WTO CASE REVIEW 2006[#]

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

- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99-249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317-439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

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The WTO reports we discuss are available on the web site of the WTO, http://www.wto.org. The texts of the WTO agreements we discuss are also available on this web site and are published in a variety of sources, including RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK (2d ed. 2001). 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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PART ONE: INTRODUCTION

Compared to 2005, when ten new cases, including Article 21.5 actions,[1] were filed with the Appellate Body, 2006 was a relatively quiet year, with only three new cases and two Article 21.5 actions the subject of notices of appeal,[2] but was comparable to the five in 2004 and six in 2003, all down from the peak of thirteen in 2000.[3] The number of new requests for consultations transmitted to the Dispute Settlement Body (DSB) in recent years has been twenty in 2006, twelve in 2005, nineteen in 2004, and twenty-six in 2003, but fifty in the peak year of 1997.[4] (Through February 2007, three requests had been filed.[5]) Despite fluctuating annually between 58% and 100%, the average appeal rate has been 68% over the twelve years since the Appellate Body first received appeals.[6]

One may speculate on the reasons for the gradual downward trend in both new requests for consultation and new Appellate Body proceedings. They may well include the high cost of Dispute Settlement Understanding (DSU) proceedings, particularly for developing-country Members,[7] but one may reasonably attribute at least a significant part to the very success of the system. After twelve years and eighty-two appeals to the Appellate Body, the Appellate Body has by now implemented and applied dozens of provisions of all of the major "covered agreements," including but not limited to the GATT 1994, the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, and the Agreement on Trade-

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1. Dispute Settlement Understanding (DSU) Article 21.5 provides in pertinent part that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 21.5, 1869 U.N.T.S. 401, 33 I.L.M. 1125, 1238 (1994) [hereinafter DSU]. Two of the five appeals filed in 2006 were such compliance reviews. The authors have chosen, largely for reasons of length, to limit this and previous case reviews to the original Appellate Body proceedings.

2. Appellate Body, *Annual Report for 2006*, at 3, WT/AB/7 (Jan. 23, 2007) [hereinafter *Annual Report 2006*].

3. *Id.* annex 2.

4. World Trade Org. [WTO], Dispute Settlement: The Disputes – Chronological List of Dispute Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 12, 2007).

5. *Id.*

6. *Annual Report 2006*, *supra* note 2, annex 3.

7. *See* Chad P. Brown & Bernard M. Hoeckman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861 (2005) (arguing that the poorest WTO Member countries usually do not participate in Dispute Settlement Body actions because of cost).

Related Investment Measures, just to list those most frequently litigated.[8] Even in a system where there is no formal usage of precedent, the de facto respect for early decisions by the Appellate Body and by the WTO Members appearing before it has resulted in a high level of predictability from case to case, even though from time to time the Appellate Body may broaden or narrow its interpretations, as, for example, in *EC – Selected Customs Matters*.[9]

Procedurally, there were several important changes. Professor David Unterhalter of South Africa joined the Appellate Body in 2006, after the untimely death of John Lockhart of Australia. Werner Zdouc of Austria, a member of the WTO Secretariat since 1995, succeeded Valerie Hughes of Canada as the Director of the Appellate Body Secretariat on January 1, 2006.[10] However, there were no amendments to the Appellate Body's Working Procedures; the January 2005 version remains current.[11]

PART TWO: DISCUSSION OF THE 2006 CASE LAW FROM THE APPELLATE BODY

I. GATT OBLIGATIONS

A. Pillar Obligations

1. Citation

Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – HFCS), WT/DS308/AB/R (issued on March 6, 2006, and adopted on March 24, 2006) (complaint by the United States, with Canada, China, European Communities, Guatemala, and Japan as third-party participants).[12]

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8. The WTO Secretariat and the Appellate Body have produced a number of very useful aids to practitioners and scholars studying decisions. *See* WTO, Legal Affairs Div., *WTO Dispute Settlement: One-Page Case Summaries, 1995–September 2006* (2006), *available at* http://www.wto.org/english/res_e/booksp_e/dispu_summary06_e.pdf; WTO, *WTO Analytical Index – Guide to WTO Law and Practice* (2006), *available at* http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm.

9. *See infra* Part Two.I.B.

10. *Annual Report 2006*, *supra* note 2, at 2.

11. WTO, *Working Procedures for Appellate Review*, WT/AB/WP/5 (Jan. 4, 2005).

12. Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (adopted Mar. 24, 2006) [hereinafter *Mexico – HFCS* Appellate Body Report]. For the panel report in this case, see Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005) [hereinafter *Mexico – HFCS* Panel Report] (complaint by the United States, with Canada, China, the European Communities, Guatemala, and Japan as third-party participants).

2. The Sugar War

Mexican restrictions on imports of artificial sweeteners and sugar substitutes, most notably high fructose corn syrup (HFCS), and on imports of beverages containing HFCS, has been the subject of a battle between Mexico and the United States dating back to 1997.[13] Indeed, sugar has been perhaps the most contentious product in the booming trade between the two countries, and has given rise in the legal literature to the term "Sugar War(s)."[14] One battle in the war was an antidumping (AD) action, whereby Mexico imposed AD duties on HFCS from the United States.[15] Following adverse decisions by panels under Chapter 19 of the North American Free Trade Agreement (NAFTA) and the DSU, Mexico revoked the AD duties in 2001.[16]

The next year, Mexico—specifically, its Congress—launched another battle in the Sugar War, firing a battery of tax measures (explained below).[17]

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13. *See* Rossella Brevetti, *Crane Asks Administration to Consider Appropriate Action in Sweetener Dispute*, 20 Int'l Trade Rep. (BNA) 1669 (Oct. 9, 2003).

14. *See, e.g.*, Alice Vacek-Aranda, *Sugar Wars: Dispute Settlement Under NAFTA and the WTO as Seen Through the Lens of the HFCS Case, and Its Effects on U.S.-Mexican Relations*, 12 TEX. HISP. J.L. & POL'Y 121, 123-60 (2006) (discussing the implications of the *Mexico – HFCS* case on international trade policies).

Other farm products that have been the subject of disputes between the United States and Mexico include apples, beef, bulk corn, dry edible beans, poultry, and rice. *See* Rossella Brevetti, *Senate Finance Committee Members Urge Mexican Officials to Remove AG Barriers*, 20 Int'l Trade Rep. (BNA) 1669 (Oct. 9, 2003); Rossella Brevetti, *High-Level Talks with Mexico on Farm Trade Exclude Sweeteners*, 20 Int'l Trade Rep. (BNA) 763 (May 1, 2003).

On the subject of NAFTA rights and duties concerning agricultural trade, see, for example, Raj Bhala, *Managing Trade in Agriculture in North America*, *in* THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA 73-116 (Kevin C. Kennedy ed., 2004).

15. *See* John Nagel, *Mexican Congress OKs Tax Measures for 2003, Including Maintaining HFCS Tax*, 19 Int'l Trade Rep. (BNA) 2183 (Dec. 19, 2002). In 1997, Mexico calculated preliminary duties at $55 to $175 per ton of HFCS. In 1998, it finalized these amounts. *Id.*

16. *See* Daniel Pruzin, *WTO Rejects Mexico's Appeal of Ruling in Favor of U.S. in Soft Drink Tax Dispute*, 23 Int'l Trade Rep. (BNA) 370 (Mar. 9, 2006).

17. On March 5, 2002, President Vincente Fox suspended the tax on soft drinks sweetened with HFCS, but the Mexican Supreme Court overrode that action and reinstated the tax effective July 12, 2002. Rossella Brevetti & John Nagel, *Corn Products International Files NAFTA Arbitration Case on HFCS Tax*, 20 Int'l Trade Rep. (BNA) 1759 (Oct. 23, 2003).

For some aspects of Mexican sugar politics and tax reform, see, for example, Michael O'Boyle, *Mexican Senate Begins Review of Tax Bills, Including Measure on Soft Drink Tax*, 22 Int'l Trade Rep. (BNA) 1806 (Nov. 10, 2005); Michael O'Boyle, *Mexican Senate Clears 2006 Tax Laws, Rejects Exemption to HFCS Soft Drink Tax*, 22 Int'l Trade Rep. (BNA) 1895 (Nov. 24, 2005).

Correctly perceiving those measures as discriminatory, the United States fired back with a WTO action.[18] Mexico again had a sour experience with a WTO panel. The United States prevailed, as the *Mexico – HFCS* panel held that Mexico's taxes on soft drinks and other beverages that use any sweetener other than cane sugar were illegal under GATT Article III:2 (first and second sentences) and Article III:4.[19]

Mexico appealed.[20] Three specific Mexican measures were in dispute[21]:

Interestingly, in 2004, the Dominican Republic considered a 25% tax on soft drinks sweetened with HFCS. Rossella Brevetti, *USTR Concerned with Dominican Proposed Tax on Soft Drinks Sweetened with HFCS*, 21 Int'l Trade Rep. (BNA) 1475 (Sept. 9, 2004). The U.S. Trade Representative (USTR) told the Dominican Republic that such a move would negatively affect prospects for a Central American free trade agreement. *See id.*

18. The private sector also fired back. The tax triggered a NAFTA Chapter 11 claim, brought by Corn Products International (one of the world's largest corn refiners) against the government of Mexico, for $325 million in past and potential lost profits and other damages caused by the 20% tax on soft drinks sweetened with HFCS. Brevetti & Nagel, *Corn Products International*, *supra* note 17, at 1759; *see* John Nagel, *U.S. Corn Syrup Exporter to Seek NAFTA Compensation for Mexican Tax*, 20 Int'l Trade Rep. (BNA) 233 (Jan. 30, 2003).

19. *See* Rossella Brevetti & Michael O'Boyle, *WTO Panel Issues Ruling Backing U.S. in Beverage Tax Dispute with Mexico*, 22 Int'l Trade Rep. (BNA) 1636 (Oct. 13, 2005); Esther Lam, *WTO Panel Forwards Ruling Against Mexico in Dispute with U.S. on HFCS Soft Drink Tax*, 22 Int'l Trade Rep. (BNA) 1317 (Aug. 11, 2005); Michael O'Boyle, *Mexico May Slap Tariff on HFCS Imports Following Unfavorable WTO Panel Ruling*, 22 Int'l Trade Rep. (BNA) 1346 (Aug. 18, 2005); Daniel Pruzin, *WTO Panel Issues Preliminary Ruling Against Mexican Taxes on U.S. HFCS*, 22 Int'l Trade Rep. (BNA) 1078 (June 30, 2005).

20. *See* Daniel Pruzin, *Mexico Appeals WTO Ruling Against Tax on HFCS Soft Drinks*, 22 Int'l Trade Rep. (BNA) 1978 (Dec. 8, 2005).

21. The facts of the case are set out in the *Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 1.1-.2, 2.1-3.1, and in the *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶¶ 1-9.

As the panel explained, these measures were set out in various legislative instruments, most notably:

> (1) The *Ley del Impuesto Especial sobre Producción y Servicios* (Law on the Special Tax on Production and Services, or LIEPS), as amended effective 1 January 2002, and its subsequent amendments published on 30 December 2002, and 31 December 2003; and
>
> (2) Related or implementing regulations, contained in the *Reglamento de la Ley del Impuesto Especial sobre Producción y Servicios* (Regulations of the Law on the Special Tax on Production and Services), the *Resolución Miscelánea Fiscal para 2003* (Miscellaneous Fiscal Resolution for the year 2003), and the

- *Soft Drink Tax* – A 20% tax imposed on the transfer or importation of soft drinks and other beverages that use any sweetener other than cane sugar. In effect, this measure was a 20% tariff levied on imported soft drinks sweetened with high fructose corn syrup (HFCS) or beet sugar. The levy did not apply to soft drinks sweetened with cane sugar, which tended to be Mexican beverages.

- *Distribution Tax* – A 20% tax on services provided for the transfer of products such as soft drinks and other beverages that use any sweetener other than cane sugar. Examples of such services include agency, brokerage, commission, consignment, distribution, mediation, and representation. This measure, in essence, was a 20% levy on services relating to imported soft drinks sweetened with HFCS or beet sugar. The levy did not apply to soft drinks sweetened with cane sugar, i.e., Mexican beverages.

- *Bookkeeping Requirements* – Extra obligations imposed on taxpayers subject to the Soft Drink or Distribution Tax. These obligations did not apply to domestically manufactured beverages that used cane sugar as a sweetener.

Mexico implemented these measures beginning in 2002.

3. Aim, Effect, and Products

While aim is not relevant to a GATT Article III case, manifestly, Mexico designed these measures to protect its domestic sugar producers—and, of course, grab the attention of the United States and try to force a settlement in the Sugar War. Precious little HFCS is made in Mexico; most of it comes from the giant country to the north. Conversely (as even a brief tour around Veracruz, or a drive

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Resolución Miscelánea Fiscal para 2004 (Miscellaneous Fiscal Resolution for the year 2004).

(3) [Additional instruments articulating the details for the Bookkeeping Requirements.]

Mexico – HFCS Panel Report, *supra* note 12, ¶¶ 2.3, 2.5. Following their approval by the Congress of Mexico, the first two measures were published in the Mexican *Official Journal*, called the *Diario Oficial*, on January 1, 2002. *Id.* ¶ 2.4. Subsequent amendments also were published therein (in 2002, 2003, and 2004). *Id.* ¶ 2.4. The third measure was published in 2003 and 2004. *Id.* ¶ 2.5.

from Xalapa to Veracruz evinces), Mexico abounds with cane sugar plantations. They are not altogether efficient, nor are Mexican sugar refineries. Unsurprisingly, before imposition of the tax, HFCS accounted for 99% of Mexico's imports of sweeteners.[22]

Similarly, while proof of actual injury is unnecessary to prevail in a GATT Article III claim, there was little doubt the 20% tax caused damage to American producers of HFCS.[23] Mexico was America's largest market for HFCS before the tax.[24] The industry group for American HFCS producers—the Corn Refiners Association—said the tax cost their members $944 million in annual lost sales, equal to 168 million bushels of corn.[25] Absent the tax, and with full restoration of the Mexican market for HFCS exports from the United States, the Association estimated the price per bushel of corn in the United States likely would increase by ten cents in major corn states, and six cents nationally.[26]

In the *Mexico – HFCS* case, two categories of products were at issue[27]:

- *Soft Drinks and Syrups* – This category includes not only soft drinks, but also hydrating and re-hydrating drinks, plus concentrates, essences, flavor extracts, powders, and syrups that can be diluted to make such drinks, and concentrates or syrups to prepare such drinks sold in containers that require equipment for this use. The category excludes alcoholic beverages, beer, wine, fruit and vegetable juices, and water and mineral water.

  Notably, the Mexican market in this product category is dominated by foreign multinational corporations (MNCs). The panel, with realism and a touch of sarcasm, observed the domination extended "in other parts of the world," too.[28] Coca Cola controls 71.9% of the Mexican carbonated soft drink market, and Pepsi Cola has a 15.1% share of that market. A Peruvian company, Kola Real,

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22. *See* Pruzin, *WTO Rejects Mexico's Appeal, supra* note 16, at 370.

23. *See* Daniel Pruzin, *U.S., Mexico Reach Agreement on WTO Soft Drink Dispute Compliance Deadline*, 23 Int'l Trade Rep. (BNA) 1069 (July 13, 2006).

24. *See* Daniel Pruzin, *WTO Panel Sets Target Date for Ruling on U.S. Case on Mexico Sweetener Duties*, 22 Int'l Trade Rep. (BNA) 228 (Feb. 10, 2005).

25. Michael O'Boyle, *Mexican Senate Votes to Eliminate HFCS Tax in Compliance with WTO Ruling*, 24 Int'l Trade Rep. (BNA) 21 (Jan. 4, 2007). The Corn Refiners Association said that if Mexican AD duties are included in the calculation, then American HFCS producers have lost $4 billion dollars between 1997 and 2006. *See* Rossella Brevetti & Michael O'Boyle, *Grassley, U.S. Industry Welcome Agreement with Mexico on Sugar, HFCS*, 23 Int'l Trade Rep. (BNA) 1168, 1168-69 (Aug. 3, 2006).

26. O'Boyle, *Mexican Senate Votes to Eliminate HFCS Tax*, *supra* note 25, at 21.

27. *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 2.6.

28. *Id*.

holds 4%, and Cadbury Schweppes about 2%. However, the Mexican tax measures were not aimed at MNCs per se, i.e., they were not aimed at excluding foreign soft drinks. Rather, as intimated, their focus was on the sweetener used by the MNCs, seeking to discourage American HFCS importing and to encourage use of local sugar.

- *Sweeteners Used in the Preparation of Soft Drinks and Syrups* – Three types of sweeteners are used in soft drinks and syrup:
    - Cane sugar, which is a form of sucrose, is the first type. It is a disaccharide composed of 50% glucose and 50% fructose, which are bonded together.[29]
    - The second type of sweetener is beet sugar. While it is a distinct form of sucrose, as it is derived from a different source, it is chemically and functionally identical to cane sugar.[30]
    - The third sweetener is, of course, HFCS. HFCS is a corn-based liquid sweetener, made from cornstarch. It is high in fructose relative to regular corn syrup, and made through a multi-stage production process. A monosaccharide admixture of glucose, fructose, and other saccharides comprise HFCS.[31] There are three grades: HFCS-55 (the primary grade used in soft drinks), HFCS-42 (used mainly for bakery products, canned goods, and dairy products), and HFCS-90 (used in candies, juices, some baked goods, and food processing, or blended with HFCS-42 to make HFCS-55).

