset Reviews – the mandatory review after five years of an anti-dumping order to determine whether it should be continued in force.[360] In making its determinations as to whether revocation of an anti-dumping order "would be likely to lead to continuation or recurrence of dumping"[361] the DOC essentially assumes that if the order were to be revoked, dumping would continue or recur at the highest level found during the initial investigation or any administrative review of the dumping margins.

Thus, as discussed *infra*, unless the domestic industry indicates that it does not wish the order to continue in force, the DOC virtually always has concluded in Sunset Reviews that revocation would lead to continuation or recurrence of dumping. This result occurs even if recent annual reviews have found an absence of dumping of the imported product. As Japan pointed out in the course of this appeal, in a total of 227 Sunset Reviews in which the U.S. domestic industry had contended that the anti-dumping duties should be continued, the DOC had *never* reached a negative determination, terminating the Anti-Dumping Order.[362] The approach of the U.S. International Trade Commission ("USITC") has been considerably different, with a full factual investigation conducted in circumstances in which both the domestic and foreign parties agree to participate in a full injury investigation and submit the required information.[363] If either the DOC or the USITC recommends the termination of the Anti-Dumping Order, the order is terminated.[364] As a result, some foreign respondents skip the process before the DOC and concentrate their resources on a Sunset Review before the USITC.[365]

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360. *See* 19 U.S.C. § 1675(c) (specifying the requirements for a "Five-year review" by the Commerce Department and the International Trade Commission).

361. Antidumping Agreement, Art. 11.3.

362. Japan's appellant's submission, ¶ 161, cited in *US – Carbon Steel Sunset Review*, ¶¶ 170, 184.

363. See 19 C.F.R. §§ 206.61-207.62 (setting out the requirements for interested party petitions for Sunset review and criteria for assessing their adequacy).

364. Article 11.3 effectively requires a determination that expiry of the order would lead to a continuation or recurrence of dumping [by DOC in the United States] *and* a determination that the expiry would lead to a continuation or recurrence of injury [by the USITC].

365. For example, in the Sunset Review of the anti-dumping order concerning color picture tubes from Japan, Korea, Malaysia and Canada, in 1999, the foreign producers were successful in obtaining the termination of the orders based on a USITC finding that termination of the order would not lead to injury to the domestic CPT producers. (One of the authors, David Gantz, represented one of the Korean CPT producers in that

The zeroing issue comes to play because dumping margins for the initial investigation and annual reviews of carbon steel flat products from Japan were conducted using the discredited (but not yet flatly WTO illegal) zeroing methodology.

This particular appeal involves Japan's challenge of various provisions of the Tariff Act of 1930, as amended – containing the United States' dumping laws implementing the WTO Antidumping Agreement,[366] as inconsistent with Articles VI and X of the GATT 1994 and Articles 2, 3, 5, 6, 11, 12 and 18 of the Anti-Dumping Agreement.

4. Major Issues Upon Appeal[367]

The appeal raises a number of important, if largely technical, issues regarding not only the proper conduct of a Sunset Review, but also the nature of government documentation that may be challenged under the WTO Agreements. According to the Appellate Body, five issues were raised:

> (a) Whether the Panel was correct in its determination that the DOC's "Sunset Policy Bulletin," a document providing guidance to interested parties that is neither a statute nor a regulation, is not a "mandatory legal instrument" and thus cannot be challenged as a "measure" challengeable under the WTO Agreement or the Anti-dumping Agreement;
> (b) Whether the United States acted inconsistently with Articles 2.4 or 11.3 of the Anti-Dumping Agreement by relying in the DOC Sunset Review on dumping margins from prior administrative reviews calculated using a "zeroing" methodology;
> (c) Whether the United States acted inconsistently with Articles 6.10 or 11.3 of the Anti-Dumping Agreement, in following its Sunset Policy Bulletin directive in making the Sunset Review determination on an "order-wide" (rather than company-specific) basis;

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proceeding.) The foreign CPT producers chose not to participate in the parallel Sunset Review procedures before the Department of Commerce, believing that the outcome – a finding that the termination of the order would lead to renewed or continued dumping – was a foregone conclusion.

366. Tariff Act of 1930, as amended, Sections 731 *et seq*., especially sections 751-752 of the Act, codified at 19 U.S.C. §§ 1631-1677n, particularly 19 U.S.C. §§ 1675(c) and 1675a. These latter sections constitute the U.S. statutory implementation of the AD Agreement provisions relating to Sunset Reviews.

367. Based on *US – Carbon Steel Sunset Review*, Appellate Body Report, *supra* note 359, ¶ 72.

> (d) Whether the United States acted inconsistently with Article 11.3 of the Anti-Dumping Agreement, again following the Sunset Policy Bulletin directive, in this instance with regard to the DOC's conclusion that dumping was likely to recur if the order were to be lifted; and
> (e) Whether the Panel was correct in determining that the United States otherwise acted consistently with the Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement, with regard to the Sunset Policy Bulletin. [Affirmed without extensive discussion, and not discussed in this review.]

5. Holdings and Rationale

a. Challenging the Sunset Policy Bulletin[368]

The Sunset Policy Bulletin is a document apparently unique to U.S. law. The Anti-Dumping Agreement (and other WTO Agreements) are not self-executing under the U.S. legal system. Rather, as the Appellate Body notes, the requirement for Sunset Reviews under Article 11.3 of the Anti-Dumping Agreement became part of U.S. law through the enactment of the Uruguay Round Agreements Act ("URAA"),[369] which incorporated what are now sections 751(c) and 752 of the Tariff Act of 1930, as amended.[370] The DOC's regulations[371] provide more detailed rules and procedures for the conduct of sunset reviews. The Sunset Policy Bulletin ("SPB") provides yet a third layer, setting out "policies regarding the conduct of five-year ('sunset') reviews . . . pursuant to the provisions of sections 751(c) and 752 . . . and [DOC's] Regulations."[372] The DOC, in preparing the SPB, relied on the "legislative history" of the URAA, including the Statement of Administrative Action.[373] In the words of the DOC, the Sunset Policy Bulletin is "intended to complement the applicable statutory and regulatory

368. Discussion drawn from *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶¶ 73-101.

369. Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994).

370. 19 U.S.C. §§ 1675(c) and 1675a**.**

371. 19 C.F.R. § 351.214 (2005).

372. Policies Concerning the Conduct of Five Year "Sunset Reviews" of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 18,871-01 (Dep't of Commerce Apr. 16, 1998) (policy bulletin).

373. The Statement of Administrative Action, which accompanies any trade agreement submitted to the U.S. Congress under the "fast-track" provisions through which such agreements are considered, "represents an authoritative expression by the Administration concerning its views regarding the interpretation of the Uruguay Round agreements." Statement of Administrative Action, H.R. 5110, 103d Cong., 2d Sess. (1994), at 656.

provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations."[374] The relevant provisions of the SPB, according to the Appellate Body, were those which were entitled "Determination of the Likelihood of Continuation or Recurrence of Dumping."

Japan had argued before the Panel that various provisions of the SPB were inconsistent with U.S. obligations under the Anti-Dumping Agreement. However, the Panel refused to address those charges, essentially on the grounds that the SPB is not a mandatory legal instrument, and thus is not a "measure" or otherwise challengeable under the WTO Agreement.[375] In Japan's view, the SPB constituted "actionable administrative procedures" where could be challenged under the Anti-Dumping Agreement and the WTO Agreement.