At the panel stage, the United States prevailed in its arguments that the Mexican tax measures violated the national treatment obligations of GATT Article III:2 (first and second sentences) and Article III:4. On these points, Mexico did not appeal the panel's findings.[32] (The American arguments raise a matter on which

29. *Id.* Chemically, the United Nations Food and Agriculture Organization (FAO) defines cane sugar as a non-refined crystallized material from the juices of sugar cane stalk and consisting wholly or essentially of sucrose. *Id.*

30. *Id.* Chemically, the FAO defines beet sugar as non-refined crystallized material from the juices extracted from sugar beet root and consisting entirely or essentially of sucrose. *Id.*

31. *Id.* Chemically, the FAO defines HFCS as an isoglucose, which is a type of starch syrup in which glucose has been transformed into a fructose isomer by using one or more isomerizing enzymes. *Id.*

32. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 6.

some comment is worth making, below.) As explained next, the unsuccessful Mexican defense was twofold.[33]

4. The Two Mexican Defenses

First, the American complaint in the WTO was inextricably linked to a dispute between the United States and Mexico arising under NAFTA. The two sides battled over how to interpret NAFTA Section 703:2 and Annex 703:2.[34] Invoking these provisions, Mexico claimed the United States had not provided its cane sugar producers with the market access to which they have a right under the free trade accord.[35] For example, between 1995 and 2001, Mexico imported 3 million tons of sweeteners from the United States, but the United States allowed in only 224,000 tons of sugar from Mexico.[36]

Specifically, Mexico said NAFTA permits Mexico to sell its surplus sugar in the American market free of duty, i.e., as long as Mexico qualifies as a "surplus producer" under Section 703:2 and Annex 703:2 (paragraphs 13-22), then it can ship all excess sugar production to the United States duty-free.[37] The United States disagreed, asserting there is a limit (until free trade in sugar supposedly occurs in 2008 under NAFTA) as to how much sugar Mexico can ship duty-free.[38] The United States pointed to a Side Letter the two countries signed in 1993. The Side Letter limits access to the U.S. market, and reportedly states (in essence) that:

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33. *See Mexico – HFCS* Panel Report, *supra* note 12, ¶ 3.2.

34. *See* Michael O'Boyle, *Mexico Holds Out for New Proposal from U.S. Sugar in Sweetener Dispute*, 22 Int'l Trade Rep. (BNA) 611 (Apr. 14, 2005).

35. *Id.*

36. *See* John Nagel, *Solution to U.S. Mexican Soda Tax Conflict Still Possible, Say Industry Representatives*, 21 Int'l Trade Rep. (BNA) 1835 (Nov. 11, 2004).

37. *See* Pruzin, *U.S., Mexico Reach Agreement on Soft Drink Dispute*, *supra* note 23. That surplus can be considerable. In 2002, Mexico's surplus production was estimated at 650,000 tons. *See* John Nagel, *U.S. – Mexico Sweetener Talks Continue as Both Sides Seek Negotiated Solution*, 19 Int'l Trade Rep. (BNA) 1703 (Oct. 3, 2002). Yet, for that year, the United States set a 148,000-ton quota for duty-free entry of Mexican sugar. Mexico's return salvo was a 148,000-ton tariff-rate quota (TRQ) of its own on American HFCS, with an above-quota tariff of its pre-NAFTA bound rate of 210%. *See* John Nagel, *U.S., Mexico Still Seeking September Sweetener Solution, But Talks Could Extend*, 19 Int'l Trade Rep. (BNA) 1557 (Sept. 12, 2002); John Nagel, *Mexico to Protest U.S. Trucking Rules, Maintain Corn Syrup Quota, Minister Says*, 19 Int'l Trade Rep. (BNA) 970 (May 30, 2002); John Nagel, *Mexico to Cap Imports of Duty-Free HFCS in Latest Skirmish of Sweetener Trade War*, 19 Int'l Trade Rep. (BNA) 751 (Apr. 25, 2002).

38. *See* Michael O'Boyle, *Mexican Congress Unlikely to Act Soon on Corn Syrup Tax Following WTO Ruling*, 23 Int'l Trade Rep. (BNA) 413 (Mar. 16, 2006).

> Mexico's domestic consumption of HFCS must be considered when calculating Mexico's net sugar market access to the U.S. market, and . . . Mexico will be determined to be a net surplus producer only when production of sugar exceeds consumption of sweeteners, including both sugar and HFCS.[39]

Further, the Side Letter limits Mexican sugar imports into the United States at a zero-duty rate to 250,000 tons annually.[40] Mexico retorted the Side Letter is invalid because the Mexican Senate never approved it.[41]

Thus, Mexico brought a NAFTA Chapter 20 case. However, its NAFTA Section 703.2 right had no effective NAFTA remedy.[42] The United States, argued Mexico in the WTO action, had obstructed that case from going forward. Exasperated, Mexico took recourse (unilaterally, to be sure) to the Soft Drink and Distribution Tax measures and the Bookkeeping Requirements, essentially because of America's breach of its NAFTA obligations. Thus, Mexico asked the panel to decline to exercise jurisdiction, and recommend the parties pursue both of their actions before a NAFTA Chapter 20 panel.[43]

Second, as a fall-back position in the WTO case, Mexico argued that GATT Article XX(d) justified any Article III violations.[44] This exception is for administrative necessity. It condones a measure inconsistent with a GATT-WTO obligation, but only if necessary to implement a rule that is itself consistent with multilateral trade rules. If the panel were to render a decision, then Mexico asked it to ensure explicitly that its decision would not prejudice Mexico's rights in the NAFTA case.[45] In other words, said Mexico, if the panel is going to bisect what is really one Sugar War into two battles, then it should bisect them into completely different theaters of combat unrelated to one another.

5. The Panel, Consequentialism, and Morality

Unfortunately for Mexico, the panel rejected Mexico's primary argument that the United States wrongly bisected what is one case. The panel not only said it lacked the discretion to decide the exercise of jurisdiction over a case properly before it, thus exercising this jurisdiction, but also held against the GATT Article XX(d) defense.[46] The Soft Drink Tax, Distribution Tax, and Bookkeeping

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39. John Nagel, *U.S. Executive Urges Sweetener Accord with Mexico, Outlines Important Points*, 20 Int'l Trade Rep. (BNA) 393 (Feb. 27, 2003).

40. *See* O'Boyle, *Mexican Congress Unlikely to Act Soon*, *supra* note 38, at 413.

41. *See* Nagel, *Mexican Congress OKs Tax Measures*, *supra* note 15, at 2183.

42. *See Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 4.79-.80, 4.91.

43. *Id.* ¶¶ 3.2, 4.102-.108.

44. *Id.* ¶¶ 3.2(a), 4.116-.137.

45. *Id.* ¶¶ 3.2(b), 4.109-.111.

46. *Id.* ¶¶ 7.5-.17.

Requirements hardly were necessary to secure compliance by the United States with other laws or regulations. The stage was set for a simple appeal by Mexico—was the panel right to exercise jurisdiction rather than defer to a NAFTA dispute settlement action, and if so, did it rule correctly against the Article XX(d) defense?[47]

The readily apparent problem with the Mexican strategy is that it was, at bottom, tit-for-tat. That results in the law of the jungle governing international economic relations. But, Mexico's strategy was poor on more than consequential grounds. It was morally dubious.

Victimized as Mexico probably was by poor American behavior in respect of NAFTA, it took a deliberately illegal act (violating a pillar of GATT) and sought to justify that act with the positive consequences the act might produce (better behavior by the United States). In international trade relations, as in all aspects of life, even an unambiguously good outcome causally linked to a serious wrong does not justify the wrong. Much of the *Mexico – HFCS* case, then, can be read as the Appellate Body, like the panel before it, looking (consciously or not) for the technically correct legal bases on which to manifest these consequential and normative principles.

6. The Appellate Body on Judicial Abstinence

a. Why Abstain?

As indicated above, the panel rejected Mexico's argument for judicial abstinence. The panel held, under the DSU, it had no discretion to decide whether or not to exercise jurisdiction in a case that is properly before it—and, even if it did, the facts of the case did not justify declining to exercise jurisdiction.[48] Mexico appealed, rather predictably arguing that:

> WTO panels, like other international bodies and tribunals, "have certain implied jurisdictional powers that derive from their nature as adjudicative bodies." Such powers include the power to refrain from exercising substantive jurisdiction in circumstances where "the underlying or predominant elements of a dispute derive from rules of international law under which claims cannot be judicially enforced in the WTO, such as the

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47. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 39(a)-(b).
A third, and minor, appellate issue concerned Article 11 of the DSU. *See id.* ¶ 39(c). In brief, the Appellate Body rejected Mexico's argument that the panel had failed to make an objective assessment of the facts of the case as mandated by DSU Article 11. *See id.* ¶¶ 82-83, 85(c).

48. *See Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 7.5-.17.

> NAFTA provisions" or "when one of the disputing parties refuses to take the matter to the appropriate forum." Mexico argues, in this regard, that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute regarding access of Mexican sugar to the United States' market under the NAFTA. Mexico further emphasizes that "[t]here is nothing in the DSU . . . that explicitly rules out the existence of" a WTO panel's power to decline to exercise validly established jurisdiction and submits that "the Panel should have exercised this power in the circumstances of this dispute."[49]

The United States countered with the terms of reference set for the panel in the case, and instructed the panel to examine the matter before it.[50] That is an obligation incumbent on the panel under DSU Article 7. Indeed, Article 7.2 says a panel "shall address" the relevant provisions in any covered argument cited by the parties to a dispute.[51]

The Appellate Body accepted the American argument and the panel's tight reasoning.[52] First, as the panel said, discretion exists only if there is freedom to choose among two or more equally lawful options. That freedom would exist under the DSU only if a complainant does not have the "legal right to have a panel decide a case properly before it."[53] In other words, if a complainant has a legal right to be heard by a tribunal, then the tribunal does not have the option of telling the complainant to "get lost." The right to be heard indeed exists under DSU Article 11 and under Appellate Body case law, namely, the *Australia – Salmon* case.[54] These sources evince that the aim of the WTO dispute settlement system is to resolve issues and secure positive solutions to disputes.

In particular, DSU Article 11 requires a panel to make an "objective assessment" of the matter before it, including an "objective assessment" of the facts in a case and, in respect of a disputed measure, the applicability of, and conformity with, a relevant covered argument.[55] True, admitted the Appellate Body, Article 11 uses the word "should" to make these assessments. But,

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49. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 42 (footnotes omitted).

50. *Id.* ¶¶ 22-34.

51. DSU, *supra* note 1, art. 7.2.

52. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶¶ 40-57. The Appellate Body found it unnecessary to rule on the propriety of the panel exercising its jurisdiction in the case at bar. *See id.* ¶¶ 54-57.

53. *Id.* ¶ 41 (quoting *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 7.7).

54. *See* Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 223, WT/DS18/AB/R (adopted Nov. 6, 1998) [hereinafter *Australia – Salmon* Appellate Body Report].

55. DSU, *supra* note 1, art. 11.

> The Appellate Body has previously held that the word "should" can be used not only "to imply an exhortation, or to state a preference", but also "to express a duty [or] obligation". The Appellate Body has repeatedly ruled that a panel would not fulfill its mandate if it were not to make an objective assessment of the matter. Under Article 11 of the DSU, a panel is, therefore, charged with the *obligation* to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Article 11 also requires that a panel "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." It is difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.[56]

Succinctly put, that the word "should" can, and does, mean "shall" in the context of DSU Article 11 is part of WTO common law.

As a second reason for rejecting the Mexican argument, the panel and Appellate Body pointed to DSU Article 23. This provision states that a WTO Member, believing its benefits under GATT or another WTO text have been nullified or impaired, has a right to bring a case under this system.[57] Here, the text of Article 23.1 uses the verb "shall," in that the Member "shall have recourse" in the dispute settlement system.[58] That right of recourse, as the Appellate Body said in the *U.S. – Corrosion-Resistant Steel Sunset Review* case, and recalled in the *Mexico – HFCS* case, is critical in ensuring disputed measures do not undermine the overall balance of rights and obligations created by the GATT-WTO regime.[59]

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56. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 51 (citing Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, ¶¶ 187-88, WT/DS70/AB/R (Aug. 20, 1999) (quoting *The Concise Oxford English Dictionary*); Appellate Body Report, *Economic Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 133, WT/DS26/AB/R, WT/DS48/AB/R (adopted Feb. 13, 1998) [hereinafter *EC – Hormones* Appellate Body Report]; Appellate Body Report, *European Communities – Export Subsidies on Sugar*, ¶¶ 329, 335, WT/DS266/AB/R (Apr. 28, 2005)).

57. DSU, *supra* note 1, art. 23.

58. *Id.* art. 23.1.

59. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 52 (citing Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 89, WT/DS244/AB/R (Dec. 15, 2003) [hereinafter *U.S. – Corrosion-Resistant Steel Sunset Review* Appellate Body Report]).

Simply put, the legal right of a Member to initiate a WTO complaint implies the complainant is entitled to a ruling on the complaint.

Finally, lest there be any doubt as to the lack of freedom of a panel to exercise jurisdiction, two other DSU provisions are relevant—Articles 3.2 and 19.2. From them, said the panel and agreed the Appellate Body, a strong inference may be drawn. Were a panel to decide not to exercise jurisdiction in a case properly before it, then that decision would diminish the rights of the complainant under the DSU and relevant WTO texts.[60] Specifically, any act of judicial abstention would diminish the right of the complainant to seek redress for an alleged violation of obligations owed to it. Yet, under these Articles, dispute settlement is not supposed to lead to a diminution or accretion of rights or obligations under the covered agreements.

b. Implied Powers?

Significantly, the Appellate Body did not entirely dismiss the Mexican argument that a WTO panel, like other international tribunals, has certain implied jurisdictional powers.[61] Such powers, agreed the Appellate Body, spring from the very nature of a panel or tribunal as an adjudicative body:

> We agree with Mexico that WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it." Further, the Appellate Body has also explained that panels have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated." For example, panels may exercise judicial economy, that is, refrain from ruling on certain claims, when such rulings are not necessary "to resolve the matter in issue in the dispute". The Appellate Body has cautioned, nevertheless,

60. *Id.* ¶ 41 (quoting *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 7.9); *see also id.* ¶ 53.

61. *See id.* ¶ 45.

> that "[t]o provide only a partial resolution of the matter at issue would be false judicial economy."[62]

The problem with the Mexican argument was that it went too far.

Just because a panel has certain implied powers does not mean that, once jurisdiction validly has been established before a panel (i.e., once it is clear a case is properly in front of a panel), the panel is free to decline to rule on the claims in the dispute.[63] To the contrary, said the Appellate Body, quoting from its Report in the *India – Patent Protection* case:

> Although panels enjoy some discretion in establishing their own working procedures, *this discretion does not extend to modifying the substantive provisions of the DSU. . . . Nothing in the DSU gives a panel the authority either to disregard or to modify . . . explicit provisions of the DSU.*[64]

Indubitably, the Appellate Body was both wise and legally correct in its approach to the Mexican argument. It had to mark for future cases that WTO adjudicators have some implied powers. Adjudicators are not robots, and their operating rules are not algorithms. Those cases, presumably, will help shape the boundary between implied powers and judicial over-reach. Observe, however, that the holding of the Appellate Body on discretion suggests an algorithm: Assuming a Member has standing to bring a complaint, and sufficiently pleads it, then a panel must hear the case.

c. The NAFTA Connection

Another significant feature of the Appellate Body holding and rationale on the first issue in the *Mexico – HFCS* case concerns the Mexican argument about NAFTA. Mexico, of course, said only a NAFTA panel could resolve the Sugar War as a whole. The Appellate Body offered two noteworthy findings.

First, Mexico undermined its own argument. It did so by admitting that the facts of the NAFTA dispute and of the WTO case are not identical, nor are the

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62. *Id.* (citing Appellate Body Report, *United States – Antidumping Act of 1916*, ¶ 54 n.30, WT/DS136/AB/R, WT/DS162/AB/R (adopted Sept. 26, 2000)); *EC – Hormones* Appellate Body Report, *supra* note 56, ¶ 152 n.138; Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, at 19, WT/DS33/AB/R (adopted May 23, 1997); *Australia – Salmon* Appellate Body Report, *supra* note 54, ¶ 223).

63. *Id.* ¶ 46.

64. *Id.* (quoting Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 92, WT/DS50/AB/R (adopted Jan. 16, 1998) [hereinafter *India – Patent Protection* Appellate Body Report]).

positions of the parties.[65] Even modestly different facts, arguments, and counterarguments can suggest that a single adjudicator and proceeding is not essential. In one manner (at least), Mexico also undercut its argument for judicial abstention and transfer of the WTO case to a NAFTA Chapter 20 panel. Mexico admitted it had not triggered the Exclusion Clause of NAFTA Article 2005.6.[66] This Clause states:

> Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, *the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4*.[67]

In other words, sloppily, even Mexico had not requested, under NAFTA, exclusive use of Chapter 20 proceedings. Its call now, at the WTO stage, was too faint and too late.

Second, the Appellate Body dealt with a 1927 ruling from the Permanent Court of International Justice (PCIJ), the *Factory at Chorzów* case.[68] The case was cited by Mexico for the following reason:

> Mexico's position is that the "applicability" of its WTO obligations towards the United States would be "call[ed] into question" as a result of the United States having prevented Mexico, by an illegal act (namely, the alleged refusal by the United States to nominate panelists to the NAFTA panel), from having recourse to the NAFTA dispute settlement mechanism to resolve a bilateral dispute between Mexico and the United States regarding trade in sweeteners. Specifically, Mexico refers to the ruling of the Permanent Court of International Justice (the "PCIJ") in the *Factory at Chorzów* case, and "calls into question the 'applicability' of its WTO obligations towards the United States in the context of this dispute."[69]

Mexico cited, in particular, the following passage from the PCIJ decision:

> [O]ne party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act,

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65. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 54.
66. *Id.*
67. *Id.* ¶ 54 n.109.
68. *See* Factory at Chorzów (F.R.G. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 13).
69. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 55 (footnotes omitted).

> prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.[70]

In brief, and paraphrasing from this passage, Mexico's point was the United States cannot avail itself of the fact that Mexico has not fulfilled its GATT obligation, or had not had recourse to redress under NAFTA, because the United States has, by an illegal act, prevented Mexico from having recourse to the NAFTA tribunal.

Evidently, this paraphrasing highlights the weakness of the Mexican argument. One clause of the PCIJ opinion refers to "prevent[ion of] the latter from fulfilling the obligation in question."[71] Nothing the United States did, or did not do, "prevented" Mexico from fulfilling its GATT national treatment obligations. Strangely, perhaps, the Appellate Body did not make this point—a simple rebuttal to the Mexican use of the PCIJ case. Instead, the Appellate Body noted that:

> [T]he ruling of the PCIJ in the *Factory at Chorzów* case relied on by Mexico was made in a situation in which the party objecting to the exercise of jurisdiction by the PCIJ was the party that had committed the act alleged to be illegal. In the present case, the party objecting to the exercise of jurisdiction by the Panel (Mexico) relies instead on an allegedly illegal act committed by the other party (the United States).[72]

Further, and more significantly, the Appellate Body took the *Factory at Chorzów* discussion as an opportunity to declare that neither it nor a WTO panel is the proper forum in which to adjudicate NAFTA obligations. The Appellate Body stated:

> Mexico's arguments, as well as its reliance on the ruling in *Factory at Chorzów*, is [sic] misplaced. Even assuming, *arguendo*, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations. We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered agreements*, and to

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70. *Id.* ¶ 55 n.114 (quoting *Factory at Chorzów*, 1927 P.C.I.J. at 31).
71. *Factory at Chorzów*, 1927 P.C.I.J. at 31.
72. *Id.* ¶ 56 n.115.