The Appellate Body began its analysis by stressing that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement provisions."[376] An instrument of a Member with rules or norms could constitute a "measure." It is irrelevant how they are applied in a particular instance; the objective of security and predictability of future trade would be frustrated if such instruments could not be challenged in the WTO. Under such circumstances, "allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[377] Nor, as the Appellate Body stated in *US - 1916 Act*, are there any obvious limitations "on a panel's jurisdiction to entertain claims against *legislation as such.*"[378] Further, the Appellate Body reminds that it has defined "measure" broadly in *Guatemala - Cement I*: "In the practice established under the GATT 1947, a "measure" may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government."[379]

According to the Appellate Body, in Article 18.4 of the Anti-Dumping Agreement, "the phrase 'laws, regulations and procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings."[380] The Panel's approach was too narrow, both in its focus on the mandatory/discretionary distinction where addressing the impact of the SPB, in

374. 63 Fed. Reg. 18871-18872, *supra* note 372.

375. *US – Carbon Steel Sunset Review*, Panel Report, ¶ 7.246.

376. *US – Carbon Steel Sunset Review,* Appellate Body Report, ¶ 81.

377. *Id.* ¶ 82.

378. *Id.* ¶ 83, referring to *United States - Anti-Dumping Act of 1916*, WTO, Report of the Appellate Body, WT/DS213/AB/R, WT/DS162/AB/R (Aug. 28, 2000), *adopted* Sept. 26, 2000.

379. WTO, Report of the Appellate Body, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS60/AB/R ¶ 69 n.47 (Nov. 2, 1998), *adopted* Nov. 25, 1998.

380. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 87.

concluding that the SPB provides only "guidance" in the sunset review process,[381] and in further concluding that the SPB is only an "administrative procedure." The Panel was wrong on all counts, and the SPB is in fact challengeable as such under the WTO Agreement.[382] Japan's challenges thus must be examined.

b. General Requirements of Article 11.3[383]

Article 11.3 of the Anti-dumping Agreement provides in pertinent part as follows:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review . . .), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[384]

As the Appellate Body notes, Article 11.3 requires the termination of an anti-dumping duty unless there is a review; that there is a determination that expiry of the duty would lead to continuance or recurring of dumping; and there is a determination that expiry of the duty would likely lead to continuation or recurrence of injury.

In this case the issue is the determination that the expiry of the order would be likely to lead to continuation or recurrence of dumping. Since Article 11.3 does not contain a definition of dumping, the administering authority must necessarily refer to Article 2.1 of the Anti-Dumping Agreement:

> 2.1 *For the purpose of this Agreement*, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the

381. *Id.* ¶ 95.

382. *Id.* ¶ 102-115.

383. Discussion based on *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶¶ 102-115.

384. A footnote provides in essence that even if the most recent review finds no dumping that "shall not by itself require the authorities to terminate the definitive duty."

> like product when destined for consumption in the exporting country. (emphasis added)

This definition applies necessarily to Article 11.3 determinations, in a process that necessarily combines "both investigatory and adjudicatory aspects."[385] Moreover, for the Appellate Body, Article 11 "suggests to us that authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply."[386] Further, the Panel was correct in concluding that Article 11.3

> precludes an investigating authority from simply assuming that likelihood [of dumping or injury of the duty is allowed to expire] exists. . . [T]he investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation and recurrence."[387]

c. Dumping Margins Used in the Sunset Review[388]

One of the most significant aspects of the DOC's sunset review was that it did not calculate any new margins for imports of corrosion resistant carbon steel flat product from Japan. Rather, DOC relied on the dumping margins that it had calculated in the course of two prior "administrative reviews."[389] Here, as normally, the DOC conducted the reviews on a company-specific basis. One participant in the sunset review, NSC, focused on the fact that dumping margins for NSC had decreased from 12.51% to 2.47% from the first to the second of these administrative reviews, instead of objecting to the methodology used by the DOC or the fact that the DOC was relying on administrative review dumping margins.[390]

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385. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 111.

386. *Id.* ¶ 113.

387. *US – Carbon Steel Sunset Review*, Panel Report, ¶ 7.271, *quoted in US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 114-115.

388. Discussion based on *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶¶ 116-138.

389. Under the U.S. anti-dumping system, the dumping duties posted upon entry of the product are only estimates. After the goods are imported, the DOC normally determines the actual dumping margins based on imports during the (normally one year) period of review, and assesses the actual duty amounts, refunding excess cash deposits or collecting additional duty amounts. 19 U.S.C. § 1675(a).

390. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 117.

Japan challenged the DOC's use of prior administrative review results in the sunset review on grounds that the DOC had used a "zeroing" methodology that was inconsistent with the requirements of Article 2.4 of the Anti-Dumping Agreement. The Panel had rejected this challenge by drawing a distinction between the determination of dumping in Article 2.4 and the determination of likelihood of continuation or recurring of dumping under Article 11.3, and concluding that DOC reliance on these administrative reviews was not precluded by Article 11.3.[391]

Significantly, the Appellate Body began its discussion by confirming that the investigating authority is *not* required to calculate new dumping margins in sunset reviews. As the Appellate Body noted, "in a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping."[392] However, if the investigating authority relies on earlier-calculated dumping margins, those margins must be calculated in a manner consistent with Article 2.4 of the Anti-Dumping Agreement; if they were legally flawed, "this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement."[393] Nor does it matter that NSC failed to object to the DOC's administrative review methodology; Japan is not precluded by that failure from raising the issue here. As the Appellate Body stated in *US - Lamb*,

> [I]n arguing claims in dispute settlement, a *WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities by the *interested parties* during the domestic investigation, even if the WTO Member was itself an interested party in that investigation. (original emphasis)[394]

Under these circumstances, the Panel was incorrect in concluding that the United States did not act inconsistently with Article 11.3 by relying on earlier margin calculations using the "zeroing" methodology.

The Appellate Body referred also to its anti-zeroing decision in *EC - Bed Linen*, in which the Appellate Body concluded that this methodology "inflated the result from the calculation of the margin of dumping" and that such process was not a "fair comparison" between the export price and normal value as required

391. *US – Carbon Steel Sunset Review,* Panel Report, ¶ 7.184.

392. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 124.

393. *Id.* ¶ 127.

394. WTO, Report of the Appellate Body, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 113, WTO Doc. WT/DS177/AB/R, WT/DS178/AB/R (May 10, 2000), *adopted* Jun. 7, 2000.

under Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.[395] Further, the Appellate Body observed that in addition to inflating margins, zeroing "could, in some instances, turn a negative margin of dumping into a positive margin of dumping." Moreover, "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[396] However, in this instance, there is insufficient data on U.S. zeroing practice in the two administrative reviews for the Appellate Body to complete the analysis, and the United States thus escaped a decision on the merits of zeroing.

d. May the Likelihood Determination be on an Order-Wide Basis?[397]

As the Appellate Body recognized, Japan effectively argued that under Article 11.3, the investigating authorities in a sunset review are required to "make a separate determination, for each individual exporter or producer, of whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping by that exporter or producer."[398] However, under the Sunset Policy Bulletin, "the Department [of Commerce] will make its determination of likelihood on an order-wide basis."[399] In this, as in other sunset reviews, the DOC made the determination on an order-wide basis, that is, a single likelihood determination applies to all foreign producers.

The Panel failed to examine whether the Anti-Dumping Agreement required the DOC to use a producer-specific analysis for sunset reviews, as it does under Article 6.10, because of its threshold determination that the SPB was not a measure challengeable under the WTO Agreements. Since the Appellate Body has already reversed this determination of the Panel, it proceeded to consider the Japanese claim. However, the Appellate Body found nothing in the language of Article 11.3 that required a company-specific determination, rather than an order-wide determination, in contrast to the reviews discussed in Articles 11.1 and 11.2, which refer explicitly to "any interested party" and [i]nterested parties."

The Appellate Body also found support for an industry-wide approach in Article 9.1 of the Anti-Dumping Agreement, which, as the United States argued, "makes clear that the definitive duty is imposed on a product-specific (i.e., order-

395. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 134, referring to *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, supra* note 81, ¶ 55.

396. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 135.

397. *Id.* ¶¶ 139-163.