> clarify the existing provisions of *those agreements*." (emphasis added) Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements. In light of the above, we do not see how the PCIJ's ruling in *Factory at Chorzów* supports Mexico's position in this case.[73]

To be sure, this resolute statement rightly should delight DSU commentators concerned about judicial activism. Might the passage, though, be one with which the Appellate Body has to wrestle in a future case, and square with past leanings, such as in the *Turkey – Textiles* decision[74]?

7. The Appellate Body on Administrative Necessity

The second Mexican defense in the *HFCS* case afforded the Appellate Body to clarify and elaborate on the Article XX(d) exception to GATT obligations.[75] It proved to be an easy task. The Appellate Body did not need to apply the second step of its now well-known two-step test for an Article XX defense. Because Mexico could not prove its Soft Drink Tax, Distribution Tax, and Bookkeeping Requirements qualified under item (d) of Article XX, there was no need to discuss the *chapeau* to the Article.[76]

Mexico argued its measures were "necessary to secure compliance by" the United States with NAFTA, and predictably, the United States countered with the point that the measures were not "necessary."[77] Cleverly, the United States also said NAFTA is not a "law or regulation" within the meaning of GATT Article XX(d).[78] The panel observed that "to secure compliance" under that Article means "to *enforce* compliance." But, that Panel concluded:

> [T]he phrase 'to secure compliance' in Article XX(d) does *not* apply to measures taken by a Member in order to induce another

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73. *Id.* ¶ 56.

74. *See* Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products,* ¶¶ 41-63, WT/DS34/AB/R (adopted Nov. 19, 1999); RAJ BHALA, INTERNATIONAL TRADE LAW ch. 22 (3d ed., forthcoming 2007-08) (manuscript on file with author) (containing an excerpt of the case and discussion of the subject matter jurisdiction over free trade agreements and customs unions).

75. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶¶ 58-80.

76. *Id.* ¶ 81.

77. *Id.* ¶ 59 (citing *Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 8.162-.163).

78. *Id.* (citing *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 8.163).

> Member to comply with obligations owed to it under a *non*-WTO treaty.[79]

That much is clear enough. But, the panel went on to confuse matters, by articulating a dubious distinction between domestic and international countermeasures.[80] Continuing down this path of shadowy reasoning, the panel declaimed an international countermeasure is inherently unpredictable in comparison with a domestic measure. Hence, had Mexico taken action under its own legal system, aimed directly at the right target, the outcome of the action likely would have been predictable. But, Mexico chose an international act—violating the GATT national treatment obligation. That is not the kind of countermeasure Article XX(d) excuses.[81]

Understandably, Mexico appealed the panel's finding that "to secure compliance" excludes international countermeasures and, for the same reason, "laws and regulations" excludes international legal obligations. The United States was in a position many of its critics could only hope for—defending the panel and thereby upholding the international rule of law.

That is, the United States argued against unilateral actions taken in violation of international law.[82] Surely the panel was right, the United States urged: The ordinary meaning of "laws and regulations" with which a measure is designed to secure compliance is domestic rules, like a statute, not obligations under an international agreement like NAFTA.[83] Surely, too, "securing compliance" by violating an international obligation, such as one in GATT or a WTO accord, is not what Article XX(d) condones. The United States also offered a consequential rebuttal to the Mexican appeal. The WTO is a self-contained, rules-based system. Allowing a Member to take action outside the GATT-WTO regime to secure compliance with a GATT-WTO obligation is an interpretation of Article XX(d) that conflicts with DSU Article 23.[84] Worse yet, the United States hinted, such an interpretation could undermine the multilateral trading system.

The American argument proved to be the winning one. The Appellate Body precisely identified the central issue it faced:

> [W]hether the terms "to secure compliance with laws or regulations" in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to

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79. *Id.* ¶ 60 (quoting *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 8.181) (emphasis added).

80. *See id.* ¶ 61.

81. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 61.

82. *See id.* ¶ 65.

83. *Id.*

84. *Id.*

> secure compliance with another WTO Member's obligations under an international agreement.[85]

Beginning with the term "laws or regulations," the Appellate Body agreed Article XX(d) means obligations to secure compliance of one Member, the same Member invoking the enforcement rule, with a measure of that same Member. In a critical sentence explaining the limited scope of Article XX(d), the Appellate Body stated:

> In our view, the terms "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member. Thus, the "laws or regulations" with which the Member invoking Article XX(d) may seek to secure compliance do not include obligations of *another* WTO Member under an international agreement.[86]

The Appellate Body gave two cogent reasons to support this explanation that the term "laws or regulations" does not extend to the international duties of some other WTO Member.

First, Article XX(d) has an illustrative list of "laws or regulations."[87] They include customs enforcement, antitrust enforcement, intellectual property protection, and anti-fraud rules. All of the items on the (admittedly) non-exclusive list are rules that are part of the domestic legal system of a WTO Member. Some of them also may be the topic of an international agreement. But all of them typically are the province of a domestic legal regime, i.e., of regulation by a sovereign government of economic activity within its territory.[88]

Second, the context of Article XX(d) is revealing.[89] Other itemized exceptions in Article XX explicitly refer to international obligations. For instance, Article XX(h) speaks of international commodity agreements.[90] That fact contradicts Mexico's contention the term "laws or regulations" in Article XX(d) implicitly includes international agreements. Put differently, if the drafters of GATT had meant that implication, they would have written it expressly into item (d), as they did in item (h). Notably, China reinforced the American argument by pointing out that GATT Article X:1 refers to "laws [and] regulations" and separately mentions "[a]greements affecting international trade policy."[91] China, of course, had little interest in seeing other WTO Members use GATT or WTO obligations as a sword to attack alleged Chinese violations of

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85. *Id.* ¶ 68.
86. *Id.* ¶ 69 (footnote omitted).
87. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 70.
88. *Id.*
89. *Id.* ¶ 71.
90. *See id.*
91. *Id.*

other international agreements. Here, then, was a salubrious coincidence of two great powers arguing against the law of the jungle.

As for the GATT Article XX(d) phrase "to secure compliance," the Appellate Body began with the statement that its meaning does not expand the scope of the phrase "laws or regulations."[92] That is, neither phrase encompasses international obligations of another WTO Member. It continued, with reference to precedent, that whether a measure passes muster under Article XX(d) as one "to secure compliance" depends on its design.[93] There is no need for the measure to provide, with absolute certainty, that it will secure compliance. But, contribution to doing so is essential:

> It is Mexico's submission that the Panel erred in requiring a degree of certainty as to the results achieved by the measure sought to be justified. Mexico also asserts that the Panel, in its reasoning, incorrectly relied on the Appellate Body Report in *US – Gambling*. We agree with Mexico that the *US – Gambling* Report does not support the conclusion that the Panel sought to draw from it. The statement to which the Panel referred was made in the context of the examination of the "necessity" requirement in Article XIV(a) of the *General Agreement on Trade in Services*, and did not relate to the terms "to secure compliance". As the Appellate Body has explained previously, "the contribution made by the compliance measure to the enforcement of the law or regulation at issue" is one of the factors that must be weighed and balanced to determine whether a measure is "necessary" within the meaning of Article XX(d). A measure that is not suitable or capable of securing compliance with the relevant laws or regulations will not meet the "necessity" requirement. We see no reason, however, to derive from the Appellate Body's examination of "necessity," in *US – Gambling*, a requirement of "certainty" applicable to the terms "to secure compliance". In our view, a measure can be said to be designed "to secure compliance" even if the measure cannot be guaranteed to achieve its result with absolute certainty. Nor do we consider that the "use of coercion" is a necessary component of a measure designed "to secure compliance". Rather, Article XX(d) requires that the design of the measure contribute "to secur[ing] compliance with laws or regulations which are not inconsistent with the provisions of" the GATT 1994.

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92. *Id.* ¶ 72.
93. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶¶ 74, 79.

> Nevertheless, while we agree with Mexico that the panel's emphasis on "certainty" and "coercion" is misplaced, we consider that Mexico's arguments miss the point. Even if "international countermeasures" could be described as intended "to secure compliance", what they seek "to secure compliance with"—that is, the international obligations of another WTO Member—would be outside the scope of Article XX(d). This is because "laws or regulations" within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member.
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> . . . .
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> As the United States points out, Mexico's interpretation of the terms "laws or regulations" as including international obligations of another WTO Member would logically imply that a WTO Member could invoke Article XX(d) to justify also measures designed "to secure compliance" with that other Member's WTO obligations. By the same logic, such action under Article XX(d) would evade the specific and detailed rules that apply when a WTO Member seeks to take countermeasures in response to another Member's failure to comply with rulings and recommendations of the DSB pursuant to Article XXIII:2 of the GATT 1994 and Articles 22 and 23 of the DSU. Mexico's interpretation would allow WTO Members to adopt WTO-inconsistent measures based upon a *unilateral* determination that another Member has breached its WTO obligations, in contradiction with Articles 22 and 23 of the DSU and Article XXIII:2 of the GATT 1994.
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> Finally, . . . Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. As we noted earlier [in deciding on Mexico's first appellate argument], this is not the function of panels and the Appellate Body as intended by the DSU.[94]

94. *Id.* ¶¶ 74-75, 77-78 (footnotes omitted) (citing Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 317, WT/DS285/AB/R (adopted Apr. 20, 2005); Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000)).

In sum, the Americans (and the Chinese) were right. WTO dispute settlement cannot be used for non-WTO claims, nor can it be an excuse for unilateral action.

The Appellate Body offered an additional reason (as the panel had), for rejecting the expansive view of Article XX(d) urged by Mexico:

> We note that, in its analysis, the Panel also referred to the negotiating history of the GATT 1947, and particularly to the *rejection of a proposal presented by India during the negotiations on the International Trade Organization (the "ITO") Charter according to which Members would be permitted to justify, on a temporary basis, retaliatory measures under Article XX*.[95]

For GATT history buffs, unfortunately, the Appellate Body buried this solid rationale in a footnote.

8. Commentary

a. Product Types and National Treatment Claims

As any student of GATT appreciates, a threshold question in any national treatment dispute concerns the likeness of imported merchandise as against domestic products. GATT Article III:2 (first sentence) demands that products be "like," as does Article III:4. GATT Article III:2 (second sentence), coupled with GATT Article III:1 and Antidumping (AD) Agreement Article 3, paragraph 2 (the Interpretative Note), enlarges the scope of covered products to include not only like ones, but also directly competitive or substitutable ones.[96] Prior GATT and WTO jurisprudence, including the important Appellate Body precedent in the *Japan Alcoholic Beverages* case,[97] articulates the test for product relationships. In the *Mexico – HFCS* case, a threshold matter was whether a soft drink sweetened with either HFCS or beet sugar is "like" one sweetened with cane sugar (under Article III:2, first sentence, and Article III:4), or possibly not "like," but "directly competitive or substitutable" with one sweetened with cane sugar (under Article III:2, second sentence).

As any soft drink aficionado appreciates, arguing HFCS and beet sugar are neither "like" nor "directly competitive or substitutable" with sugar cane would be implausible. Wisely, Mexico did not make such an argument, i.e., it did

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95. *Id.* ¶ 78 n.175 (emphasis added).

96. *See* RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS ch. 1 (2005).

97. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996).

not urge that Article III is entirely inapplicable to the case. Rather, the debate was about how and which parts of the Article were applicable.

At the panel stage, the United States successfully urged the Soft Drink and Distribution Taxes were inconsistent with the national treatment rule of Article III:2, first sentence.[98] That is, the United States claimed, and the panel concluded, the two measures were illegal under that provision. The violations arose because:

> (1) As applied to sweeteners, specifically beet sugar, the measures taxed imported beet sugar in excess of the tax applied to the "like" domestic product.[99] The "like" domestic product, in this respect, was cane sugar.
>
> (2) As applied to soft drinks and syrups sweetened with either HFCS or beet sugar, the measures taxed imported soft drinks and syrups sweetened with non-cane sugar sweeteners in excess of the tax applied to "like" domestic products.[100] The "like" domestic product, in this respect, is any soft drink or syrup sweetened with cane sugar.

The United States also claimed, with success, that Mexico violated, with respect to HFCS, the national treatment rule of Article III:4.[101] The Soft Drink and Distribution Taxes affected the internal use (i.e., use in Mexico) of imported non-cane sugar sweeteners. These measures accorded imported HFCS-containing beverages and imported beet-sugar-containing beverages less favorable treatment than given to "like" products.[102] That is, as applied to sweeteners, Mexico treated imported HFCS and imported beet sugar less favorably than the "like" domestic product, cane sugar, through differential tax imposition.

Finally, the panel agreed with the American argument concerning the Bookkeeping Requirements.[103] Under this measure, Mexico illegally subjected sweeteners, again, imported HFCS and imported beet sugar, less favorable treatment than it accorded to the "like" domestic product, cane sugar.

Interestingly, the United States also prevailed in an argument under the national treatment rule provided in the second sentence of Article III:2.[104] The successful argument was the Soft Drink and Distribution Taxes violate that provision as imposed on sweeteners. Those measures apply to HFCS, but not to

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98. *Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 8.6-.8, 8.11.

99. *Id.* ¶ 3.1; *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 5(a)(i).

100. *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 3.1; *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 5(a)(iv).

101. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 5(a)(iii).

102. *Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 8.9-.12, 8.21-.22, 8.59.

103. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 5(b).

104. *See Mexico – HFCS* Panel Report, *supra* note 12, ¶ 3.11; *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 5(a)(ii).

cane sugar, for which HFCS is a "directly competitive or substitutable" Mexican product. The result is the measures "afford protection" to Mexican production of cane sugar.

The American argument here is noteworthy, as it relates to the U.S. claims under Article III:2, first sentence, and Article III:4. The scope of Article III:2, first sentence, and Article III:4, is defined by the concept of "likeness." The American argument under those provisions necessarily relied on two "likenesses":

(1) As a sweetener, imported HFCS is "like" domestic cane sugar.
(2) As a sweetener, imported beet sugar is "like" domestic cane sugar.[105]

But, in fashioning its Article III:2, second sentence argument, the United States said HFCS is "directly competitive or substitutable" with cane sugar.[106]

Is it legally inconsistent to argue, under Article III:2, first sentence, and Article III:4, that HFCS is a sweetener "like" cane sugar, but under Article III:2, second sentence, that HFCS is directly competitive or substitutable? The answer is "no." The universe of "like" products is encompassed by the larger universe of "directly competitive or substitutable" products. That is, speaking generally, all "like" products are "directly competitive or substitutable," but the reverse is not true.[107]

What did the Appellate Body say about the American GATT Article III arguments, and the topic of "like" and "directly competitive or substitutable" products? Nothing. In a deadpan footnote, the Appellate Body observed that because Mexico did not appeal the national treatment claims, stating: "[W]e express no view on the Panel's interpretation of Article III in this case."[108] One way to read this footnote is that the Appellate Body suspected some cleaning up of

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105. *Mexico – HFCS* Panel Report, *supra* note 12, ¶¶ 8.6-.7.

106. *Id.* ¶ 8.8.

107. A related question arises under a claim that imported soft drinks and syrups that use HFCS or beet sugar are "like" domestic soft drinks and syrups that use cane sugar as a sweetener. Would it be legally inconsistent to argue both (1) under Article III:2, first sentence, and Article III:4, that soft drinks using HFCS as a sweetener are "like" soft drinks using cane sugar, and (2) under Article III:2, second sentence, the two kinds of soft drinks are directly competitive or substitutable? The answer is "no." As above, in general, all "like" products are "directly competitive or substitutable," but the reverse is not true.

It might seem that a claim that a finished product (e.g., soft drinks) that uses as a key ingredient (e.g., sweetener) either of two alternatives (e.g., HFCS or cane sugar) ought to indicate strongly that the alternatives (HFCS and cane sugar) are, themselves, "like." However, a finished good (e.g., soft drinks) may well be distinct from a key ingredient (e.g., sweetener). Indeed, that is likely the case (pun intended).

108. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 58 n.117.

the panel's findings or rationale may have been in order. In passing, though, the Appellate Body might have observed two points.

First, if HFCS is "like" cane sugar as a sweetener for purposes of Article III:2, first sentence, and Article III:4, then why bother making a claim under Article III:2, second sentence, resting on "direct competition or substitution"? The answer is pleading in the alternative makes sense, in the event one claim is rejected, at least as long as the Appellate Body lacks the power to remand a case to a panel. Second, conceptually, Article III:2 (first and second sentences) applies to fiscal measures, namely, internal taxes. Article III:4 applies to non-fiscal measures.[109] The Appellate Body might have observed that technical precision in pleading would have led the United States to focus its Article III:4 claim on the Bookkeeping Requirements, and its Article III:2 claim on the Soft Drink and Distribution Taxes. The Appellate Body might have chastised the panel for not doing likewise.

b. Forum-Shopping

Mexico's argument for judicial abstention in the *HFCS* case conjures up the general policy question of how, if at all, dispute settlement mechanisms under different trade agreements relate to one another. Mexico urged a holistic approach, seeing market access into the United States for cane sugar under NAFTA as inseparable from its disputed measures in the WTO action. Why not have both battles in the Sugar War resolved in one setting?

From Mexico's perspective, in 1998 it launched a case under NAFTA, and in August 2000 requested establishment of a panel under NAFTA Article 2008.[110] The essence of its claim was the United States violated a NAFTA commitment to grant access for Mexico's sugar to the American market. Mexico appointed its panelists to the tribunal. The United States not only failed to do so, but also told its section of the NAFTA Secretariat to refrain from doing so.[111] Mexico thus could not have its grievance heard. The Soft Drink Tax, Distribution Tax, and Bookkeeping Requirements were Mexico's way of compelling the United States to fulfill its NAFTA duties, or at least appoint panelists.