398. *Id.* ¶ 140.

399. 63 Fed. Reg. 18872, *supra* note 357, at Sec. II.A.2.

wide) basis, not a company-specific basis."[400] The Appellate Body further notes that "when the drafters of the Anti-Dumping Agreement intended to impose obligations on authorities regarding individual exporters or producers, they did so explicitly."[401] The drafters did not do so in Article 11.3. Thus, where Article 6.10 states that "as a rule" dumping margins are calculated "for each known exporter or producer concerned" the principle is not relevant to sunset reviews under Article 11.3. The SPB, therefore, is not inconsistent with Articles 6.10 or 11.3 of the Anti-Dumping Agreement in providing for a likelihood determination on an order-wide basis.

e. Relevant Factors in the Likelihood Determination[402]

The essence of Japan's argument was that the SPB unduly limited the DOC's ability to consider the facts fully. Rather, according to Japan, the SPB required DOC to make an affirmative decision whenever one of three scenarios existed, and permitted a negative determination only "if a single 'virtually impossible' scenario exists." Japan also objected to the imposition on the interested parties the burden of showing "good cause" before DOC could consider other relevant factors.[403]

Here again, the Panel had declined to consider Japan's arguments on the merits because of its view of the SPB as not being challengeable under the WTO Agreements.

The Appellate Body proceeded to complete the analysis, beginning with an analysis of the relevant Sunset Policy Bulletin provisions (incorporating the criticized "scenarios"):

> II. Sunset Reviews in Antidumping Proceedings
>
> A. *Determination of Likelihood of Continuation or Recurrence of Dumping*
>
> . . .
>
> Likelihood of Continuation or Recurrence of Dumping
>
> . . .
>
> The Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where –

400. *US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 150, (quoting from United States' appellee's submission, ¶ 34).

401. *Id.* ¶ 152.

402. *Id.* ¶¶ 164-207.

403. *Id*. ¶ 164.

(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.

4. No Likelihood of Continuation or Recurrence of Dumping

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased. Declining margins alone normally would not qualify because the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See section II.A.3, above. In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share. Such information should be provided to the Department by the parties.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the elimination of dumping coupled with steady or increasing import volumes may not be conclusive with respect to no likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.

. . .

C. *Consideration of Other Factors*

The SAA at 890, also notes that the list of factors is illustrative, and that the Department should analyze such information on a case-by-case basis.

> Therefore, the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. With respect to a sunset review of a suspended investigation, where the Department determines that good cause exists, the Department normally will conduct the sunset review consistent with its practice of examining likelihood under section 751(a) of the Act.[404]
>
> * * *

According to Japan, the thrust of these provisions is to limit the DOC to considering only the historical dumping margins and import volumes. This, coupled with the "good cause" requirement, produces a biased process. As proof, Japan noted that of 227 sunset reviews, the application of the SPB rules quoted above resulted in a continuation of the duty in all cases.[405] The United States, in contrast, insisted that the "outcome in each case is determined on the facts of that particular case and must be supported by the evidence on the record of the sunset review at issue."[406] However, the United States also noted before the Panel that dumping margins and import volumes are the primary standard for making sunset review determinations based on their "highly probative" value to the determination.

The Appellate Body was generally sympathetic to the United States. However, it questioned whether these two factors are "highly probative" in all cases. A presumption that these two factors alone would be sufficient for a determination that expiry of the duty would lead to continuation or recurrence of dumping would only have validity if dumping had continued since the order. In the other two scenarios (3(b) and 3(c) in the passage quoted above), the result "could well have been caused by or reinforced by changes in the competitive conditions of the market-place or strategies of exports, rather than by the imposition of the duty alone."[407] Under these circumstances, a case-specific analysis is required: "We believe that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping."[408]

That being said, the Appellate Body seemed to accept the United States assertion that "there is never an automatic presumption" and that "the outcome

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404. 63 Fed. Reg. 18872-18874, *quoted in US – Carbon Steel Sunset Review*, Appellate Body Report, ¶ 169.

405. *US – Carbon Steel Sunset Review,* Appellate Body Report, ¶ 170.

406. *Id.* ¶ 171, quoting United States' appellee's submission, ¶ 67.

407. *Id.* ¶ 177.

408. *Id.* ¶ 178.

depends on the facts of the case,"[409] even when Japan argued that the consideration of "good cause" arguments and the permissibility of demonstrating "other factors" has been rare in DOC practice (15 cases for good cause and only 5 of the 15 for consideration of other factors, out of 227).[410] Ultimately, however, the Appellate Body declined to rule on whether the SPB provisions are inconsistent with the Anti-Dumping Agreement because of the lack of factual findings by the Panel. At best, the Appellate Body issued a dictum (and perhaps a warning):

> [T]hese considerations cannot override the obligation of investigating authorities, in a sunset review, to determine, on the basis of all relevant evidence, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping. As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create "irrebuttable" presumptions, or "predetermine" a particular result, run the risk of being found inconsistent with this type of obligation.[411]

On substance, the facts did not support Japan. As noted earlier, several Japanese companies were found to have dumped during the two administrative reviews, and the import data submitted by the Japanese interested parties showed that imports had slowed following the imposition of the anti-dumping order. The Panel found these factors to constitute "a sufficient factual basis to allow it [DOC] to reasonably draw the conclusions concerning the likelihood of such continuation or recurrence [of dumping] that it did."[412] The Appellate Body agreed. Where Japan complained that DOC failed to collect or evaluate its own evidence, the Appellate Body observed that "the Anti-Dumping Agreement assigns a prominent role to interested parties as well and contemplates that they will be a primary source of information in all proceedings conducted under that agreement."[413] Nor under U.S. regulations and the published initiation notice is there any confusion concerning what information must be submitted by interested parties, and at what time it must be submitted; NSC was aware of and took advantage of these opportunities to submit data, but did not submit evidence of other factors.[414]

According to the Appellate Body, the result was that "in this case, there appears to be sufficient justification for USDOC's reliance on the dumping

409. *Id.* ¶ 182.
410. *US – Carbon Steel Sunset Review,* Appellate Body Report, ¶ 188.
411. *Id.* ¶ 191.
412. *US – Carbon Steel Sunset Review*, Panel Report, ¶ 197.
413. *US – Carbon Steel Sunset Review,* Appellate Body Report, ¶ 199.
414. *Id.* ¶¶ 201-203.

margins and import levels as well as the inferences it drew from this data . . . . In our view, it was not unreasonable for USDOC to conclude that *both* of these factors [administrative review margins and levels of imports] pointed in the same direction, that is, toward likely future dumping."[415] The Panel's similar finding was therefore affirmed.

6. Commentary

a. United States' Sunset Methodology Largely Approved – or Was It?

In this case, the Appellate Body did not find any provisions of the United States *Sunset Policy Bulletin* (discussed below) to violate either the *Agreement Establishing the World Trade Organization* ("*WTO Agreement*") or *Antidumping Agreement*. Despite Japan's allegations that the American Sunset Review rules set an unjustifiably high standard for withdrawing an AD measure, contained an inappropriate method for determining dumping margins, and treated respondents unfairly, the Panel disagreed, and the Appellate Body also sided with the United States.

Thus, it is acceptable for DOC to rely largely, if not exclusively, on prior administrative reviews showing dumping, and on reduced imports, as the basis of continuing the dumping order in force. While the Appellate Body suggested that presumptions may be inconsistent with the investigating authority's obligation to use positive evidence in each case for a determination, the DOC obviously met the minimum requirements here. Nor was the Appellate Body swayed by the overall sunset review data: 227 reviews undertaken, 0 dumping orders revoked. The DOC was also affirmed for its industry-wide, rather than producer-specific, approach – an approach that is probably a necessity given the enormous volume of sunset reviews undertaken.

While the United States technically lost its arguments that the Sunset Policy Bulletin should not be challengeable under the WTO Agreements (it is a measure, and it is irrelevant whether it is mandatory or not), the practical impact on DOC practice is minimal. The underlying content of the SPB survives. Regardless of its precise legal status, the DOC's largely successful effort at improving the transparency of the Sunset Revisions process – the SPB was duly published in the Federal Register – is to be highly commended.

415. *Id.* ¶ 205.

b. Use of Zeroing in Sunset Reviews Lives for Another Day

If there is an Achilles Heel in the DOC's sunset review process, it is the use of zeroing in the administrative reviews that the DOC relies upon for its sunset determinations. DOC gets a breather here because the Appellate Body could not complete the analysis. However, there are no doubt dozens of sunset reviews which resulted in the continuation of the anti-dumping order which relied on administrative reviews using zeroing methodology. Some of those, presumably, would have resulted in zero or *de minimis* (0.5% under U.S. practice) margins if zeroing had not been used. It remains to be seen how many such reviews are brought to the DSB.

D. Challenging Sunset Reviews II – Oil Country Tubular Goods from Argentina

1. Citation:

United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R (issued 29 November 2004, adopted 29 November 2004) (complaint by Argentina).

2. Facts:

This *OCTG* case is the third, and possibly most prominent (thus far), in this line of Sunset Review cases. As its title suggests, oil country tubular products are used in the oil and gas industry, and include drill casings, drill pipes, and steel tubes. The United States imports these products from (*inter alia*) an Argentine company called *Siderca S.A.I.C.*, and in June 1995 imposed a 1.36% AD duty on these imports.

The initial AD investigation, leading to this duty, occurred in 1994, before the birth of the WTO and the entry into force of the *Antidumping Agreement*, and it thus followed pre-Uruguay Round rules. Siderca was the only respondent participating in the original investigation (though the DOC calculated a residual duty at the same rate, 1.36%, for other Argentine exporters). After the order was imposed, Siderca ceased exporting oil country tubular goods to the United States. During the five-year life of the AD order, the United States Department of Commerce ("DOC") initiated four administrative reviews, all at the request of American producers of oil country tubular goods. However, in these reviews, Siderca explained that it did not ship these goods to the American market, and the DOC ended each review. In July 2000, the DOC self-initiated a

Sunset Review of the order on oil country tubular goods manufactured by Siderca.[416]

Argentina challenged the Sunset Review, which of course occurred after the *Agreement* entered into force, of the order affecting *Siderca*. The DOC conducted, with the International Trade Commission ("ITC"), the Review on an expedited basis. (A Sunset Review entails two conceptual determinations: a likelihood-of-dumping determination, i.e., whether dumping is likely to continue or recur if the order is lifted, and if so, at what margin; a likelihood-of-injury determination, i.e., whether material injury is likely to continue or recur if the order is lifted.[417]) The DOC apparently expedited its Review for three reasons. First, the DOC deemed the responses submitted by Siderca to its notice of initiation of the Review to be inadequate.[418] Second, Siderca was the lone respondent.[419] Third, Siderca accounted for significantly less than the threshold of 50% of total imports of oil country tubular goods from Argentina to the United States between 1995 and 1999.[420]

Based on its expedited Review, published in November 2000, the DOC concluded that dumping is likely to continue or recur at the 1.36% margin if the order is lifted. The DOC reported its conclusion to the ITC, which published its final likelihood-of-injury determination in June 2001. The ITC said material injury is likely to continue or recur if the order is lifted. In July 2001, the DOC issued a determination to continue the AD order.

3. Issue and Panel Rulings:

The problem in this Sunset Review, from the perspective of the complainant, Argentina, was that the respondent, the United States, did not listen. That is, in Sunset Reviews conducted by the United States, Argentina claimed (as Japan did in the earlier case) that the result was all but a foregone conclusion – the punishment would continue. As explained below, the Appellate Body did not share the Argentine perspective.

The gravamen of Argentina's claim arose under Article 11:3 of the WTO *Antidumping Agreement*.[421] Argentina alleged American Sunset Review law

416. The facts of the case are set forth in Appellate Body Report, *OCTG*, *supra* note 352, ¶¶ 1-11; Panel Report, *OCTG*, *supra* note 352, ¶¶ 2:1-2:7; WTO, *Update*, *supra* note 22, at 56-57.

417. *See* Appellate Body Report, *OCTG*, ¶ 3 at n.8.

418. *See* Daniel Pruzin, *WTO Panel Delays Ruling on U.S. Duties on Oil Drilling Equipment from Argentina*, 21 INT'L TRADE REP. (BNA) 454 (Mar. 11, 2004).

419. *See* Panel Report, *OCTG*, ¶ 2:5.

420. *See id.* ¶ 2:5. Regulations of the DOC contain this threshold.

421. This provision of the *Agreement* was the focus of the claim and rulings. *See* Appellate Body Report, *OCTG*, ¶ 152(a)-(c); Panel Report, *OCTG*, ¶¶ 8:1(a)(i)-(ii), 8:1(b)-(c); WTO, *Update*, *supra* note 22, at 56-57.

contains an irrebuttable presumption that dumping is likely to continue or recur if an AD order is lifted.[422] Argentina objected specifically to the so-called "waiver" provision in that law.[423] First, argued Argentina, the law obliges the DOC to conclude that continued dumping is likely without conducting a substantive Review as to whether the earlier circumstances of dumping continue to exist. The DOC (as well as the ITC) is supposed to make an "objective" determination, using "positive evidence." Second, the provision rides roughshod over the right of an interested party to defend itself in a sunset review.

In July 2004, a WTO Panel ruled in favor of the Argentine claim. The Panel held the American Sunset Review law (Section 751(c)(4)(B) of the *Tariff Act of 1930*, as amended, codified at 19 U.S.C. Section 1675(c)(4)(B)), as well as the DOC's implementing regulations (specifically, 19 C.F.R. Section 351.218(d)(2)(iii)) and the American Sunset Review policy (published in the *United States Sunset Policy Bulletin*, specifically, Section II.A.3 of the *Bulletin*) violated Article 11:3 of the *Antidumping Agreement*.[424] The law, regulations, and policy, held the Panel, were inconsistent with the obligation in that Article to render a determination on the likelihood of continuation or recurrence of dumping. Without this determination, it is illegal to maintain an AD order beyond five years. However, Section 751(c)(4)(B) of the *1930 Act* allowed the DOC to conclude dumping is likely to continue if an AD order is removed if the firm that is the target of the order waives its right to participate in the Sunset Review investigation. Section 351.218(d)(2)(iii) of the regulations state that a target firm is deemed automatically to waive its right to participate in the investigation if it fails to file with the DOC a "complete substantive response" to a notice of initiation of the Review published by the DOC.

Thus, the central conceptual issue in the *OCTG* case was whether an investigating authority is obliged to carry out a new determination in a Sunset

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Argentina raised arguments under Articles 1-2, 3:1-3, 3:4-5, 5, 6:1, 6:2, 6:8, 12:1, 12:3, and 18 as well, plus Articles VI and X of GATT and Article XVI:4 of the *Agreement Establishing the World Trade Organization*. The more notable among these claims are mentioned in the Commentary below.

In addition, with respect to deemed waivers under the regulations of the DOC, and conduct by the DOC, the Panel found a violation of Article 6:1 of the *Antidumping Agreement*. Concerning the Sunset Review by the DOC of Siderca, the Panel found a violation of Article 6:2. However, with respect to the Sunset Review of Siderca conducted by the DOC, the Panel found no inconsistency with Articles 6:1, 6:8, or 12 of the *Agreement*. This finding was not appealed. *See* Appellate Body Report, *OCTG*, ¶¶ 4-7.