Another way to frame the general question is in terms of forum-shopping.[112] From a Mexican perspective, the American legal strategy at bisection conjured up the possibility of forum-shopping. The United States could bottle up the NAFTA case against it by procedural and other delays. At the same

109. *See* BHALA, *supra* note 96, chs. 5-6.

110. *See Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 54 n.106.

111. *Mexico – HFCS* Panel Report, *supra* note 12, ¶ 4.388.

112. *See* David Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties,* 14 AM. U. INT'L L. REV. 1025 (1999).

time, it could prosecute its case against Mexico in the WTO, and couch its argument in the language of non-interference. Mexico's choice, given the legal insufficiency (indeed, availability) of a NAFTA remedy, was a kind of international civil disobedience. But, from the American vantage point, and that of the Appellate Body, the risk of forum-shopping was secondary to the risk of hyperactive judges in Geneva. It simply could not be appropriate for a WTO adjudicator to assess by itself the correctness of claims under NAFTA. Otherwise, the DSU would become a forum for WTO Members to obtain determinations about the consistency, or lack thereof, of a measure with a non-WTO agreement.

The boundaries of this general problem have yet to be set. There may never be permanent boundaries. However, one delineation, which is consistent with the American perspective, is that unless and until a regional or bilateral trade agreement expressly grants jurisdiction to a WTO panel or the Appellate Body, any panel or the Appellate Body had better back off from regional trade agreement (RTA) claims. Forum-shopping may or may not occur in a given case, but any claim or issue that arises under a free trade agreement (FTA) or customs union (CU) must be resolved under dispute resolution procedures in that context. Another way to draw the boundary is to return to GATT Article XXIV. It confers some authority over FTAs and CUs on the WTO, and the Appellate Body has made much out of some of the substantive features of this provision on at least one occasion.[113] Might Mexico have done well to argue the mirror image of what it did?

That is, might Mexico have had a better chance if it had argued Article XXIV empowers a panel or the Appellate Body to take over all of the sugar-related issues? Interestingly, Mexico had the opportunity to raise the matter at the appellate stage, in oral argument. The Appellate Body observed:

> Mexico also stated that it could not identify a legal basis that would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it is pursuing under the NAFTA.[114]

Perhaps next time, the argument will be offered as a possible way of getting around the difficulty of finding some textual basis in the GATT-WTO regime for a panel or the Appellate Body to abstain from adjudicatory proceedings until an FTA or CU tribunal has issued a ruling.

c. Kudos to the Appellate Body and Shame on Mexico?

Might it be said the Appellate Body's treatment of the judicial abstention issue is a notably fine one? The Appellate Body gives a clear, succinct, and

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113. *Turkey – Textiles, supra* note 74.
114. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 54.

forceful presentation of the matter. It draws not only from the text of the DSU, but also from NAFTA. It handles a Permanent Court of International Justice (PCIJ) case. And, importantly, it applies—relentlessly but appropriately—its own precedents. All of that adds up to a decision to keep the WTO courthouse doors open. That decision, in turn, accords with a common-sense vision of fairness, as manifest in the "right to be heard."

Conversely, should Mexico be faulted for its argument about exercise of jurisdiction? Both the panel and the Appellate Body say—without using the metaphor—that the WTO dispute settlement system is not like a private hospital. WTO adjudicators cannot pick or choose among patients, and decline (at least after stabilizing) certain (e.g., indigent) ones. Rather, the system is akin to a public hospital, indeed a church or other place of worship—its doors are open to service for all.

These analogies bespeak the irony of Mexico's position. As a developing country, it would seem Mexico would want to maximize access to the DSU. Notably, China (along with the European Communities) did not support the Mexican position.[115] China provided a consequential reason why developing (and, indeed, developed) countries ought to favor exercise of jurisdiction—namely, certainty in dispute settlement. As the Appellate Body characterized it:

> China submits that if a panel declines to exercise jurisdiction over a dispute, such a decision will create legal uncertainty, contrary to the aim of providing security and predictability to the multilateral trading system and the prompt settlement of disputes as provided for in Article 3.3 of the DSU.[116]

In sum, Mexico's argument that a panel has the right to pick and choose among cases to hear, while suiting Mexico's short-term interests in the *HFCS* case, hardly serves the long-term access interests of poor countries.

d. Compliance and Economics

To be fair to Mexico, it is important to appreciate that Mexico complied with the Appellate Body ruling. The United States and Mexico agreed Mexico would have until January 1, 2007, to implement the ruling.[117] In the summer of 2006, Mexico elected a new Congress, which took office on September 1.[118] On

115. *See id.* ¶¶ 34.37.
116. *Id.* ¶ 43.
117. Brevetti & O'Boyle, *Grassley, U.S. Industry Welcome Agreement*, *supra* note 25, at 1168.
118. *Id.*

December 20, 2006, the Mexican Senate voted to repeal the disputed measures, and Mexico's *Official Journal* published notice of the repeal a week later.[119]

That repeal is part of a transitional arrangement reached between the two countries in July 2006 to do what NAFTA envisions: achieve free trade in HFCS by January 1, 2008.[120] The deal relies on tariff rate quotas (TRQs), and its key points are as follows:

- From October 1, 2006, until September 30, 2007, the United States is granting duty-free access to 250,000 metric tons of Mexican sugar. In return, Mexico is providing duty-free access to its market for an equal amount of HFCS from the United States.

- From October 1, 2007 through December 31, 2007, the United States will give duty-free access to Mexican sugar of at least 175,000 metric tons, and as much as 250,000 metric tons, depending on market conditions. In return, Mexico will give duty-free access to an equivalent amount of American HFCS.

- For each of three years, 2006, 2007, and 2008, Mexico will grant sugar from the United States duty-free treatment for at least 7258 metric tons (raw value).

- Starting on January 1, 2008, Mexico will eliminate the tariff on over-quota shipments of sugar from the United States. Mexico also will eliminate all duties on HFCS imports. Both moves conform to NAFTA.[121]

Arguably, Mother Nature weakened American protections against foreign sugar. Partly because of the lingering effects of Hurricanes Katrina and Wilma (both in 2005), the American sugar market has been in deficit.[122] And, apparently, the

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119. *See* Daniel Pruzin, *Mexico Cites Compliance with WTO Rulings Against Taxes on Imports of U.S. Sweeteners*, 24 Int'l Trade Rep. (BNA) 79 (Jan. 18, 2007). The Senate also rejected a government proposal (which the lower chamber of Mexican Congress had approved) to put a 5% tax on all soft drinks, regardless of the type of sweetener they contained. *Id*.

120. *See* Brevetti & O'Boyle, *Grassley, U.S. Industry Welcome Agreement*, *supra* note 25, at 1168-69.

121. *Id.*

122. *See id.* at 1169; Michael O'Boyle, *Mexico, U.S. Raise Quotas on HFCS, Sugar in Midst of Long-Standing Sweetener Dispute*, 22 Int'l Trade Rep. (BNA) 1595, 1595 (Oct. 6, 2005).

Mexican judiciary reduced Mexico's appetite for the 20% tax on HFCS.[123] A Mexican court granted an injunction to the largest bottler of Coca-Cola in Mexico, known as "Coca-Cola FEMSA," under which the bottler can use HFCS tax-free in its beverages.[124]

Under NAFTA, free trade in HFCS was supposed to have happened by 2003.[125] That would have eliminated the stratospheric Mexican bound rate of 210% on HFCS—which, in August 2005, Mexico threatened to impose if the United States forced it to remove its taxes without granting duty-free treatment to its surplus sugar.[126] Free trade will now happen, under the July 2006 settlement, in 2008. NAFTA also calls for free trade in sugar in 2008.

Might there yet be some battles in the Sugar War? Economics may decide whether managed trade will sweeten into free trade. Of the many quotes from various constituencies in both the United States and Mexico, one that stands out is from Jack Roney, Director of Economics and Policy Analysis at the American Sugar Alliance:

> NAFTA is basically flawed and the notion of free trade in sweeteners is not really tenable, because the U.S. market clearly cannot withstand 2 million tons of displaced Mexican sugar coming into our market if we were to send 2 million tons of U.S. corn sweetener into Mexico.[127]

True or false?

B. Customs and Transparency

1. Citation

European Communities – Selected Customs Matters, WT/DS315/AB/R (issued on November 13, 2006, and adopted on December 11, 2006) (complaint by the United States, with Argentina, Australia, Brazil, China, Chinese Taipei, Hong Kong, India, Japan, and Korea as third-party participants).[128]

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123. *See* O'Boyle, *Mexican Congress Unlikely to Act Soon*, *supra* note 38, at 413.

124. *Id.*

125. *See id.*

126. *See* Brevetti & O'Boyle, *WTO Panel Issues Ruling*, *supra* note 19, at 1636.

127. Michael O'Boyle, *Mexico Considers Other Measures to Block U.S. HFCS Following Interim WTO Decision*, 22 Int'l Trade Rep. (BNA) 1128 (July 7, 2005) (quoting Jack Roney, Director of Economics and Policy Analysis at the American Sugar Alliance).

128. Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R (adopted Dec. 11, 2006) [hereinafter *EC – Selected Customs Matters* Appellate Body Report].

2. Introduction

In an ideal world (for the United States at least), this could have been a blockbuster case, with the Dispute Settlement Body requiring the European Communities under Article X of the GATT[129] to revamp significantly its system of customs administration. That would have meant eliminating the current arrangements in which twenty-seven EC members hold primary responsibility for administering the EC customs laws and regulations, including, but not limited to, classification and valuation determinations, as well as national administrative and judicial review, penalty provisions, and audit procedures. According to the United States, "the [EC] administers its customs law through 25 [now 27] separate, independent customs authorities and does not provide any institution or mechanism to reconcile divergences automatically and as a matter of right when they occur,"[130] rather than in a "uniform, impartial and reasonable manner" throughout the EC member nations.[131] (There was no U.S. challenge of the EC customs legal regulatory system as such, only of the divergent manner in which the rules may be applied by the national authorities.)

Had the United States been fully successful in its broad challenge based on Article X:3 of the GATT, the Appellate Body might have decreed, and the EC might have been forced to adopt, a centralized customs decision review mechanism, which would have ensured a prompt, quasi-automatic centralized mechanism for review and coordination of the determinations of the national offices, and perhaps their auditing, in matters of classification, valuation, and penalties, among others.

However, that didn't happen. Instead, the Appellate Body, even though sympathizing with the United States' assertions on appeal that it had in fact been challenging broadly the EC customs administrative system, declined to "complete the analysis" for lack of a proper factual record.[132] At best, the decision leaves open the possibility that the United States, with more extensive evidence, could launch a new attack on the EC customs administrative system, with much more extensive evidence as to how individual EC member country decisions resulted in a system that is inconsistent with the requirements of GATT Article X.

The actual decision is thus largely a narrow and technical one (albeit 120 pages, excluding annexes), further defining the requirements of a complaint to the Dispute Settlement Body under Article 6.2 of the Dispute Settlement

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129. General Agreement on Tariffs and Trade 1994 art. X, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]. The texts quoted and cited are taken from the GATT 1947 as revised and amended by the GATT 1994 and are referred to in the text simply as "GATT."

130. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 158.

131. *See id.* ¶ 196 (quoting GATT 1994, *supra* note 129, art. X:3(a)).

132. *See id.* ¶¶ 279-87.

Understanding,[133] affirming U.S. complaints regarding different classifications of the same liquid crystal display (LCD) monitors by various EC members,[134] but rejecting assertions by the United States that a practice by some EC nations mandating a prior approval process (illegal under EC regulations) failed to demonstrate EC failure to implement its customs laws in a uniform manner.[135] If there is any significant innovation, it is in the Appellate Body's somewhat broader interpretation of GATT Article X:3(a), which, instead of limiting challenges to the *application* of a WTO Member's laws (as suggested by earlier decisions), leaves open the possibility of a challenge to "the substantive content of a legal instrument that regulates the administration" of customs-related laws and regulations—a challenge to the manner in which a legal instrument is administered—provided that the claimant meets the burden of showing "how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1."[136]

3. Major Issues on Appeal[137]

The first series of issues related to the panel's interpretation and application of its terms of reference: (i) whether the "measure at issue" under Article X:3(a) of the GATT is the "manner of administration" allegedly inconsistent with the requirement of uniform, impartial and reasonable administration; (ii) whether the panel was correct in finding that the "measure at issue" before it was the "manner of administration" of the various EC laws, regulations and related EC-wide measures; (iii) whether the panel was precluded from considering challenges of the EC system of customs administration as a whole (rather than challenges to particular aspects of customs administration); and (iv) whether the panel erred by considering information that pre-dated or post-dated the formation of the panel.[138]

The second, and likely most important, group of issues concerned whether the panel erred in finding that the requirement in GATT Article X:3(a) that each member "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings" relating, *inter alia*, to customs, is applicable to the *application* of laws, regulations, and administrative processes, but "not to the laws and regulations as such."[139] In particular, did the panel err in

133. DSU, *supra* note 1, art. 6.2.

134. *See EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶¶ 244-60.

135. *See id.* ¶¶ 261-70.

136. *Id.* ¶¶ 200-01.

137. This section is based on *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 116.

138. *Id.* ¶ 116(a).

139. *Id.* ¶ 116(b)(i).

finding that differing penalty and audit provisions[140] among the various member states of the EC are not inconsistent with Article X:3(a)?

The uniformity issue was raised in the context of several very specific situations:

(a) Does Article X:3(a) require uniformity of "administrative processes" so that an administrative process (in Germany) leading to tariff classification of blackout draperies was such as to result in non-uniform administration that is thus inconsistent with the Article X:3(a) "uniformity" requirement?;

(b) Was the EC process of classifying LCD monitors with a digital video interface under HS 8471 of the EC's Common Customs Tariff as computer monitors (subject to zero duty because they fall under the Information Technology Agreement[141]) in some EC member countries but as video monitors (subject to a 14% duty under HS 8528) in other EC member countries a violation of Article X:3(a)?; and

(c) Did the imposition of a "form of prior approval requirement" in some EC member states (even though no such procedure is sanctioned by EC laws and regulations) also constitute a violation of Article X:3(a)? Assuming that the Appellate Body found that the panel erred, was the Appellate Body in a position to complete the analysis (based on the factual information developed by the panel), so as to rule on the United States' challenge of the administration of the EC's customs administration system as a whole (rather than only with regard to the three instances considered directly by the panel)?[142]

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140. In general, penalties are imposed for violations of national (or in this case, EC wide) customs-wide laws and regulations, but those penalty provisions vary among the EC member states. *See id.* ¶¶ 50-52. Similarly, EC member states (and other WTO Members) commonly undertake audits of customs import and other transactions to determine, *inter alia*, whether the importer has provided accurate and complete classification, valuation, country of origin, and other information relating to the entry. *See, e.g., id.* ¶ 204 n.462 (citing Council Regulation 2913/92, art. 78(2), 1992 O.J. (L 302) 1-50 (EEC)).

141. WTO, Ministerial Declaration on Trade in Information Technology Products, Dec. 13, 1996, WT/MIN(96)/16, 36 I.L.M. 383 (1996) [hereinafter Information Technology Agreement].

142. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 116(b).

The final main issue was whether the panel erred in determining that Article X:3(b), which requires that Members "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters,"[143] demands that the review and correction procedures "govern the practice of *all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular [WTO] Member."[144] (Obviously, an EC-wide mechanism to cover all relevant agencies of twenty-five or twenty-seven EC members would be a daunting challenge, particularly at the initial review level.) The only issue under Article XXIV of GATT 1994—the article dealing with the requirements for customs unions and free trade areas—was raised conditionally, as a possible defense should the Appellate Body have found that the EC customs system as a whole was deficient under Article X:3.[145]

Despite the interrelationship of many of these sub-issues, they are considered here in the same order as in the Appellate Body Report.

4. Holdings and Rationale

a. The Panel's Terms of Reference[146]

Article 6.2 of the Dispute Settlement Understanding provides that the request for establishment of a panel should, *inter alia*, "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[147] Much if not most of the discussion of "terms of reference" relates to whether the panel refused to consider a broad frontal challenge by the United States to the administration of the EC customs system by the individual members' customs services, largely because the United States limited its complaint to a few specific problems (i.e., blackout draperies, LCD monitors, prior approval requirements) rather than making a more broadly based challenge to the system as a whole. In particular, this meant to the panel that for a violation of Article X:3(a), the "measure at issue" to be identified in the panel request would have been the "manner of administration" of the relevant EC legal instruments that was alleged to be other than uniform, impartial, or reasonable.

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143. *Id.* ¶ 293 (quoting GATT 1994, *supra* note 129, art. X:3(b)).

144. *Id.* ¶ 116(c) (quoting Panel Report, *European Communities – Selected Customs Matters*, ¶ 7.539, WT/DS315/R (June 16, 2006) [hereinafter *EC – Selected Customs Matters* Panel Report]).

145. *Id.* ¶ 116(d).

146. Unless otherwise indicated, this section is based on *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶¶ 118-89.

147. DSU, *supra* note 1, art. 6.2.

For the Appellate Body, the requirements of Article 6.2 are two. First, the "specific measure" is the object of the challenge—the measure "that is alleged to be causing the violation of an obligation contained in a covered agreement."[148] In contrast, the basis of the "claim" is the provision of the specific provision of the "covered agreement" (in this case, the GATT) containing the provision alleged to have been violated (here, Article X:3(a)), along with a brief explanation as to "*how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question."[149] Together, these two requirements define the scope of the dispute and satisfy due process requirements. The panel was wrong to confuse the "measure at issue" with the specific agreement provision; uncertainty would be created if the identification of the measure were to vary depending on the substance of the legal provision invoked by the complaining Member, in part because the responding Member would have to "guess what the panel would identify as the measure at issue."[150] Once the specificity requirements of Article 6.2 are met, the Member can then set out "any act or omission" it wishes to challenge.

The essence of the United States' complaint, as noted above, was that the EC's manner of administering "its laws, regulations, decisions and rulings [of those described in GATT Article X:1] [was] not uniform, impartial and reasonable, and therefore [was] inconsistent with Article X:3(a) of the GATT 1994."[151] For the United States, these areas of administration included classification and valuation, and procedures for the same, including the provision of information to importers; procedures for the entry or release of goods, including different requirements for certificates of origin, physical inspection, differing licensing requirements for food products, and express delivery shipments; procedures for auditing entry statements after the release of goods; penalties and procedures for imposing penalties for violation of customs rules; and requirements for record-keeping.[152] The United States provided a number of illustrations, noted earlier.

The panel interpreted these challenges, in accordance with DSU Article 6.2, to require specific identification of the measure at issue in each instance, due to the fact that the U.S. challenges affected thousands of different provisions relating to "a vast array of different customs areas."[153] Accordingly, it effectively limited its analysis to the specific examples, rather than to the broader problem.

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148. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 130.

149. *Id*.

150. *Id.* ¶ 136.

151. Request for the Establishment of a Panel by the United States, *European Communities – Selected Customs Matters*, at 1, WT/DS315/8 (Jan. 14, 2005) [hereinafter U.S. Panel Request].

152. *Id.* at 2; *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 139.

153. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 141 (quoting *EC – Selected Customs Matters* Panel Report, *supra* note 144, ¶ 7.30).

The Appellate Body was not convinced of the correctness of the panel's approach. It began by noting the instruments characterized as "measures" by the United States: the Community Customs Code,[154] the Implementing Regulation,[155] the Common Customs Tariff,[156] the Integrated Tariff (TARIC),[157] and all amendments, "implementing measures and other related measures."[158] For the Appellate Body, it was clear that the United States challenged only the collective administration of these legal instruments, not their substantive content, as the United States confirmed at the oral hearing.[159] Under these circumstances, the Appellate Body concluded that the specificity of the U.S. request met the requirements of DSU Article 6.2.[160]

Does the panel request confine the measure at issue to areas of customs administration (rather than administration of the various laws and regulations)? No, said the Appellate Body: The U.S. panel request was simply an illustrative list (beginning with classification and valuation, as noted above), and did not preclude a challenge to administration of the laws and regulations themselves by limiting the U.S. challenges to those specified areas of customs administration. Rather, the specific areas of administration are the instruments characterized as "measures" by the United States, i.e., the Community Customs Code et al.[161]

Again, because of the U.S. reference to the specific areas of customs administration, the panel concluded that the U.S. request precluded a wholesale challenge to EC customs administration, the stated objective of the United States. Again, the Appellate Body disagreed. First, it looked to the issue of whether a Member may challenge another Member's legal system as a whole. Here, the United States was not challenging the application of individual provisions of the legal instruments, but, rather, "the absence of any mechanism or procedure at the European Communities level to reconcile divergences in the administration of these instruments by the member states of the European Communities."[162]

The fact that the U.S. claim related to administration as a whole was not a violation of EC due process rights, in that adequate notice of the nature of the complainant's case was afforded. The panel request made it clear that the United States was concerned that the divergent practices of the EC members' customs administrations, with the United States stating that "the myriad forms of administration of these measures include, but are not limited to, laws, regulations, handbooks, manuals, and administrative practices of customs authorities of

154. *See* Council Regulation 2913/92, 1992 O.J. (L 302) 1-50 (EEC).

155. *See* Commission Regulation 2454/93, 1993 O.J. (L 253) 1-766 (EEC).

156. *See* Council Regulation 2658/87, 1987 O.J. (L 256) 1-675 (EEC).

157. *See* Integrated Tariff of the European Communities (TARIC), 1999 O.J. (C 212) 1-31 (EC).

158. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 150.

159. *Id.* ¶ 151.

160. *Id.* ¶ 152.

161. *Id.* ¶ 153.

162. *Id.* ¶ 166.

member States of the European Communities."[163] While the Appellate Body concedes that the request for a panel—a two-page document—"could have been drafted with more precision," the issues were presented with sufficient clarity to satisfy DSU Article 6.2 and demonstrate that the claim under GATT Article X:3(a) "challeng[ed] the European Communities' system of customs administration as a whole or overall."[164] Accordingly, the panel was also wrong in precluding the United States from challenging the EC customs administration system "as such."

However, the panel did not, as the EC alleged on appeal, err in considering in the course of its analysis "steps and acts of administration that pre-date or post-date the establishment of a panel," and thereby violate the EC's due process rights, because preparation of defenses for past instances of administration is "unduly difficult" and the inclusion of future instances makes the subject matter a "moving target."[165] While the general rule in DSU Article 6.2 is that the measures challenged must be in existence at the time the panel is established, there are two exceptions: where a subsequent legal instrument amends a measure identified in the panel request, and where even after a measure's legislative basis has expired, the effects allegedly are impairing the benefits accruing to the requesting Member under a covered agreement.[166]

This rationale was applicable to this proceeding, particularly where the "manner of administration in a specific case may not have a clear starting or end point" and where the administration "may comprise a continuum of steps and acts, some of which may pre-date or post-date the step or act of administration that is considered by a panel at the time of establishment of that panel."[167] These, the Appellate Body agreed, can be relevant to determining whether a violation of GATT Article X:1(a) existed at the time of panel formation. However, the Appellate Body's reasoning is different from the panel's. According to the Appellate Body, the panel failed to distinguish between measures and pieces of evidence. The United States was not precluded from presenting evidence from acts of administration before and after the formation date, and a panel "enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment."[168]

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163. U.S. Panel Request, *supra* note 151, at 2.

164. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 172.

165. *Id.* ¶¶ 179, 185 (quoting Other Appellant's Submission by the European Communities, ¶ 66, WT/DS315 (Aug. 29, 2006), *available at* http://trade.ec.europa.eu/doclib/docs/2007/march/tradoc_133787.pdf).

166. *Id.* ¶ 184.

167. *Id.* ¶ 185.

168. *Id.* ¶ 188.

b. Claims Under GATT Article X:3(a)[169]

In this section of the opinion, the Appellate Body analyzed specific aspects of the United States' claims under GATT Article X:3(a), including the threshold issue of whether the substantive content of a legal instrument (such as the EC customs laws and regulations) may be challenged under Article X:3(a) (rather than under some specific provision of GATT or the other covered agreements), or whether the challenge under Article X:1(c) must be limited to the *administration* of those laws and regulations. (The issue is raised in the context of U.S. criticism of differing EC member state customs penalty and audit procedures.) The panel concluded that the same laws and regulations cannot at the same time qualify as those described in Article X:1 and as acts of administration within Article X:3(a).[170] The Appellate Body disagreed.

The relevant provisions of Article X read as follows:

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.
> . . . .
> 3. (*a*) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.[171]

However, the problem for the Appellate Body is that two prior rulings, *EC – Bananas III* and *EC – Poultry*, give at least the appearance of barring challenges under Article X:3(c) to the substance of the laws and regulations. In *EC – Bananas III*, the Appellate Body stated that "Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be

169. *See id.* ¶¶ 190-286.

170. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶¶ 191-93.

171. GATT 1994, *supra* note 129, art. X.

examined for their consistency with the relevant provisions of the GATT 1994."[172] Similarly, in *EC – Poultry,* the Appellate Body concluded that to the extent the Brazilian appeal "relates to the *substantive content* of the EC rules themselves, and not to their *publication or administration*, that appeal [fell] outside the scope of Article X of GATT 1994."[173]

This case, according to the Appellate Body, is different:

> The statements [in these earlier cases] do not exclude, however, the possibility of challenging under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1. . . . While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial or reasonable administration of that legal instrument.[174]

However, the burden on the claimant wishing to prevail on such allegations is substantial. It must show that the challenged legal instrument "necessarily leads to a lack of uniform, impartial or reasonable administration."[175] It will not be enough for the claimant just to cite the legal instrument; the claimant "must discharge the burden of substantiating how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1."[176]

i. Penalty and Audit Procedures

With regard to the issues at hand—penalty provisions and audit procedures—the panel had decided that substantive differences in penalty laws (in the absence of uniform EC provisions) were not in themselves violations of Article X:3(a).[177] It reached essentially the same conclusion with regard to audit procedures: the existence and exercise of discretion within the national customs services as to deciding when and how to undertake audits is not a violation, as

172. Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶ 200, WT/DS27/AB/R (adopted Sept. 25, 1997).

173. Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, ¶ 115, WT/DS69/AB/R (July 13, 1998).

174. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 200.

175. *Id.* ¶ 201.

176. *Id.*

177. *Id.* ¶¶ 203-04.

long as such discretion does "not unduly compromise the underlying due process objective of Article X:3(a)" and does "not render the trading environment insecure and unpredictable without just cause.[178]

The Appellate Body did not disagree with the panel. For the United States to demonstrate that the divergent penalty procedures violate Article X:3(a), more than allegations were required. But the United States did not provide concrete examples or other evidence "on either the degree of differences in the penalty provisions of the member States or the impact of such differences in the enforcement of the provisions of European Communities customs law."[179] Differences between "individual acts of [customs] administration" may stem from exercise of discretion in the application of the law, rather than from differences in penalty provisions.[180] In other words, the United States failed to meet its burden of proof.

With regard to audit procedures, the Community Customs Code permits customs authorities to conduct post-release-of-goods audits, but does not require them to do so.[181] However, differences in audit procedures do not necessarily lead to non-uniform administration of EC customs laws in violation of Article X:3(a); no such demonstration was made before the panel.[182] The Appellate Body also believed that there could be other reasons as to why audits were not uniform or predictable: "We are also aware that a certain degree of uncertainty as to when and under what conditions an audit will be carried out is in the interest of sound customs administration and must be accepted by traders as part of a normal customs regime."[183]

ii. Administrative Process and the Requirement of Uniformity

Does Article X:3(a) require uniformity of administrative processes? The panel had found that the term "administer" in the Article X:3(a) *relates* to the administrative process, but did not find that the article *requires* uniformity with regard to administrative processes.[184] Since an administrative process "may be understood as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision," it appears to the Appellate Body that Article X:3(a) "does not contemplate uniformity of administrative processes."[185]

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178. *EC – Selected Customs Matters* Panel Report*, supra* note 144, ¶ 7.434.
179. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 211.
180. *Id.* ¶ 213.
181. *Id.* ¶ 215.
182. *Id.* ¶ 216.
183. *Id.* ¶ 215 (citing *EC – Selected Customs Matters* Panel Report*, supra* note 144, ¶ 7.432).
184. *Id.* ¶¶ 219-20.
185. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 224.

Evidence showing a lack of uniformity might show differences in an administrative process as to constitute a violation of Article X:3(a), but a case-by-case analysis is required because of the likely variances from case to case. The burden of proof in each instance will be on the complainant, demonstrating that the features of the administrative process under challenge "necessarily lead to a lack of uniform, impartial or reasonable administration of a legal instrument of the kind described in Article X:1."[186]

iii. Tariff Classification of Blackout Drapery Lining

The panel had found initially that the classification of blackout drapery lining was correct. However, the panel also determined that the different administrative processes of German customs authorities on the one hand, and those of the United Kingdom, Ireland, the Netherlands, and Belgium on the other, constituted a non-uniform administration which could lead to inconsistency with the requirements of GATT Article X:3(a).[187] Under this GATT provision, the United States had challenged the administrative process in Germany, particularly the practice of using an administrative aid unique to Germany that was not contemplated in the EC Common Customs Tariff.[188] The panel was also concerned that German classification decisions could be made without any required reference to decisions of other EC customs authorities, and concluded that this treatment (i.e., ignoring) of other classification decisions amounted to non-uniform administration in violation of Article X:3(a).[189]

For the Appellate Body, the panel erred by failing to demonstrate that the use of a unique administrative aid, and failing to make reference to other EC classification decisions, would necessarily lead to non-uniform classification.[190] On that basis, the finding was reversed.

iv. Tariff Classification of LCD Flat Monitors

The monitor issue, unlike blackout drapery linings, presented a much clearer issue of lack of uniformity in the classification of merchandise. Computer products are governed by the Information Technology Agreement (ITA);[191] LCD flat computer monitors with digital video interface (DVI), classified under HS

186. *Id.* ¶ 226.
187. *Id.* ¶ 229.
188. *Id.* ¶¶ 229, 235-36.
189. *EC – Selected Customs Matters* Panel Report, *supra* note 144, ¶ 7.275.
190. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶¶ 240-42.
191. Information Technology Agreement, *supra* note 141.

heading 8471, are traded duty-free among the parties to the ITA.[192] In contrast, if the LCD flat monitors are classified as video monitors under HS heading 8528—as reception apparatus for television—they are subject under the EC Common Customs Tariff to an *ad valorem* duty of 14%,[193] presumably to protect EC manufacturers of similar items.[194] As the Appellate Body noted, because of the "convergence of information technology and consumer electronics," the classification is significant;[195] in other words, the difference between a zero duty and 14% amounts to real money for an electronics importer!

The United States was able to demonstrate to the panel that while the customs authorities of the Netherlands classified the LCD monitors with DVI as video monitors subject to the 14% duty, customs authorities of other EC member states classified the same product as computer monitors subject to zero duty. This was sufficient for the panel to conclude that the divergence in classification amounted to non-uniform administration within the scope of GATT Article X:3(a).[196] Apparently, the only defense raised by the EC was an assertion (implying an admission) that "certain actions" had been taken by EC authorities since 2004 to resolve the divergence. After viewing the evidence proffered by the EC, the panel decided that the EC actions had not resolved the divergence.

The Appellate Body essentially agreed, noting that while the EC might have wished that the panel had given more weight to the proffered evidence of correction, the panel was within its discretion as trier of fact to weigh that evidence.[197] The Appellate Body rejected other technical defenses raised by the EC, and affirmed the panel's finding that the classification divergence amounted to "non-uniform administration within the meaning of Article X:3(a) of the GATT 1994."[198]

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192. *Id.* There are seventy parties, including the EC nations, the United States, and most other major trading countries, accounting for over 97% of world trade in information technology products. WTO, Information Technology Agreement (Trade Topic), http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm (last visited Apr. 15, 2007). Developing-country Members who are parties to the ITA have in some instances been given extended phase-out periods for tariffs on some ITA items. *See* WTO, Information Technology Agreement – Introduction, http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm (last visited Apr. 15, 2007).

193. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 245.

194. The EC is not the only developed country to maintain tariffs on color television receiving and viewing equipment. Imports of such items into the United States remain subject to a 5% *ad valorem* tariff if the diagonal viewing area is over 34.29 cm. *See* Harmonized Tariff Schedules of the United States, Jan. 1, 2007, HS item 8528.12.72, *available at* http://hotdocs.usitc.gov/docs/tata/hts/bychapter/070Pc85.pdf.

195. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 245.

196. *EC – Selected Customs Matters* Panel Report, *supra* note 144, ¶ 7.305.

197. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 258.

198. *Id.* ¶ 260.

v. Admission of the Successive Sales Provision

The United States alleged that because some member states of the EC imposed a "form of prior approval" requirement for certain imports, which others do not, this divergence also constituted a violation of GATT Article X:3(a).[199] The panel, finding that the prior approval requirement is inconsistent with EC customs law (based on a report reaching the same conclusion issued by the EC Court of Auditors), agreed with the United States.[200] In doing so, the panel noted that the EC had not submitted evidence to rebut the Court of Auditors' report, i.e., the EC had not met its burden of proof once the United States introduced the report into evidence.

The Appellate Body disagreed, finding that the evidence introduced on this subject by the United States failed to establish a prima facie case because the document was internally inconsistent; it contained both the Court of Auditors' assertion and a rebuttal by the Commission denying that any such notification requirements are imposed by EC member states.[201] The United States failed to introduce sufficient evidence of the prior approval requirements; it failed to meet its burden of proof, and the panel finding of an Article X:3(a) violation failed as well.

vi. Completing the Analysis with Regard to the United States' "As a Whole" Challenge to the EC Customs System as Administered

Even with these reversals, the Appellate Body had left the United States in a seemingly good position, first by finding that the United States' request for the establishment of a panel was sufficient under DSU Article 6.2 to justify an attack on the EC customs administrative system "as a whole" (rather than only on specific issues). The panel should have examined the United States' claim that the Community Customs Code, the Implementing Regulation, the Common Customs Tariff, and the TARIC collectively were administered in a non-uniform manner, constituting a violation of Article X:3(a). However, it did not, and as a result, the Appellate Body was again faced with determining if there existed a sufficiently detailed factual record before the panel to permit the Appellate Body to complete the analysis.[202]

The United States, after all, was not demanding that the EC establish a centralized customs administration system, replacing the twenty-five national systems. Rather, the United States criticized the absence of "any procedures or

199. *Id.* ¶ 261.
200. *EC – Selected Customs Matters* Panel Report*, supra* note 144, ¶ 7.385.
201. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 268.
202. *Id.* ¶ 272.

institutions to ensure against divergences or to reconcile them promptly and as a matter of right when they occur."[203] Here, however, the United States' challenge by its nature was very broad, affecting the four major instruments of EC customs law. There was some evidence before the panel of an advisory opinion mechanism permitting national authorities to seek advice from the European Court of Justice (ECJ), although the panel noted that a trader (as distinct from government authorities) is not authorized to proceed directly to the ECJ, and (perhaps consequently) the utilization of this preliminary reference system at the ECJ from 1995 to 2005 "appears low."[204] Nor, the panel noted, was there any obligation of the national customs authorities to consult with one another; even the Compendium of Customs Valuation texts has no formal legal status or binding effect.[205] The panel also found the EC system as a whole to be "complicated and, at times, opaque and confusing."[206]

However, for the Appellate Body, this was not enough; the "general observations of the panel do not constitute a sufficient foundation of factual findings or undisputed facts upon which we can rely for completing the analysis."[207] Moreover, the panel had reviewed the challenged mechanisms and institutions "in isolation" rather than discussing their interaction with EU customs law.[208] Thus, the Appellate Body once again concluded that it could not complete the analysis.

c. Claims Under GATT Article X:3(b)[209]

GATT Article X:3(b) provides in pertinent part as follows:

> Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters . . . . Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or

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203. *Id.* ¶ 277.

204. *EC – Selected Customs Matters* Panel Report, *supra* note 144, ¶ 7.168.

205. *Id.*

206. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 284 (quoting *EC – Selected Customs Matters* Panel Report, *supra* note 144, ¶ 7.191).

207. *Id.* ¶ 285.

208. *Id.* ¶ 286.

209. Unless otherwise indicated, this section is based on *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶¶ 288-308.

> tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers . . . .[210]

It seems clear that Article X:3(b) was drafted primarily with national governments, not customs unions, in mind, but it of course applies to both. The issue, as characterized by the Appellate Body, is whether this requirement applies to "*all* the agencies entrusted with administrative enforcement *throughout the territory* of a particular WTO Member."[211]

The panel noted the ambiguity of the language of Article X:3(b), and concluded that it would not be reasonable to assume that first-instance tribunals or administrative bodies (such as those existing in each of the twenty-five EC member countries) would have the authority to bind all agencies responsible for customs enforcement throughout the territory of the EC.[212] The United States disagreed, while the EC supported the panel; both agreed that the issue addressed by Article X:3(b) was first-instance review, since appeals are dealt with separately in the same provision.[213] Is the reference in the first sentence of Article X:3(b) to "agencies" in the plural sufficient, asked the Appellate Body, to imply that first-instance review decisions must govern the practice of "all agencies" of a WTO Member? The Appellate Body did not believe so.

For the Appellate Body, as for the panel, looking at the ordinary meaning of the terms "such agencies" meant:

> [O]nly those agencies whose action has been subject to review by a tribunal or procedure and that are bound by the decisions of that tribunal or procedure "with respect to identical factual situations that may arise in the future concerning identical legal issues."[214]

Nor does the context suggest otherwise. There is no indication that the drafters expected the requirements of Article X:3(a) to be applicable to Article X:3(b); the uniformity principle there does not reasonably imply that all agencies must be governed by decisions of review tribunals throughout a Member's territory.[215] Finally, the objective and purpose of the provisions—due process for the trader—is not abridged as long as that trader has an opportunity to seek review of adverse decisions through an independent mechanism.[216]

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210. GATT 1994, *supra* note 129, art. X:3(b).
211. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 288.
212. *Id.* ¶¶ 289-90.
213. *Id.* ¶¶ 291-92, 294.
214. *Id.* ¶ 298 (quoting *EC – Selected Customs Matters* Panel Report*, supra* note 144, ¶ 7.531).
215. *Id.* ¶ 301.
216. *Id.* ¶ 302.

There was thus no need for the jurisdiction of a review tribunal or procedure, and its binding effect, to extend to all of a Member's agencies.

d. Conditional Appeal of the EC Under GATT Article XXIV:12[217]

In the event that the Appellate Body had interpreted Article X:3(a) to require the EC to create a centralized customs agency or an EC-level tribunal for first-instance review of customs issues, the EC would have appealed a panel finding to the effect that Article XXIV:12 was not relevant to the United States' claims under Article X:3(a). (The panel's view was also that of the United States, since observance of GATT obligations by regional and local governments—the purpose of Article XXIV:12—was not at issue.) Article XXIV:12—the article that provides a GATT exception under certain exceptions for the formation of customs unions and free trade areas—states that "[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."[218] Since the Appellate Body did not so hold, the possible use of this exception to justify various aspects of EC customs administration at the national government level was not decided.[219]

5. Commentary

a. Interpreting the Results

Not surprisingly, the United States and the EC Commission had widely divergent views of the significance of the Appellate Body decision. The take from the Office of the U.S. Trade Representative (USTR) was:

> Today's Appellate Body report reinforces that the EU is subject to the same rules as other WTO Members. The EU's internal decisions about how to organize itself do not excuse it from or diminish its obligations to other WTO Members. Like every other WTO Member, the EU must administer its customs law uniformly across its territory. Today's report confirms the

217. Unless otherwise indicated, this section is based on *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶¶ 305-08.

218. GATT 1994, *supra* note 129, art.XXIV:12.

219. *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128, ¶ 304.

> panel's finding that the EU does not do so when it comes to the classification of LCD monitors.[220]

From the European Commission:

> The European Commission welcomes the report of the Appellate Body . . . which confirms that the EC regime for customs administration, which involves millions of transactions every year, meets WTO standards. The report rejects the unsubstantiated claims of the US on the EC customs regimes . . . This confirms the right of the European Community (and any WTO Member) to decide on how to best organize its customs administration, including judicial review of the decisions of its customs authorities.[221]

Both the USTR and the Commission read the same Appellate Body report, and each chose logically enough to emphasize the portion of it they found most attractive, although it is difficult to see how even the most exuberant trade litigator could find in the report a "confirmation" that the EC customs administrative process "meets WTO standards." It can be hoped that USTR, with the assistance of the customs bar, will put together a broader base of evidence of the inconsistencies in EC customs practice as the basis of a future challenge to the inconsistencies of the EC system.

b. Is a Successful Challenge to Non-Uniform Customs Administration in the EC Possible?

Arguably, the United States was remiss in failing to present a mountain of evidence of specific situations in which divergent customs administrative practices among different EC members have led to non-uniform results, in order to challenge EC customs administration "as a whole" as being sufficiently non-uniform to run afoul of Article X:3(a). Certainly, if the Appellate Body were to be given remand authority, which presumably will occur when and if current

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220. USTR News, *WTO Appellate Body Finds Against EU Customs Law Administration*, Nov. 13, 2006, at 1 (quoting Deputy U.S. Trade Representative John Veroneau), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/November/WTO_Appellate_Body_Finds_Against_EU_Customs_Law_Administration.html (last visited Apr. 15, 2007).

221. EU Press Statement, Customs: WTO Rejects US Claims and Confirms the Regime for EU Customs Administrations Meets High Standards (Nov. 14, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1557&type=HTML&aged=0&language=EN&guiLanguage=en.

negotiations on reform of the DSU are concluded,[222] the United States would be in a much better position to supplement the record, even with the somewhat vague analysis of the deficiencies in the record that precluded the Appellate Body from completing the analysis.[223]

Nevertheless, the members of the Appellate Body—perhaps because none of them have apparently been customs lawyers—seemed less sympathetic than they might have been to the problems caused by lack of uniformity and the resulting uncertainty of customs administration within the EC. A strong argument may be made that audit procedures by their nature cannot be uniform; discretion on the part of individual customs services is necessary for selection of imports to be audited. Even some divergence in penalty procedures may also have minimal impact, particularly if there existed a ready means for traders to appeal penalties to the EC level, and one can accept the conclusion that first-level administrative decisions should not be binding on all EC customs services immediately.

However, the fact that blackout drapery linings were correctly classified in this instance should not have been allowed to mask the unfortunate situation in which German customs authorities are permitted to ignore classification decisions rendered by other EC member customs services, even as a guide to proper classification. Nor does it make much sense for the Appellate Body to largely ignore the fact that there is no effective way in the EU of assuring that national customs services meet even minimal levels of consistency with each other; the idea that a voluntary request by national authorities (unavailable to importers) to the European Court of Justice somehow might be sufficient is ludicrous. If a national customs system can get by with non-uniformity in all but the most blatant situations—such as that which occurred with LCD flat monitors—putting together the evidence needed to convince the Appellate Body will be difficult indeed.

One can argue that highly developed nations, such as EC members and the United States, should be held to a high standard, particularly when the issue relates to classification, and should avoid using non-uniformity of classification and valuation determinations, particularly as a non-tariff barrier. Since well before 1983, when the Harmonized System Convention[224] was negotiated under the auspices of the World Customs Organization, the members of the world trading community have been seeking a uniform system of classification of products—an objective that has been facilitated by the Harmonized System (HS) Convention, with consistent official interpretation of the Convention in its

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222. *See generally* WTO, *New Negotiations on the Dispute Settlement Understanding*, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations (last visited Apr. 15, 2007) (providing the history and current status of the review of dispute settlement rules).

223. *See supra* Part Two.I.B.4.a.

224. The International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, Hein's No. KAV 2260, *available at* http://www.wcoomd.org/ie/En/Topics_Issues/HarmonizedSystem/Hsconve2.pdf (last visited Apr. 15, 2007) [hereinafter Harmonized System Convention].

frequently updated "Explanatory Notes."[225] Virtually all of the 150 WTO Members (and more than twenty-five others) are also parties to the HS Convention, including, of course, the EC.[226] For the EC, and now the Appellate Body, to countenance the practice of the customs authorities of one of the world's most prominent and highly developed trading nations—Germany—to go at it alone on classification decisions, sets an unfortunate and counter-productive precedent in a world where many national customs administrations, particularly in developing-country Members, lack the training, resources, and political will to move toward greater uniformity in customs classification.[227]

c. A Broadened Scope for Challenges Under GATT Article X:3(a)

Under *EC – Bananas III* and *EC – Poultry*, it was settled law that a substantive rule listed in GATT Article X:1 could not be challenged under GATT Article X:3(a). Those challenges were limited to the *administration* of the legal instrument. No more. In what may ultimately be a significant broadening of the scope of Article X:3(a) challenges, the Appellate Body will accept allegations that an instrument described in Article X:1 necessarily leads to a lack of uniform, impartial, or reasonable interpretation, assuming, of course, that the complainant meets its burden of proof. One can be reasonably confident that there will be future challenges of Members' customs administrations, both with regard to individual Members, and to other, less perfected, customs unions such as the Southern Cone Common Market ("Mercosur")[228] or the Central American Common Market,[229] where developing-nation Members are likely to have even

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225. *See* World Customs Org., *Harmonized System Convention – General Information*, *available at* http://www.wcoomd.org/ie/En/Topics_Issues/topics_issues.html (last visited Apr. 15, 2007).

226. *See id.*

227. Uniformity in customs classification has been a high priority for the United States for many years. For example, in the now-defunct negotiations toward a Free Trade Area of the Americas (FTAA), the United States was instrumental in encouraging the nations of the Western Hemisphere to adopt in Toronto, in 1998, a series of "business facilitation" customs related measures, including the objective of applying the 1996 version of the HS throughout the hemisphere. Free Trade Area of the Americas, Fifth Trade Ministers Meeting, Declaration of Ministers, Toronto, Can., Nov. 4, 1999, Declaration of Ministers, Annex 2, *available at* http://www.ftaa-alca.org/Ministerials/Toronto/Toronto_e.asp.

228. Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay (Treaty of Asuncion), Mar. 26, 1991, 30 I.L.M. 1041, *available (with other Mercosur agreements) at* http://www.sice.oas.org/agreemts/Mercin_e.asp#MERCOSUR.

229. Initiated under the General Treaty on Central American Economic Integration, Guat.-El Sal.-Hond.-Nicar., Dec. 13, 1960, 455 U.N.T.S. 3, *available at* http://

more difficulty than the members of the EC in meeting the requirements of Article X:3(a).

d. European Community Customs Administration and GATT Article XXIV

Except very peripherally, neither the parties nor the Dispute Settlement Body discussed or relied on any part of Article XXIV of GATT 1994—the exception to many GATT obligations for members of properly constituted customs unions and free trade areas. (The United States and the panel were almost certainly correct in concluding that Article XXIV:12 had no applicability to the present dispute.[230]) Under Article XXIV, one of the requirements for customs unions is that "substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union. . . ."[231] Arguably, the requirement that "the same duties and other regulations of commerce" be applied may not be met, at least in principle, even if the same tariff schedule, laws, and regulations are applicable throughout the custom union, if in fact the application of those duty rates and regulations differs substantially among the members of the customs union.

Irrespective of whether Article XXIV is technically violated, as a matter of regional trade policy it would seem to be very inefficient to permit different national customs offices to apply the common tariff schedule and regulations in an independent manner. As one prominent trade attorney has put it, "In theory, an imported good should be classified and treated identically by all of the EU member States, so that the point of entry into the EU should be irrelevant."[232] Inconsistent application of EC customs laws and regulations by national customs services are likely in fact to lead to situations in which exporters to the customs union would engage in port-of-entry-shopping so as to enter goods destined for EC or other customs union nations into the nation whose customs officials take the most favorable approach to duty rates and other regulations of commerce. The decision and the underlying practices emphasize again how far the EC is from a "United States of Europe," even in matters, such as customs law and administration, that are within the range of the common commercial policy.[233]

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www.sice.oas.org/trade/camertoc.asp. As usual, Costa Rica did not get around to signing until a couple of years later.

230. *See* discussion *supra* Parts Two.I.B.4(a)-(b).

231. GATT 1994, *supra* note 129, art. XXIV:8(a)(ii).

232. BRENDAN MCGIVERN, WTO APPELLATE BODY REPORT: EC – CUSTOMS 1 (White & Case 2006) (copy on file with author) (discussing *EC – Selected Customs Matters* Appellate Body Report, *supra* note 128).

233. Under the Commerce Clause of the U.S. Constitution, Congress has authority to "regulate Commerce with foreign Nations, and among the several States, and with the

II. TRADE REMEDIES

A. Antidumping and Zeroing

1. Citation

United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (issued on April 18, 2006, and adopted on May 9, 2006) (complaint by the European Communities, with Argentina, Brazil, China, Hong Kong, India, Japan, Korea, Mexico, Norway, and Taiwan as third-party participants).[234]

2. Types of and Contexts for Zeroing

The European Communities challenged U.S. law and practice concerning zeroing. The key legal bases for its challenge were the Uruguay Round, or WTO, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly known as the WTO Antidumping

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Indian Tribes." U.S. CONST. art I, § 8, cl. 3. The Constitution further provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." *Id.* § 9, cl. 5. These provisions greatly circumscribe the states from activities involving foreign commerce. In contrast, see Single European Act, 1988 O.J. (L 169) 1 (eliminating, as of 1993, many but not all border restrictions for trade in goods within the EC).

234. *See* Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005) [hereinafter *U.S. – Zeroing (EC)* Panel Report]. The Panel Report was adopted by the DSB as modified by the Appellate Body on May 9, 2006. Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (adopted May 9, 2006) [hereinafter *U.S. – Zeroing (EC)* Appellate Body Report].

There are redundancies and errors in the Panel Report. For example, footnote 11 on page 2 is identical to footnote 16 on pages 3-4, and each footnote uses the term "*infra*," when in fact footnote 16 should use "*supra*." Nevertheless, the Panel Report contains a helpful discussion of the facts, as well as a review of U.S. dumping margin determination practices. The discussion of the facts is drawn in part from the Panel Report at paragraphs 2.1-2.12.

The Appellate Body Report, too, contains redundancies that careful editing would have cured. For example, footnote 10 of the Report refers the reader to the Panel Report for a discussion of simple zeroing. Yet, paragraph 110 of the Appellate Body Report regurgitates the panel's treatment, at paragraph 2.5, of the topic. Similarly, paragraph 109 of the Appellate Body Report replicates the panel's summary of the retrospective basis on which the American antidumping system operates from paragraph 2.4 of the Panel Report.

Agreement,[235] and GATT. The EC pointed specifically to Articles 2.4, 2.4.2, and 9.3 of the Antidumping Agreement and to GATT Article VI:1-2.[236]

The EC challenge was both "as such" and "as applied." The distinction between the two types of challenges goes to the nature of a claim. In making an "as such" challenge, the EC argued zeroing is illegal under WTO rules, regardless of how the United States applies the methodology. An "as such" challenge is a dramatic claim against a statute, regulation, or other measure as being incompatible with the GATT-WTO regime. An "as applied" challenge, which also may be called an "as is" challenge, is a claim that the way in which a measure is put into practice offends a GATT or WTO rule. Thus, in its "as applied" challenge, the EC contended zeroing is illegal under GATT-WTO rules as the United States practices it.

The EC "as such" challenge was based on the following provisions of U.S. antidumping (AD) law concerning the dumping margin and zeroing:

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235. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Antidumping Agreement].

236. Additional claims were raised on appeal. However, as they were not central to the case, they are summarized as follows:

> (1) A conditional appeal by the EC under Article 2.4.2 of the Antidumping Agreement, concerning the conclusion of the panel that the United States did not violate this provision in respect of administrative reviews (in an as applied sense). The Appellate Body declined to rule on this matter. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶¶ 3(d), 107(c), 160-64, 263(a)(iv).
>
> (2) An as applied claim by the EC that in administrative reviews, the United States violated Articles 1, 11.1-2, and 18.4 of the Antidumping Agreement, and Article XVI of the Agreement Establishing the World Trade Organization ("WTO Agreement"). The Appellate Body upheld the panel finding that the United States did not violate Articles 11.1-2, and found it unnecessary to render a decision on the other provisions. *See id.* ¶¶ 3(d), 107(c), 165-72, 263(a)(v)-(vi).
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> (3) Whether the panel erred in exercising judicial economy in three instances, to which the Appellate Body said "no," i.e., the exercise was appropriate. *See id.* ¶¶ 3(f), 107(e)-(f), (h), 223-25, 233-34, 244-50, 263(e)-(f), (h)-(i).
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> (4) Whether the panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts of the case, an argument made by the EC but rejected by the Appellate Body. *See id.* ¶¶ 107(i), 251-62, 263(j).

- The Tariff Act of 1930, as amended, specifically sections 731, 751(a)(2)(A)9I)-(ii), 771(35)(A)-(B), 777A(d), codified at 19 U.S.C. §§ 1673, 1675, and 1677, respectively.
- Department of Commerce (DOC) regulations, specifically 19 C.F.R. section 351.414(c)(2).
- Provisions of the Department of Commerce Import Administration *Anti-Dumping Manual* (1997 edition).
- The Standard AD Margin Program, specifically the Standard Zeroing Procedures, used by the DOC.[237]

The last measure is particularly intriguing, because it is a computer program. The EC "as applied" challenge arose from fifteen original antidumping investigations, plus sixteen administrative (periodic) reviews of AD orders.[238] A diverse array of articles was involved, including ball bearings, chemicals, pasta, and steel. The EC used the same legal bases—the Antidumping Agreement and GATT—for both the "as such" and "as applied" challenges.

Obviously, zeroing arises in the context of dumping margin investigations, and understanding this methodology is essential to understanding the case.[239]

- In any dumping case, the home market price of a foreign like product, i.e., "normal value," must be compared with the price of subject merchandise in an importing country in which dumping is alleged to occur, i.e., "export price," to calculate a dumping margin.[240]

- Zeroing, briefly put, means, in the multiple comparisons, negative dumping margins—i.e., whenever export price exceeds normal value—are ignored. Literally, they are zeroed out so that only lower export price evidence is accounted for in dumping-margin calculations.

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237. Notably, the EC did not raise an "as such" challenge to the United States Statement of Administrative Action to the WTO Antidumping Agreement. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 2.6 n.23.

238. *Id.* ¶ 2.6.