422. *See* Daniel Pruzin, *U.S. Appeals WTO Ruling on Sunset Review of Dumping Order Against Argentine OCTG*, 21 INT'L TRADE REP. (BNA) 1484 (Sept. 9, 2004).

423. *See* Daniel Pruzin, *WTO Appellate Body Rules on Claims Against U.S. Sunset Review Procedures*, 21 INT'L TRADE REP. (BNA) 1965 (Dec. 2, 2004).

424. The *Sunset Policy Bulletin* is published at 63 Fed. Reg. 18, 871 (Apr. 16, 1998). Both the Panel and Appellate Body agreed the *Bulletin* is a "measure" subject to WTO dispute settlement, and cited to the *Carbon Steel* holding. *See* Report of the Appellate Body, *OCTG*, ¶¶ 182-89.

Review, with respect to a firm that is a target of an AD order, of whether continued dumping is likely if the order is terminated.[425] Under the American Sunset Review Law challenged by Argentina and found illegal by the Panel, the DOC could maintain its original determination of dumping and injury and thereby conclude that the target firm would likely continue dumping if the firm waives participation in the Sunset Review by, for instance, failing to provide adequate answers in a timely manner to questions posed by the DOC. That is precisely the conclusion the DOC reached with respect to Siderca. The Panel stopped short of finding the American law was entirely inconsistent with the *Antidumping Agreement*, and did not call upon the DOC to revoke the order against Siderca.[426] However, the Panel agreed with Argentina that the waiver provision, in particular, ran afoul of Article 11:3 of the *Agreement*.

4. Holdings and Rationale:

The Appellate Body upheld the finding of the Panel that the waiver provisions of American Sunset Review law breached Article 11:3 of the *Antidumping Agreement*. By "waiver provisions," or "deemed waiver provisions," the Panel and Appellate Body referred to Section 751(c)(4)(B) of the *1930 Act* (19 U.S.C. Section 1675(c)(4)(B)), and 19 C.F.R. Section 351.218(d)(2)(iii) of the regulations of the DOC.[427] The Appellate Body also

425. *See* Daniel Pruzin, *Argentina Welcomes WTO Ruling Against U.S. Sunset Review on OCTG*, 21 INT'L TRADE REP. (BNA) 1078, 1079 (June 24, 2004).

426. For instance, the Panel declined to hold that the American standard for determining whether termination of an AD order is "likely" to lead to recurred dumping violates the *Antidumping Agreement*. Argentina had argued the standard violates Article 11:3 (as well as Articles 2 and 11:4) because it equates "likely" injury with "possible" injury, and thus is biased in favor of maintaining an order. (Argentina also said the *de minimis* standard in American law violates Articles 5:8 and 11:3 of the *Agreement*, because it is inconsistent with the 2 percent *de minimis* threshold of the *Agreement*. That threshold requires termination of an AD investigation if the margin is below 2 percent.) Argentina's argument was not without merit. In an April 2002 decision, the United States Court of International Trade ("CIT") held the ITC failed to prove it interpreted the word "likely" to mean "probable" rather than "possible." The case involved a Sunset Review of AD and CVD relief against carbon steel plate products from Belgium and Germany. *See Usinor Industeel et al. v. United States*, 24 ITRD (BNA) 1469, No. 02-39, (Ct. Int'l Trade Apr. 29, 2002).

427. *See* Appellate Body Report, *OCTG*, *supra* note 352, ¶ 223.

The Panel also studied "affirmative waivers," by which it meant the operation of Section 751(c)(4)(B) and Section 351.218(d)(2)(i). An "affirmative waiver" occurs if a respondent declares its intention not to participate in a Sunset Review. The Panel held affirmative waivers, like deemed waivers, violate Article 11:3. The Panel said an investigating authority (namely, the DOC) must not assume, without further inquiry, that

upheld the conclusion of the Panel that one such provision, the DOC regulation (again, Section 351.218(d)(2)(iii)), was inconsistent with Articles 6:1-2 of the *Agreement*.[428] Thus, the waiver rules were too automatic and effectively denied targeted firms the right to a Sunset Review. The Appellate Body also upheld the conclusion of the Panel that the waiver denies the right of an interested party to defend itself in a Sunset Review.[429]

The gist of the Argentine argument against the deemed waiver provisions was that the provisions precluded the DOC from engaging in a substantive review, whereas Article 11:3 of the *Antidumping Agreement* mandates an investigating authority to take an active role in such Reviews and gather and evaluate relevant facts. The text of Section 751(c)(4)(B) of the *1930 Act*, entitled "Effect of waiver," states:

> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[430]

Section 351.218(d)(2)(iii) of the DOC regulations provides:

> (2) Waiver of response by a respondent interested party to a notice of initiation –
> ….
> (iii) *No response from an interested party*. The Secretary will consider the failure by a respondent interested party to file a complete substantive response to a notice of initiation under paragraph (d)(3) of this section as a waiver of participation in a sunset review before the Department.[431]

Accordingly, under the statute, any waiver results ineluctably in an affirmative likelihood-of-dumping determination. Under the regulation, if a respondent does not file a submission in response to a likelihood-of-dumping

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dumping is likely to continue or recur just because the respondent elected not to participate in the Review. *See id.* ¶¶ 224, 228.

428. *See* Daniel Pruzin, *WTO Appellate Body Rules on Claims Against U.S. Sunset Review Procedures*, 21 INT'L TRADE REP. (BNA) 1965 (Dec. 2, 2004).

429. On deemed waivers, the United States also made claims under Article 11 of the *DSU*, which the Appellate Body rejected (finding the Panel did make an objective assessment of the matter, including the facts). *See* Appellate Body Report, *OCTG*, ¶¶ 254-70.

430. *Quoted in id.* ¶ 226.

431. *Quoted in id.* ¶ 225 (emphasis added by Appellate Body).

inquiry or if it files an incomplete response, then the respondent is deemed to have waived participation in the Review by virtue of the missing or inchoate submission. The Panel agreed with Argentina that Article 11:3 requires an investigating authority like the DOC to take into consideration in a Sunset Review facts submitted by a respondent, or any other facts that might be relevant. Conversely, Article 11:3 does not permit the authority to render an affirmative likelihood-of-dumping conclusion from an incomplete submission, or no submission. Yet, that automatic adverse inference is precisely what the deemed waiver provisions require – hence, they violate Article 11:3.

The United States argued that in a deemed waiver situation, the DOC conducts Sunset Reviews on an order-wide, not company-specific, basis.[432] While the DOC looks at what evidence a respondent did, or did not, submit, that is only the first step. The second step is to look at the totality of evidence relevant to the order. Consequently, operation of the deemed waiver with respect to a particular respondent does not automatically lead to a final affirmative order-wide determination. As the DOC is not precluded from arriving at a negative likelihood-of-dumping determination as to an order, even if a specific exporter is deemed to have waived participation, there is no violation of Article 11:3. Moreover, urged the United States, when a respondent waives the right to participate in Sunset Review, it does so with full knowledge an unfavorable determination on an order-wide basis is likely. That is because the respondent failed to submit data; therefore the evidence on the record comes from the domestic industry seeking extension of the AD (or CVD) order.[433]

The Appellate Body agreed with the United States in one respect, namely, characterization of the relevant issue: whether an order-wide likelihood-of-dumping determination is consistent with Article 11:3 by virtue of the operation of the deemed waiver provisions. The Appellate Body even agreed with the American point that if a respondent consciously decides not to submit evidence, there is no fault in rendering an unfavorable order-wide determination based on record evidence from the domestic industry. Yet, the Appellate Body observed the Panel did not base its finding that the deemed waiver provisions were inconsistent with the Article on company-specific determinations. The Panel instead considered the impact of a company-specific determination on the order-wide determination and found that operation of the deemed waiver "is likely to be conclusive" as regards the order-wide determination.[434] Indeed, at oral argument before the Panel, the United States could not cite a single example of a negative order-wide determination following an affirmative company-specific determination. The Appellate Body put it more strongly, saying the waiver provisions (namely, Section 751(c)(4)(B) of the *1930 Act* and Section 351.218(d)(2)(iii) of the DOC's regulations)

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432. *See id.* ¶¶ 229-30.

433. *See id.* ¶ 234.

434. Appellate Body Report, *OCTG*, ¶ 233 (quoting the Panel).

> require the USDOC [United States Department of Commerce] to arrive at affirmative company-specific determinations without regard to any evidence on record, [hence] these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence. … [E]ven assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11:3 to "arrive at a reasoned conclusion" on the basis of "positive evidence."[435]

Not surprisingly, therefore, the Appellate Body held as the Panel had under Article 11:3 on the impact of deemed waiver provisions on order-wide determinations.[436]

The Appellate Body also upheld, under Article 6:1 and 6:2 of the *Antidumping Agreement*, part of the analysis and conclusion of the Panel.[437] These provisions contain fundamental due process guarantees for all interested parties in a Sunset Review. Article 6:1 states:

> All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and *ample opportunity to present in writing all evidence* which they consider relevant in respect of the investigation in question.[438]

Article 6:2 states:

> Throughout the anti-dumping investigation all interested parties shall have a *full opportunity for the defense of their interests*. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the

435. *Id.* ¶ 234 (emphasis added).

436. *See id.* ¶ 235.

437. *See id.* ¶¶ 247, 253. Argentina did not make a claim about affirmative waivers under these provisions of the *Agreement*.

438. Emphasis added.

> convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.[439]

The Appellate Body said that the Panel was right to find a violation with respect to one of two scenarios, namely, where a respondent files an incomplete submission in response to the notice of initiation of a Sunset Review by the DOC.

The United States argued unsuccessfully that the DOC, when making an order-wide determination, takes into account whatever information a respondent files – and that is sufficient under Article 6:1.[440] This tortured argument went as follows: the United States conceded that in a company-specific determination, the DOC is precluded from taking facts submitted by an exporter in an incomplete response into consideration. However, the DOC takes the incomplete data into account in an order-wide determination and considers the country-specific determination in making the order-wide determination. The former, however, is not determinative of the outcome of the Review. Further, argued the United States, its Sunset Review law affords ample opportunity to provide evidence to the DOC, and the Panel seemed to assume that a respondent (or any interested party) has an indefinite right under Articles 6:1 and 6:2 to present evidence.[441]

True enough, said the Appellate Body: an authority conducting a Sunset Review must provide liberal opportunities for a respondent to defend its interests, as the words "ample" and "full" suggest, but the case cannot go on forever. The authority must be able to proceed expeditiously, control the conduct of what is typically a multi-step inquiry, and conclude the Review in a timely fashion.[442] Still, the Appellate Body saw the process as conducted by the DOC under its operative law differently from the United States.[443]

The Appellate Body, like the Panel, observed that if a respondent does not provide all the information required under the DOC's regulations (specifically, Section 351.218(d)(3)), and thus files an incomplete response, the DOC must conclude that, with respect to this respondent, there is a likelihood of continued or recurred dumping. That automatic and inexorable process is evident from these regulations (namely, Section 351.218(d)(2)(iii), quoted above). If a respondent files an incomplete submission, these features render the process a denial of procedural rights Articles 6:1 and 6:2 grant to the respondent. The American argument reveals as much: in a company-specific determination, the DOC does not consider evidence, albeit incomplete, presented by a respondent, and then uses

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439. Emphasis added.
440. *See id.* ¶¶ 237, 245.
441. *See* Appellate Body Report, *OCTG*, ¶¶ 237-38.
442. *See id.* ¶¶ 241-42.
443. *See id.* ¶¶ 236-37.

the company-specific determination as a basis for making an order-wide Sunset Review determination.

To say (as the United States does) that the DOC considers the evidence at the order-wide determination stage does not negate its disregard for the evidence at the earlier stage. At that earlier stage, the respondent has a right to present, and have considered, evidence it considers relevant to a Sunset Review of an order against its merchandise, and to confront parties with adverse interests at a hearing. The DOC's disregard at the company-specific stage, therefore, violates the "ample opportunity to present in writing all evidence" language of Article 6:1, and the "full opportunity for the defense of their interests" language in Article 6:2.[444] Put differently, in the case of an incomplete submission, violations of Article 6:1 and 6:2 at the company-specific level necessarily taint the order-wide determination of the DOC.

However, on appeal, the United States scored two important, if modest, victories.[445] First, with respect to the cases involving incomplete responses versus cases involving no response, the Appellate Body reversed the decision of the Panel that a violation exists if a targeted importer does not respond in a Sunset Review to requests from the DOC for information. In other words, the Appellate Body not only picked up, but also emphasized, a distinction the Panel had failed to – between an incomplete response and no response at all – and thereby handed the United States a partial victory.[446] The partial victory concerned the latter scenario, where a respondent files no submission in response to the notice. The Panel said the American Sunset Review law did not give this respondent rights detailed in Articles 6:1 and 6:2 of the *Antidumping Agreement*. The Appellate Body disagreed.[447]

The Appellate Body stressed this distinction and overturned part of the Panel's finding because it saw the issue as whether a respondent who does not respond to a DOC notice of initiation is denied opportunities guaranteed by Articles 6:1 and 6:2.[448] Such a respondent (1) faces an automatic affirmative company-specific determination, (2) is precluded from submitting evidence in the remainder of the Sunset Review, and (3) is not allowed a hearing with adverse parties. In these three respects, there is no difference between a respondent filing an incomplete submission and one filing no submission. However, unlike the respondent with the incomplete submission, the DOC does not disregard any evidence for a respondent that does not answer the inquiry notice – there is, by definition, no evidence to disregard. Consequently, the only reason for a respondent not submitting evidence to claim that its rights are denied under Articles 6:1 and 6:2 of the *Antidumping Agreement* is the denial of the opportunity

444. *See id.* ¶¶ 245-46.
445. *See* Pruzin, *supra* note 428, at 1966.
446. *See* Appellate Body Report, *OCTG*, ¶ 244.
447. *See id.* ¶¶ 248-53.
448. *See id.* ¶ 248.

to participate in later stages of the Review, particularly the right to request a hearing with adverse parties and submit evidence after the filing deadline for the initial submission.

This reason, said the Appellate Body, is not compelling. Argentina's claim under Articles 6:1 and 6:2 focuses on the initiation of a Sunset Review, not its later stages. As intimated earlier, valid reasons exist at the initial stage for an investigating authority like the DOC to worry about enforcing deadlines for submission of evidence. Without such enforcement, a Sunset Review is difficult to conduct in a fair and orderly manner. Indeed, without company-specific data (which, by definition, only a company can provide), such as dumping margins and export volumes and values, it is difficult for the authority or interested parties to become informed about the critical issues in dispute in a likelihood-of-dumping determination. In brief, the initial submission from a respondent effectively contributes to the establishment of the parameters of the Review, and Argentina neither contests this reality nor argues that the deadlines administered by the DOC are unreasonable.[449]

Accordingly, said the Appellate Body, the right of a respondent to present evidence and request a hearing is not "denied" simply because the respondent must submit evidence in response to a notice of initiation by a certain deadline.[450] It is reasonable to require a respondent to file a timely submission to preserve its rights for the remainder of the Sunset Review – and, ironically, noted the Appellate Body, even an incomplete filing will do the trick. Thus, the Appellate Body concluded that it is impossible to infer a violation of Articles 6:1 and 6:2 in the "no response" scenario. True, the waiver provision violates Article 11:3 with respect to a targeted firm that files an incomplete submission in response to a notice of initiation from the DOC. However, as for a firm that fails to respond completely within a prescribed deadline, the blame goes to the firm, not to the deemed waiver rules, because the firm chose not to take the necessary and reasonable initial steps to avail itself of the "ample" and "full" opportunity to "defend" its interests.[451] The American Sunset Review process provides the ample and full opportunity to defend its interests, and the firm simply fails to make use of the chance.