239. In two previous *WTO Case Reviews*, zeroing precedents—the *EC – Bed Linens* and *Softwood Lumber Zeroing* cases—were discussed. The Table below summarizes the zeroing precedents. In the previous *Case Review* discussions, the definition of zeroing and hypothetical illustrations are set out.

240. In all instances here in which the term "export price" is used, it is understood that the reference also includes the possibility, depending on the facts of a particular case, of the need to use "constructed export price."

- Any negative dumping margin is artificially equated to zero when aggregating the results of the comparisons to compute an overall dumping margin for the subject merchandise.

Zero values, rather than negative dumping margins, adulterate the summing up calculation with positive margins. That is, the long-standing criticism of the methodology made by many WTO Members is that disallowing non-dumped sales (i.e., transactions in which the dumping margin is negative) to offset dumped sales does not yield a "fair comparison" of normal value to export price, as mandated by the WTO Antidumping Agreement (specifically, Articles 2.4 and 2.4.2). The unfairness lies in the arithmetic inflation of the dumping margin, which in turn means the amount of AD duty imposed is inflated, because liability depends on the margin.[241]

According to the labels used by the EC, there are two types of zeroing[242]:

- Simple Zeroing[243]

    Simple Zeroing embraces two of the three ways of calculating a dumping margin, individual-to-individual and average-to-individual, as laid out in Article 2.4.2 of the Antidumping Agreement. The first way is a comparison of normal value for individual sales of a foreign like product against export price for individual sales of subject merchandise. That is, comparisons are made on a transaction-specific basis. The second approach is a comparison of a weighted-average normal value, constructed from sales of a foreign like product, against export prices for individual sale transactions of subject merchandise. However, the average-to-individual method is limited (under Article 2.4.2 of the Antidumping Agreement) to cases in which targeted dumping is alleged (i.e., a claim that the pattern of export prices differs among purchasers, regions, or time periods).

    When applying Simple Zeroing, which it does in administrative reviews, the United States uses the average-to-individual method.[244] Thus, in sixteen of the thirty-one

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241. *See, e.g.*, *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶¶ 114-22.

242. The United States does not officially use the labels "Simple Zeroing" and "Model Zeroing," but rather follows the tripartite rubric of Article 2.4.2 of the Antidumping Agreement. Happily, the United States and EC did not quarrel over labels.

243. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 2.5.

244. *See id.* ¶ 2.5; 19 C.F.R. § 351.414(c)(2). To be precise, the United States uses Simple Zeroing when calculating the assessment rate, which is the amount of AD duty owed by an individual importer. The assessment rate is used as the basis for any future cash deposit rate, which is the rate of AD duty applied on future entries from the exporter

Administrative Reviews underlying the EC complaint, the U.S. Department of Commerce (DOC) used Simple Zeroing.

The key point about Simple Zeroing is there is no grouping of products into sub-categories. That is, neither a foreign like product nor subject merchandise is broken down into particularized sub-groupings. If, for example, baseball bats are the allegedly dumped product, then all baseball bats are considered like.

Critically, in applying Simple Zeroing, whether in the average-to-individual or individual-to-individual method, the DOC records non-dumped sales of subject merchandise as zero. That is, in any comparison in which the dumping margin is negative (i.e., average normal value is less than individual export price, or individual normal value is less than individual export price), the DOC equates the margin to zero. Then, the DOC calculates an overall dumping margin for subject merchandise by combining the results of all the comparisons. The DOC expresses this total dumping margin, which excludes negative amounts by treating them as zero, as a percentage of the total export price, which includes all export transactions. The result can be inflation of the dumping margin, by virtue of the exclusion of negative dumping margins from the numerator (thus enlarging the size of the numerator), and use of a total export price in the denominator.

- Model Zeroing[245]

  Model Zeroing refers to the third of the three ways Article 2.4.2 of the Antidumping Agreement specifies for calculating a dumping margin, namely, average-to-average comparisons.

  The United States uses Model Zeroing in original investigations. Thus, in fifteen of the thirty-one original investigations underlying the EC complaint, the DOC used Model Zeroing. Disaggregation of a product into sub-

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in question. Unless an interested party requests an administrative (i.e., periodic) review to determine the amount of AD duties owed in the previous year, the cash deposits made on entries during that previous year automatically are assessed as the final AD duty, i.e., the cash deposit rate becomes the assessment rate. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 2.4.

245. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 2.3.

categories—called averaging groups—is the hallmark of Model Zeroing.

The DOC establishes averaging groups based on the products in those groups being identical or virtually identical in all physical characteristics, at the same level of trade, sold in the same region, and other relevant factors. These criteria are set out in U.S. regulation, 19 C.F.R. section 351.414(d)(2), as well as in chapter 6 of the U.S. *Anti-Dumping Manual* (1997 edition) of the U.S. Department of Commerce Import Administration. For instance, if the allegedly dumped product is baseball bats, then averaging groups might be, for example, (1) wooden bats, (2) aluminum bats, (3) youth-size bats, (4) adult 32- to 33-inch bats, and (5) adult 30- to 31-inch bats. Within each averaging group, the DOC calculates a dumping margin based on its comparison of weighted-average normal value for a foreign like product against a weighted-average export price for subject merchandise. In turn, the DOC calculates these weighted averages from individual sales transactions of the foreign like product and subject merchandise in that averaging group.

Critically, for any averaging group in which the dumping margin is negative (i.e., where export price exceeds normal value), the DOC sets the dumping margin to zero. In effect, the DOC throws out a negative value and replaces it by a zero value. Then, the DOC calculates an overall weighted-average dumping margin, i.e., a dumping margin that covers all product sub-categories, such as all baseball bats. That aggregate is the sum of the dumping margins from each averaging group. To convert the overall margin into a percentage, the DOC divides the aggregate weighted-average dumping margin by the aggregate export price. Significantly, the DOC includes in the percentage calculation any averaging group in which there is no dumping—they are in the numerator, recorded as zero. This practice inflates the dumping margin, by inflating the numerator (even though the export price from averaging groups in which zeroing occurs also are included in the denominator).

In sum, the EC challenge was broad. It attacked Simple and Model Zeroing, in original investigations and administrative reviews, and for the most part did so both "as such" and "as applied."[246]

3. Key Issues

The Appellate Body rightly put the claims of the EC into two categories defined by the contexts in which zeroing occurs, namely, (at issue in the case) administrative reviews and original investigations, which were then further defined by the nature of the claim, "as applied" or "as such." In respect of administrative reviews, the key issues were:

- Is zeroing, "as applied" by the United States, inconsistent with Article 9.3 of the Antidumping Agreement and Article VI:2 of GATT?[247] The panel responded "no," and the EC appealed.[248] As explained below, the Appellate Body held zeroing does violate Article 9:3 and Article VI:2.[249]

- Is zeroing "as applied" by the United States a "fair comparison" between normal value and export price under Articles 2.4 and 2.4.2 of the Antidumping Agreement?[250] The panel responded "yes," or at least, that zeroing is not inconsistent with a fair comparison.[251] The EC appealed this finding. The Appellate Body declared moot, and of no legal effect, the panel's finding, but declined to rule on the substantive issue as to whether zeroing is, or is not, "fair."[252]

- Is zeroing "as applied" by the United States an impermissible adjustment to the dumping-margin calculation under Article 2.4 of the Antidumping Agreement?[253] The panel responded "no," i.e., zeroing is a

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246. Indeed, at the initial stage, the EC challenged Simple Zeroing "as such" in the context of new shippers, changed circumstances reviews, and sunset reviews. *See id*. ¶ 3.1(e).

247. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 107(a)(i).

248. *See id*. ¶¶ 3(f), 114-31.

249. *See id.* ¶¶ 132-35, 263(a)(i). The Appellate Body declared moot, and of no legal effect, the panel's findings under GATT Article VI:1. *See id.* ¶¶ 135, 263(a)(vii).

250. *See id.* ¶¶ 107(a)(ii), (iv).

251. *See id*. ¶ 3(d).

252. *See id*. ¶¶ 136-47, 263(a)(ii), (c).

253. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 107(a)(iii).

permissible adjustment, and the EC appealed.[254] As explained below, the Appellate Body upheld the panel's conclusion, agreeing with it that zeroing is not an impermissible adjustment under Article 2.4.[255]

- Is zeroing "as such" inconsistent with Articles 2.4, 2.4.2, or 9.3 of the Antidumping Agreement (as well as various other GATT-WTO obligations)?[256] The panel said "no," there was no inconsistency, and the EC appealed.[257] The Appellate Body declared moot that finding, and felt unable to complete the analysis.[258]

In respect of original investigations, in which the DOC employs Model Zeroing (i.e., comparisons of weighted-average normal value to weighted-average export price) the key issue was:

- Is zeroing a norm inconsistent "as such" with Article 2.4.2 of the Antidumping Agreement?[259] The panel held zeroing is a norm and thus can be challenged "as such" under the DSU, and further concluded the methodology violates Article 2.4.2.[260] The United States appealed, saying the panel failed to make an objective assessment of the facts under DSU Article 11. The Appellate Body rejected the American appeal, upholding the panel, albeit for modestly distinct reasons, thus concluding zeroing does violate Article 2.4.2.[261]

Regrettably, the Appellate Body's articulation of the issues (at paragraph 107 of its Report) is not so clearly laid out as above. Its issues list neither links back to its summary of the panel's findings (at paragraph 3), nor forward to its own conclusions (at paragraph 263). To some degree, the reader is left with the task of synthesizing, issue by issue, what the panel said, how the Appellate Body framed the question, and what the Appellate Body held. The Appellate Body would have done well to make this highly technical case more approachable to seasoned trade professionals, students of the discipline, and developing and least-developed

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254. *See id*. ¶ 3(e).
255. *See id*. ¶¶ 148-59, 263(a)(iii).
256. *See id*. ¶ 107(c).
257. *See id*. ¶ 3(g).
258. *See id*. ¶¶ 226-32, 235-43, 263(c).
259. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 107(b).
260. *See id*. ¶¶ 3(a)-(c).
261. *See id*. ¶¶ 173-214, 222, 263(b), (d).

countries where legal capacity-building is sorely needed, by making a simple, precise, and succinct identification of the issues that is well integrated with the rest of its opinion.

4. Holdings and Rationales on Zeroing in Administrative Reviews

a. Excessive Assessments

Article 9.3 of the WTO Antidumping Agreement, as well as Article VI:2 of GATT, place an upper bound on the amount of an AD duty. Under them, respectively, an AD duty "shall not exceed the margin of dumping as established under Article 2 [of the Agreement],"[262] or be "greater in amount than the margin of dumping."[263] There was no dispute that administrative reviews fall within the scope of Article 9 of that Agreement.[264]

The panel understood Article 9.3 and Article 2.4.2 to apply to distinct settings, an administrative review versus an original investigation, respectively.[265] The rules for determining the amount of an AD duty to impose and collect (an administrative review) are different from the rules to determine the existence of a dumping margin (the original investigation). Why are they different? Put simply:

- Article 2.4.2 sets out three methods for establishing the existence of a dumping margin—average-to-average, individual-to-individual, and average-to-individual comparisons. These methods apply only in the original investigation phase of an AD case.[266]

- In an assessment proceeding, such as an administrative review, under Article 9.3, the dumping margin must be related to the liability incurred in respect of particular import transactions.[267] That is, an original investigation focuses on the overall pricing behavior of exports, because the aim of the investigation is to determine whether dumping occurs, and thus whether it is justifiable to impose an AD duty. In contrast, in a review, the goal is to determine the extent of dumping practiced by a particular exporter, and translate that extent into liability to pay an

262. Antidumping Agreement, *supra* note 235, art. 9.3.
263. GATT 1994, *supra* note 129, art. VI:2.
264. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 111.
265. *Id.*
266. *See* Antidumping Agreement, *supra* note 235, art. 2.4.2.
267. *See id.* art. 9.3.

> AD duty, for which the importer of subject merchandise for a specific transaction is liable.

At the panel stage, the EC argued unsuccessfully to the panel that Article 9.3 must be interpreted in light of Article 2.4.2.[268] In other words, the EC urged that Article 9.3 prohibits duty assessment on a transaction-specific or importer-specific basis, and instead mandates a review of all export transactions as a whole, not individually. In effect, the EC urged that Article 9.3 calls for an exporter-oriented assessment of AD duties.

Not surprisingly, given its understanding of the distinctiveness of the provisions, the panel said there is no textual support for the EC proposition.[269] Reasoning consequentially, the panel also said that if the EC argument were true, then an importer might be liable to pay AD duties on an individual import transaction, regardless of the particular transaction, as long as the exporter's average export price is below the average normal value.[270] Therefore, held the panel, it is not correct to infer that zeroing violates Article 9.3 from a finding that the methodology violates Article 2.4.2. Again, the two must be treated distinctly. (The panel applied similar reasoning as to GATT Article VI:2.)

The Appellate Body considered whether the term "margin of dumping," as used in Article 9.3 of the Agreement and in Article VI:2 of GATT, necessarily corresponds to the term "dumping," and whether it applies to a product as a whole in an administrative review context. On both counts, it responded in the affirmative—thereby agreeing with the position of the EC. The Appellate Body had a precedent with which to work: the *Softwood Lumber Zeroing* case.[271] In that case, the Appellate Body held that the term "margin of dumping" and "dumping" correspond to one another.[272] That much is evident from GATT Article VI:2, which states: "[i]n order to offset or prevent *dumping*, a Member

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268. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 113.

269. *Id.*

270. *Id.*

271. *See* Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (adopted Aug. 31, 2004) [hereinafter *Softwood Lumber Zeroing* Appellate Body Report]. This case sometimes is referred to as *Softwood Lumber V* and is covered in the *WTO Case Review 2004*.

The *Softwood Lumber V* reference also is used for the companion compliance decision, Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada (Article 21:5 – Canada)*, WT/DS264/AB/R (adopted May 9, 2006), in which the Appellate Body reversed the findings of the panel. In the compliance decision, the Appellate Body held Simple Zeroing in transaction-to-transaction comparisons violates the "fair comparison" requirement of Article 2.4 of the Antidumping Agreement, and also is inconsistent with Article 2.4.2 of that Agreement, because the methodology systematically disregards comparisons in which export price exceeds normal value. *Id.*

272. *Softwood Lumber Zeroing* Appellate Body Report, *supra* note 271, ¶¶ 99-100 (quoting GATT 1994, *supra* note 129, art. VI:2).

may levy on any dumped product an anti-dumping duty not greater in amount than the *margin of dumping* in respect of such product."[273] Moreover, in both the *Softwood Lumber Zeroing* and *EC – Bed Linens*[274] cases, the Appellate Body made clear GATT Article VI requires establishment of "dumping" and "margins of dumping" for a product under investigation as a whole.[275] The Appellate Body simply extended its precedent from the original investigation phase, which was at issue in *Softwood Lumber Zeroing*, to the administrative review stage, at issue in the case at bar. In both contexts, a broad definition of "margin of dumping" is appropriate.

The United States argued unsuccessfully on appeal that the term "margin of dumping" in an administrative review can be interpreted as applying on a transaction-specific basis.[276] In effect, urged the United States, zeroing is acceptable under Article 9.3 and GATT Article VI:2 in the review context, because it entails comparisons of many transactions. The Appellate Body rejected that argument, using the first sentence of Article 6.10 as its key rationale.[277] That provision calls for an individual margin of dumping determination for each known exporter or producer of the subject merchandise, and nothing in this provision limits this requirement to the original investigation phase.[278] Moreover, the Appellate Body trotted out a number of precedents, notably, *Mexico – Antidumping Measures on Rice*,[279] *U.S. – Hot-Rolled Steel*,[280] and *U.S. – Corrosion-Resistant Steel Sunset Review*,[281] which indicate that "margin of dumping" refers to the individual dumping margin for each investigated exporter of subject merchandise.[282]

The "bottom line," said the Appellate Body, is that Article 9.3 and GATT Article VI:2 require that the total amount of AD duties collected on entries of subject merchandise from a given exporter do not exceed the margin of dumping for that exporter. The dumping margin established for an exporter is a ceiling on

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273. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 125.

274. *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 53, WT/DS141/AB/R (adopted Mar. 12, 2001).

275. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 126.

276. *E.g.*, *id.* ¶¶ 33-36, 46, 128.

277. *Id.* ¶ 128 (citing Antidumping Agreement, *supra* note 235, art. 6.10).

278. *Id.*

279. Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R (adopted Dec. 20, 2005).

280. Appellate Body Report, *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (adopted Aug. 23, 2001).

281. Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (adopted Jan. 9, 2004) [hereinafter *U.S. – Corrosion-Resistant Steel Sunset Review* Appellate Body Report].

282. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 129.

the AD duty that can be levied on entries of subject merchandise from the exporter that are covered by an administrative review.[283]

Why, then, is zeroing as applied by the DOC in an administrative review a violation of Article 9.3 of the Antidumping Agreement and Article VI:2 of GATT? Simply because the DOC systematically disregards any individual transaction in which export price exceeds the contemporaneous weighted-average normal value. By zeroing in this manner, the DOC assesses an AD duty that exceeds the actual dumping margin of a particular foreign exporter.[284] Accordingly, the Appellate Body reversed the panel's finding that zeroing as applied in an administrative review did not violate Article 9.3 and Article VI:2.

b. Fairness

Connoisseurs of jurisprudence might well yearn for a technical international trade law measure, such as zeroing, in which an adjudicator issues a thoughtful opinion on the fairness or unfairness of the measure. Such fans would be disappointed by the Appellate Body Report in *U.S. – Zeroing (EC)*, and probably with the Panel Report, too. That is not for want of opportunity in front of the adjudicators. To the contrary, neither the Appellate Body nor the panel used the opportunity put squarely in front of them by the EC in a jurisprudentially fruitful manner.

Article 2.4 (first sentence) of the Antidumping Agreement establishes an overarching obligation to make a fair comparison between normal value and export price.[285] The EC argued that, aside from targeted dumping, a comparison between normal value and export price that fails to account fully for all export transactions does not result in a dumping-margin calculation for a product as a whole and, therefore, is not fair.[286] In other words, by disregarding non-dumped sales, zeroing inflates a dumping margin and thus is inherently biased, and creates an unjustified discrimination, in favor of a petitioner in an AD case. To its credit, the EC humbly cited a precedent set against it, by India, in the *EC – Bed Linens* case, wherein the Appellate Body expressly stated "the practice of 'zeroing' at issue in this dispute . . . is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and Article 2.4.2."[287] The EC urged that subsequent precedents, *U.S. – Corrosion-Resistant Steel Sunset Review* and *Softwood Lumber Zeroing*, confirmed the unfairness of zeroing.[288]

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283. *Id.* ¶ 130.