The second notable American appellate victory concerned three scenarios spelled out in the *Sunset Policy Bulletin*, quoted in full in *United States –Carbon Steel Flat Products, supra.*[452] The Appellate Body reversed the finding of the Panel that the DOC violated Article 11:3 of the *Antidumping Agreement* by automatically concluding that dumping is likely to continue if any one of three scenarios set out in Section II.A.3 of the *Sunset Policy Bulletin* exists. At the

449. *See id.* ¶¶ 250-51.

450. *See id.* ¶ 252.

451. Appellate Body Report, *OCTG*, ¶ 252.

452. For the relevant portion of the text of the Sunset Policy Bulletin, *see supra* pp. 228 - 230.

same time, the Appellate Body took pains to state it did not mean to say Section II.A.3 of the *Bulletin* is consistent with Article 11:3.[453]

Like the Panel, the Appellate Body agreed the *Bulletin* qualifies as a "measure" that can be challenged in a WTO proceeding. However, the Appellate Body said the Panel did not examine sufficiently the *Bulletin* to support this finding. In fact, Section II.A.3 of the *Bulletin* says that the DOC "normally" will determine revocation of an AD order will lead to continued dumping if any one of the following three situations occurred after the AD order was issued: (1) dumping continued at a non-*de minimis* level; (2) imports of the targeted good ceased; or (3) dumping ended and import volumes declined significantly. This Section of the *Bulletin* also says that the DOC may not view data on any of these scenarios as conclusive, and may look at other so-called "good cause" factors, such as cost, price, or various economic and market data.

The Panel held that the United States violated Article 11:3 of the *Agreement* because the DOC interprets this Section of the *Bulletin* as conclusive on the issue of likelihood of continued or recurred dumping. The Appellate Body agreed the Panel applied the correct standard for this interpretation, namely, the new precedent from *Japan Carbon Steel*.[454] In that case, the Appellate Body said whether Sections II.A.3 and II.A.4 of the *Bulletin* are consistent with Article 11:3 depends on whether they instruct the DOC to treat a dumping margin or import volume as "determinative or conclusive," on the one hand, or merely "indicative or probative," on the other hand, with respect to the likelihood of future dumping.[455] In *OCTG*, the Panel said a measure like the *Bulletin*, which attributes determinative or conclusive value to certain factors in a Sunset Review, is "likely to violate" Article 11:3, whereas if the DOC treated the three scenarios in Section II.A.3 of the *Bulletin* as "simply indicative," then the Section is consistent with the Article.[456] (The reader surely will have noted by this point the exasperating number of uses of the word "likely" in the *OCTG* case.)

However, the United States argued successfully that the Panel had an inadequate basis for concluding that the DOC regarded the three scenarios in Section II.A.3 of the *Sunset Policy Bulletin* as determinative/conclusive (not simply indicative) of likelihood of continued or recurred dumping. Indeed, observed the Appellate Body – the text itself of Section II.A.3 does not resolve whether the three scenarios are determinative/conclusive or merely indicative in a likelihood-of-dumping determination by the DOC.[457] Yet, the Panel premised its holding on data submitted by Argentina as to how the DOC had implemented

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453. *See* Appellate Body Report, *OCTG*, ¶ 215.

454. *See id.* ¶¶ 197-98.

455. *See United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, *supra* note 83, ¶ 104, 111.

456. Appellate Body Report, *OCTG*, ¶ 193 (*quoting* the Panel).

457. *See id.* ¶ 200.

Section II.A.3 in 291 previous Sunset Reviews.[458] The data purportedly showed that the DOC relied on one of the three factual scenarios in every Sunset Review in which it has found dumping likely would continue.

The Appellate Body said this premise was insufficient, and showed that the Panel failed to make an "objective assessment of the matter" as required by Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*").[459] In other words, the Panel simply adopted Argentina's argument, based on aggregate statistics, without a qualitative assessment of the facts in hand or any additional evidence. Possibly, the DOC was making presumptions wrongly, in a mechanistic fashion based on the three scenarios, about the likelihood of continued dumping. As the Appellate Body put it:

> In our view, "volume of dumped imports" and "dumping margins," before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset reviews, although other factors may also be as important, depending on the circumstances of the case. The three factual scenarios in Section II.A.3 of the *SPB* [*Sunset Policy Bulletin*], which describe how these two factors will be considered in individual determinations, thus have certain probative value, the degree of which may vary from case to case. For example, if, under scenario (a) of Section II.A.3 of the *SPB*, dumping *continued* with substantial margins despite the existence of the anti-dumping duty order, this would be highly probative of the likelihood that dumping would continue if the anti-dumping order were revoked. Conversely, if, under scenarios (b) and (c) of Section II.A.3 of the *SPB*, imports ceased after issuance of the anti-dumping duty order, or imports continued but without dumping margins, the probative value of the scenarios may be much less, and other relevant factors may have to be examined to determine whether imports *with dumping margins* would "recur" if the anti-dumping duty order were revoked. The importance of the two underlying factors (import volumes and dumping margins) for a likelihood-of-dumping determination cannot be questioned; however, our concern here is with the possible mechanistic application of the three scenarios based on these factors, such that other factors that may be of equal importance are disregarded.

458. *See id.* ¶ 203. These data were contained in Exhibits submitted by Argentina marked ARG-63 and ARG-64. *See id.* ¶ 206.

459. *See id.* ¶ 215.

. . .

> A qualitative analysis of individual cases in all likelihood would have revealed a variety of circumstances. There could well have been cases where affirmative determinations were made objectively, based on one of the three scenarios. There could have been other cases where the affirmative determinations were flawed because the USDOC [United States Department of Commerce] made its decisions relying solely on one of the scenarios of the *SPB* even though the probative value of other factors outweighed it. There could have been yet other cases where the USDOC summarily rejected or ignored other factors introduced by foreign respondent parties, regardless of their probative value.
>
> The Panel record does not show that the Panel undertook any such qualitative assessment of at least some of the cases … with a view to discerning whether the USDOC regarded the existence of one of the factual scenarios of the SPB as determinative/conclusive for its determinations. … The Panel also appears not to have examined in how many cases the foreign respondent parties participated in the proceedings, in how many they introduced other "good cause" factors, and how the USDOC dealt with those factors when they were introduced. Such an inquiry would have enabled the Panel to identify and undertake a qualitative analysis of at least some of those cases to see whether the affirmative determinations were made solely on the basis of one of the scenarios to the exclusion of other factors. The Panel failed to undertake any such qualitative assessment and relied exclusively on the overall statistics or aggregated results…. *The fact that affirmative determinations were made in reliance on one of the three scenarios in all the sunset reviews of anti-dumping duty orders where domestic interested parties took part strongly suggests that these scenarios are mechanistically applied. However, without a qualitative examination of the reasons leading to such determinations, it is not possible to conclude definitively that these determinations were based exclusively on these scenarios in disregard of other factors*.[460]

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460. *Id.* ¶¶ 208, 211-12 (emphasis original except for last two sentences). Interestingly, of the 291 Sunset Reviews, domestic interested parties did not participate in 74 instances, thus the orders were revoked. Of the remaining 217 Sunset Reviews, foreign respondents participated in 41 (or, depending on the data used, 43) of them. In only a few of these 41 (or 43) Reviews, the foreign respondent offered other good cause factors (e.g., price, cost, market, or economic factors), which are relevant under Section 752(c)(2) of the *1930 Act*, 19 U.S.C. § 1675a(c)(2). *See id.* ¶ 206.

In sum, further evidence, and a better analysis, were needed to be certain the DOC disregarded other factors and rendered Sunset Review determinations solely on one of the three scenarios.

For the most part, the United States welcomed the 2004 *OCTG* decision, as well as earlier rebuffs to challenges to American Sunset Review law. The United States admitted that it lost the waiver issue to Argentina, but characterized that defeat as procedural. It interpreted most of the rest of the Appellate Body Report as exonerating the ITC and its practices. However, the United States and Argentina were not able to promptly reach an agreement on a reasonable time for implementation of the DSB's ruling, and Argentina sought DSB arbitration under Article 21.3(b) of the DSU.[461]

5. Commentary:

a. Injury and Sunset Reviews

In the *OCTG* case, a few issues pertaining to injury were raised.[462] They are "applied" issues, as the Appellate Body put it, in the sense of applying a general rule to a specific set of facts (here, how the relevant authority, DOC or ITC, conducted the Sunset Review of Siderca).[463] They are contrasted with the conceptual issues discussed above. The applied issues are worth mentioning, as they may provide some useful guidance in future disputes:

i. Injury Factors:

The Panel found that the obligations in Article 3 of the *Agreement*, concerning factors an investigating authority must examine in an injury determination, do not apply to a likelihood-of-injury inquiry in a Sunset Review.[464] The Appellate Body upheld this finding, and in particular that a Sunset Review under Article 11:3 of an injury determination already made in accordance with Article 3 does not require that injury be determined again in accordance with Article 3. Thus, said the Appellate Body, it did not need to complete the analysis

461. *See* Daniel Pruzin, *Argentina Seeks WTO Arbitration on Deadline for U.S. Compliance with OCTG Duty Ruling,* 22 INT'L TRADE REP. (BNA) 485 (Mar. 24, 2005) (explaining Argentina's rationale for seeking arbitration).

462. These matters are less central to the case than the Article 11:3 issues (discussed earlier). Similarly, a conditional appeal by Argentina (concerning, *inter alia*, Article X:3(a) of GATT, a request by the United States for a ruling on the Panel's terms of reference, are not discussed. *See* Appellate Body Report, *OCTG*, ¶¶ 5, 7, 154-76, 216-21.

463. *See* Appellate Body Report, *OCTG*, ¶ 6.

464. *See* Panel Report, *OCTG*, ¶ 7:273.

by ruling on Argentina's claims that the ITC acted inconsistently with Articles 3:1-2 and 3:4-5.[465]

ii. Definition of "Injury" and "Likely":

The Appellate Body also declined to rule the Panel erred in interpreting the term "injury," or in analyzing the factors an investigating authority must examine in a likelihood-of-injury determination. On the word "likely," it noted approvingly that the Panel implicitly conceived of "likely" as meaning "probable" in Article 11:3 of the *Agreement*.[466]

iii. ITC's Determinations:

With respect to the application by the ITC of American Sunset Review law, and specifically the determinations by the ITC on the (1) likely volume effect of dumped imports, (2) likely price effect of dumped imports, and (3) likely consequent (i.e., adverse) impact of the likely dumped imports on the relevant American industry, the Panel found the determinations by the ITC did not violate the *Agreement*. The Appellate Body upheld these findings.[467]

iv. ITC's Timeframe:

With respect to the timeframe used by the ITC to make a likelihood-of-injury determination (namely, the standard of continued or recurred injury "within a reasonably foreseeable time" under Sections 752(a)(1) and 752(a)(5) of the *Tariff Act of 1930*, as amended), the Panel found the ITC did not violate the *Agreement*. The Appellate Body upheld this finding.[468]

b. Cumulation and Sunset Reviews

In deciding whether continued or recurred material injury is likely if the AD order against Siderca is lifted, the ITC cumulated imports of oil country

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465. *See* Appellate Body Report, *OCTG*, ¶¶ 271-85, 365(d)(i).

466. *See id.* ¶¶ 152(d), 152(f), 305-14, 365(d)(ii); WTO, *Update*, *supra* note 22, at 56-57.

467. *See* Appellate Body Report, *OCTG*, ¶¶ 3, 152(g), 330-52, 365(g)(ii)-(iv); Panel Report, *OCTG*, ¶¶ 7:298, 7:306, 7:312; WTO, *Update*, *supra* note 22, at 56-57.

468. *See* Appellate Body Report, *OCTG*, ¶¶ 152(h), 353-64, 365(h); Panel Report, OCTG, ¶¶ 7:193, 7:260, 8:1(c); 8:1(e)(i).

tubular goods. The cumulated goods came from all sources, including countries other than Argentina.[469] (After all, Siderca had stopped exporting to the United States after the initial AD order of June 1995.) Is it permissible in a likelihood-of injury determination to cumulate the effects of dumped imports?

The Panel and Appellate Body found no inconsistency with the *Agreement*.[470] True, they said, Article 3:3 of the *Agreement* does not apply in the context of a Sunset Review. But Article 11:3 does not preclude an investigating authority from cumulating the effects of likely dumped imports in the course of a likelihood-of-injury determination. The Appellate Body agreed. Cumulation is a useful tool used to ensure that all sources of injury and their total impact on the domestic industry are taken into account in an initial determination on whether to impose AD duties or in a Sunset Review determination on whether to continue to impose these duties. That is because in both contexts, despite the differences between an original and Review investigation, injury (existing or likely future injury, respectively) could come from several sources simultaneously.

c. What is Law?

In an initial appellate skirmish, the United States argued the *Sunset Policy Bulletin* was not "law." The United States had made this kind of argument in the *India Patent Protection* case (essentially arguing India's former administrative mailbox system was insufficient, as a legal matter, and did not comply with Article 70 of the WTO *Agreement on Trade Related Aspects of Intellectual Property Rights*). The United States also used this kind of argument in defense in the *Section 301* case (arguing that the way in which Section 301 is administered is important, as a matter of law, just as is the face of the statute). In both instances, the United States enjoyed some success with the argument. However, in *OCTG*, the Appellate Body said:

> We note the argument of the United States that the SPB is not a legal instrument under United States law. This argument, however, is not relevant to the question before us. The issue is not whether the SPB is a legal instrument within the domestic legal system of the United States, but rather, whether the SPB is a measure that may be challenged within the WTO system. The United States has explained that, within the domestic legal system of the United States, the SPB does not bind the USDOC

469. *See* Appellate Body Report, *OCTG*, ¶ 3.

470. *See id.* ¶¶ 152(e), 286-304, 365(e), (g)(ii); Panel Report, *OCTG*, ¶¶ 8:1(a)(iii), 8:1(d), 8:1(e)(iii). However, the Panel and Appellate Body said the decision by the ITC to cumulate dumped imports was not based on sufficient facts. *See* Appellate Body Report, *OCTG*, ¶¶ 315-29, 365(e), (g)(i).

> and that the USDOC "is entirely free to depart from [the] SPB at any time." However, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the *WTO Agreement* and to determining whether the challenged measures are consistent with those provisions. As noted by the United States, in *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that "acts setting forth rules or norms that are intended to have general and prospective application" are measures subject to WTO dispute settlement. We disagree with the United States' application of these criteria to the SPB. In our view, the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors. It is intended to have general application, as it is to apply to all the sunset reviews conducted in the United States. It is also intended to have prospective application, as it is intended to apply to sunset reviews taking place after its issuance. Thus, we confirm – once again – that the SPB, as such, is subject to WTO dispute settlement.[471]

This passage is rich in jurisprudential issues. The Appellate Body suggests a rule can be "law" at the international level (i.e., for purposes of the WTO), but not at the domestic level. Is this position jurisprudentially defensible? Is the converse situation possible? The passage also is rich in sovereignty issues. What body should decide whether a rule is law at a particular level? What impact should a decision at one level have on the other level?

471. Appellate Body Report, *OCTG*, ¶ 187 (footnotes omitted).