284. *See id.* ¶ 133.

285. *Id.* ¶ 137 ("A fair comparison shall be made between the export price and the normal value." (quoting Antidumping Agreement, *supra* note 235, art. 2.4)).

286. See *id.* ¶ 142.

287. *Id.* ¶ 143.

288. One American counterargument appeared comparatively weaker: Just because one methodology results in higher dumping margins than another does not mean that

The panel considered the substantive meaning of the term "fair comparison," which is the centerpiece of Article 2.4. The panel stated the term is "more abstract and less determinate" than other rules in the Antidumping Agreement.[289] That may be true, but its next observation is highly contentious: "[t]he meaning of 'fair' in a legal rule must necessarily be determined having regard to the particular context within which the rule operates."[290] Evidently, the panel consisted of moral relativists. Great examples of rules in which fairness is not context-specific are the Golden Rule and Kant's categorical imperative. Of course, salvific power probably is not one of the implied powers of WTO panels, and they assuredly have discretion not to attempt to exercise jurisdiction over souls.

The panel rested its finding—that zeroing is not inconsistent with a fair comparison—on the text of the second sentence of Article 2.4.2 of the Antidumping Agreement.[291] That sentence expressly allows an asymmetrical average-to-individual transaction method of comparing export price to normal value.[292] Manifestly, this rationale is flimsy. The asymmetry of a weighted-average figure and an individual data point is entirely different from the asymmetry of a negative dumping margin that is set to zero by administrative fiat.

The Appellate Body simply avoided the issue.[293] Satisfied with its finding that zeroing "as applied" by the DOC in administrative reviews violated Article 9.3 of the Antidumping Agreement and Article VI:2 of GATT, the Appellate Body said it need not decide whether the method is unfair under Article 2.4 and 2.4.2.[294] It declined to rule on the issue, and declared moot, and of no legal effect, the panel finding.

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method is "unfair;" and Article 2.4 does not mandate calculation of dumping margin in respect of a product as a whole—that is necessary only for an average-to-average comparison in an original investigation under Article 2.4.2. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 144. The second American counter was confusing at best. *See id.* ¶ 145.

289. *Id.* ¶ 140 (quoting *U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 7.260).

290. *Id.* (quoting *U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 7.260).

291. *Id.* ¶ 141. The second sentence of Article 2.4.2 states:

> 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.

Antidumping Agreement, *supra* note 235, art. 2.4.2.

292. *See* Antidumping Agreement, *supra* note 235, art. 2.4.2.

293. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 147.

294. *Id.* ¶ 147.

c. Permissible Adjustments

Whether zeroing, "as applied" or "as such," in an administrative review leads to imposition of an AD duty in excess of an actual dumping margin in violation of Article 9.3 of the Antidumping Agreement and Article VI:2 of GATT, and whether it yields an unfair comparison in violation of Article 2.4.2 of the Agreement, are conceptually separate questions from whether it is a permissible adjustment under Article 2.4 of the Agreement. The EC argued on appeal that the panel erred in rejecting its argument that zeroing in an administrative review as applied by the DOC violates Article 2.4.[295] The key parts of that Article at issue were the third to fifth sentences, which state:

> Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph.[296]

The EC contended zeroing is an adjustment to the dumping-margin calculation for a difference not affecting price comparability. Therefore, it is an impermissible adjustment.

The EC made a lot—too much, in the end—of this provision. The EC thought Article 2.4 (third to fifth sentences) not only imposes an affirmative obligation to make an adjustment for a difference that affects price comparability, but also imposes a duty to refrain, or abstain, from making an adjustment when there is no such difference. Zeroing, urged the EC, should be construed as an adjustment falling within the scope of the third sentence of Article 2.4, because the effect of zeroing is to reduce the price at which a particular export transaction is made. But, because zeroing is an adjustment not made for a difference affecting price comparability, it ought to be held illegal under Article 2.4 (third to fifth sentences).[297]

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295. *Id.* ¶ 148.
296. *Id.* ¶ 149 (quoting Antidumping Agreement, *supra* note 235, art. 2.4).
297. *Id.* ¶¶ 150-52, 155.

The panel disagreed with the EC, and so did the Appellate Body. Both held zeroing is not an impermissible adjustment.[298] Essentially, the panel reasoned that differences in price comparability are differences between subject merchandise as sold in the export market and the foreign like product as sold in the exporter's home country. Specific price comparability factors are level of trade, quantities of sale, and taxation. In contrast, zeroing is conceptually different from an adjustment that falls within the scope of Article 2.4 (third to fifth sentences).[299] In other words, zeroing simply is not addressed by that provision, and thus it cannot be said the provision permits, or does not permit, zeroing as an adjustment. Put simply, Article 2.4 (third to fifth sentences) is not relevant to the question.

The panel's reasoning essentially was the American argument, namely, that Article 2.4 (third to fifth sentences) should be interpreted narrowly to address price adjustments before normal value and export price are compared, where the adjustment affects the comparability of prices between the exporter's home market and the importer's country market. As the United States rightly put it, "an adjustment is an addition or subtraction made to a specific price due to some characteristic of the sale in order to make the price comparable to some other price."[300] It is not a price adjustment, said the Americans, to decline to reduce the AD duty in an administrative review when the export price of a sale transaction is made at greater than normal value. In turn, because this denial of offsets—in effect, the zeroing methodology—is not a price adjustment, it is outside the scope of Article 2.4 (third to fifth sentences). Being outside that scope, it is erroneous to use the provision as a basis for judging whether zeroing is a permissible adjustment.[301]

The Appellate Body followed the American argument, and upheld the panel's finding that zeroing is not an impermissible adjustment under Article 2.4 (third to fifth sentences). The Appellate Body pointed out this provision (particularly the third sentence) contains an illustrative, non-exhaustive list indicating the nature of the differences for which adjustments are permissible—"conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics."[302] These differences affect the comparability of normal value to export price. Does this provision imply a contrary principle—that due allowance should not be made for factors that do not affect price comparability? The Appellate Body stated:

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298. *See id.* ¶¶ 148-52 (concerning the panel), 153-59 (concerning the Appellate Body).

299. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶¶ 150-51.

300. *Id*. ¶ 153.

301. *Id*.

302. *Id*. ¶ 157 (quoting Antidumping Agreement, *supra* note 235, art. 2.4).

> Article 2.4 specifies that the differences for which due allowance shall be made are those "which affect price comparability." In our view, this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction. Likewise, the *a contrario* application of this principle prohibits only those adjustments made in relation to differences in characteristics of the compared transactions that do *not* affect price comparability. These are differences that do not have an impact, or are unlikely to have an impact, on the price of the transaction. Therefore, adjustments or allowances made in relation to *differences in price* between export transactions and domestic transactions—such as zeroing—cannot be adjustments or allowances covered by the third sentence of Article 2.4, including its *a contrario* application. Indeed, whether or not a factor affects the price comparability between export and domestic transactions should be determined before this comparison is made, and not after.[303]

A close reading of the above quote suggests a timorous reasoning by the Appellate Body. What the Appellate Body meant to say, apparently, is zeroing is not an adjustment at all. Zeroing is neither a due allowance for price, nor is it an allowance for non-price characteristics. In the subsequent paragraph, the Appellate Body finally gets to this proposition:

> [I]n assessing anti-dumping duties, the USDOC compares the export price of individual transactions with the normal value, and aggregates the results of these comparisons. In the aggregation process, the USDOC disregards the results when the export price exceeds the normal value. The European Communities contends that in doing so, the USDOC makes an allowance or an adjustment for a difference that does not affect price comparability and, therefore, acts inconsistently with the third sentence of Article 2.4. We disagree with this argument of the European Communities. In our view, disregarding a result when the export price exceeds the normal value (zeroing) cannot be characterized as an allowance or an adjustment covered by the third sentence of Article 2.4, including its *a contrario* application. *Indeed, this is not undertaken to adjust to a difference relating to a characteristic of the export transaction in comparison with a domestic transaction.* Accordingly, we agree with the Panel that, conceptually, zeroing is not an

303. *Id.* ¶ 157.

> adjustment or an allowance falling within the scope of Article 2.4, third to fifth sentences.[304]

Still, the Appellate Body could have used stronger language. The proposition is a crucial one. The next line of defense, for zeroing advocates, is to dub it an adjustment, i.e., to attempt to argue that zeroing, while illegal under Article 2.4.2 and 9.3, is a permissible adjustment. If the goal of the Appellate Body is to close the door on this defense, then temerity—not timidity—is helpful.

5. Holdings and Rationales on Zeroing in Original Investigations

a. Zeroing "As Such"

The EC challenge to Model Zeroing was not restricted either to its application by the DOC or to the context of administrative reviews. The EC argued the methodology "as such" in original investigations is inconsistent with several provisions of the Antidumping Agreement (Articles 1, 2.4, 2.4.2, 5.8, 9.3, and 18.4), as well as the WTO Agreement (Article XVI:4), and GATT (Article VI:1-2).[305] The panel agreed the methodology is a "norm" and, therefore, a "measure."[306] It further agreed this norm is illegal under Article 2.4.2 of the Antidumping Agreement.[307] The United States appealed. In brief, the Appellate Body upheld the findings of the panel.[308] The Appellate Body concluded that in an original investigation, when comparing weighted-average normal value to weighted-average export price, zeroing violates Article 2.4.2. But, the Appellate Body reached this result for reasons somewhat distinct from those of the panel.[309]

The United States argued on appeal that the panel relied on historical evidence to conclude Model Zeroing is a "norm," and hence a "measure" susceptible to challenge under the DSU.[310] This evidence suggested nothing more than that the DOC, in some cases in the past, considered zeroing to be an appropriate response to facts presented to it.[311] In other words, the United States argued for a narrow definition of the word "measure," one which would exclude its challenged methodology. The EC countered convincingly with both precedent and counter-evidence:

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304. *Id*. ¶ 158 (emphasis added).

305. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 173.

306. *Id.* ¶¶ 177-78, 180.

307. *Id.* ¶ 180.

308. The Appellate Body also considered, and rejected, an American argument that the panel wrongly allocated the burden of proof concerning a prima facie case to challenge Model Zeroing. *See id.* ¶¶ 215-21.

309. *See id*. ¶ 222.

310. *Id.* ¶ 185.

311. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 185.

> [T]he European Communities underscores that the Appellate Body has previously stated that there are no limitations on the types of measures that may, as such, be subject to WTO dispute settlement. The European Communities also contests the United States' assertion that the Panel relied exclusively on evidence of past behaviour to support its conclusion that the zeroing methodology is inconsistent, as such, with Article 2.4.2 of the *Anti-Dumping Agreement*. The European Communities emphasizes that the evidence before the Panel included the *Anti-Dumping Manual*, the standard programs used by the USDOC to calculate margins of dumping, and the Standard Zeroing Procedures. In addition, the European Communities points out that the Panel had before it other "supporting and corroborating" evidence, including the expert opinions, and the "as applied" documents, "which themselves systematically refer to the [United States'] consistent methodology or practice."[312]

Unsurprisingly, the Appellate Body held in favor of a broad definition of "measure." To do otherwise would be to deviate from its prior decisions, and those of GATT panels, and to weaken panels and the Appellate Body by circumscribing their subject matter jurisdiction. Thus, the Appellate Body stated:

> In previous cases, the Appellate Body has addressed, in the context of the *Anti-Dumping Agreement*, the scope of "measures" that may, as such, be the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated 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 proceedings." The Appellate Body also noted that measures that can be subject to WTO dispute settlement can include, not only acts applying a law in a specific situation, but also "acts setting forth rules or norms that are intended to have general and prospective application." Moreover, "instruments of a Member containing rules or norms could constitute a 'measure,' irrespective of how or whether those rules or norms are applied in a particular instance."
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> In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body emphasized the seriousness of "as such" claims:
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>> "[A]s such" challenges against a Member's measures in WTO dispute settlement proceedings are serious

312. *Id*. ¶ 186 (footnotes omitted).

> challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims.

In the same case, the Appellate Body further confirmed its finding that "'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement." Applying this standard explicitly to the issue of whether the SPB [Sunset Policy Bulletin] is a measure that can be challenged, as such, the Appellate Body found that:

> [T]he 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, . . . the SPB, as such, is subject to WTO dispute settlement.[313]

But could an unwritten methodology such as zeroing (presuming, of course, lines of computer programming code[314] are not a "writing") qualify as a measure?

To this question, the Appellate Body had little trouble responding that written expression is irrelevant to whether a rule or norm may be challenged under the DSU:

> Article 18.4 of the *Anti-Dumping Agreement* is also relevant to the question of the type of measures that can, as such, be submitted to dispute settlement under the *Anti-Dumping Agreement*. That provision contains an explicit obligation for Members to ensure that their "laws, regulations

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313. *Id.* ¶¶ 188-89 (footnotes omitted).

314. *See infra* Part Two.II.A.5.b.

> and administrative procedures" are in conformity with the obligations set forth in that *Agreement*. The phrase "laws, regulations and administrative procedures" encompasses, in our view, "the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings." As the Appellate Body has previously explained, the determination of the scope of "laws, regulations and administrative procedures" must be based on the "content and substance" of the alleged measure, and "not merely on its form." Accordingly, the mere fact that a "rule or norm" is not expressed in the form of a written instrument, is not, in our view, determinative of the issue of whether it can be challenged, as such, in dispute settlement proceedings. Rather, as the Appellate Body has stated, "there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure[s] can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*." This is, moreover, consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations . . . under the covered agreements, and to clarify the existing provisions of those agreements" as provided for in Article 3.2 of the DSU.
>
> For all these reasons, and based on our review of the DSU and the *Anti-Dumping Agreement*, we see no basis to conclude that "rules or norms" can be challenged, as such, *only* if they are expressed in the form of a written instrument.[315]

Surely this response is correct. Were the Appellate Body to insist on writing, a well-coordinated, but unscrupulous, government could establish and enforce unwritten rules that violate GATT-WTO rules. The lack of written expression would immunize offending rules from suit. However, query whether the Appellate Body's response is jurisprudentially consistent with a much earlier dispute, the *India – Patent Protection* case.[316] The question in *U.S. – Zeroing (EC)* is redolent of the unsuccessful Indian defense in the *Patent Protection* case. India argued its administrative procedures, while not formally an act of the Lok Sabha (the lower house of the Indian parliament), qualified as law, specifically a mailbox rule.[317] The specific issues and contexts in the two cases are different, to

315. *Id*. ¶¶ 192-93 (footnotes omitted).
316. *See India – Patent Protection* Appellate Body Report, *supra* note 64.
317. *Id.*

be sure, but the problem of writing is an intriguing and, to some degree, general one.

b. Norm Creation

That said, the American argument was anything but implausible. The United States contended that while in principle an unwritten measure can be challenged under the DSU, great care must be taken in such instances.[318] The evidentiary burden must be significantly higher, and the analysis noticeably more penetrating, when attacking an unwritten measure than when going after a written measure. If the standards are the same, then any abstraction can be challenged as a measure, and panels and the Appellate Body will become norm-creating (and norm-evaluating) bodies. The Appellate Body noted:

> The United States takes issue with the standard adopted by the Panel arguing that it would mean that "abstractions can be measures." Moreover, the Panel's approach would mean that when a Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an "as such" challenge, at least if the Member repeats the action with some indeterminate frequency. According to the United States, this approach "would start the WTO dispute settlement system down the path of legislating 'norms' rather than resolving disputes concerning measures."[319]

In brief, the United States argued consequentially. The very existence of a challenged measure or rule is uncertain when it is not written. The easier it is to challenge an unwritten rule, the easier it is for WTO adjudicators to create norms. Norm creation is precisely what the judges of Geneva should not do.

Here, then, the policy battle is joined: Should the WTO adjudicatory apparatus be a norm-creating institution? One argument (which the present authors have advanced in other venues) is that the answer ineluctably must be "yes," and on balance should be affirmative anyway. Under a different view, which champions politics and diplomacy over legalism, and which the United States took in this case, the power of WTO adjudicators should be hemmed in, and the frequency of norm-creation minimized. The problem with the American position, as argued in the particular context of zeroing, may be summed up with a simple analogy: If zeroing is not a (legal) norm, then neither is going to a baseball game a (cultural) norm. The position relies too heavily on frequency to delineate measures that may be challenged from abstractions that are immune from suit.

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318. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 195.
319. *Id.* ¶ 195 (footnotes omitted).

Nowhere is it written that every American must go to a baseball game, and many do not. But, it is hardly an "abstraction" to go to a baseball game. It happens with considerable frequency, both in terms of the number of people who attend a game and the number of people who go repeatedly.[320]

The case is even stronger in respect of zeroing.[321] Zeroing is not something that just happened in a string of cases, from which the existence of it as a measure may be divined in the abstract. Zeroing is a deliberate American policy. Exclusion of negative margins in original investigations in weighted-average-to-weighted-average comparisons invariably occurs, and has for a long time. The United States could cite no instance in which it did not employ the methodology, i.e., in not even a single case could it show it gave a respondent credit for a non-dumped sale.[322] As its name suggests, the "Standard Zeroing Procedures" contain lines of computer code that always are applied by the DOC in its computer-program-determined dumping-margin calculation. These lines demand that any negative dumping margin be excluded from the numerator of an overall dumping-margin calculation. The United States did not even contest the EC argument that these computer code lines are a constant feature of its program.[323] Thus, along with the panel, the Appellate Body agreed that zeroing is a well-established, well-defined norm of the DOC, the methodology of which is precise, and whose application will occur in the future, as it has in the past.[324] It is, in brief, a rule or norm that qualifies as a measure, and in turn may be challenged as such.

How did the Appellate Body deal with the American argument about consequences? That is, what generic test did the Appellate Body create for determining whether an unwritten rule actually exists and is vulnerable to an "as such" challenge? The answer lies in distinguishing the Appellate Body rationale from that of the panel. The panel failed to articulate general criteria for bringing an "as such" challenge against an unwritten measure, and conflated proof of the existence of the measure with what ought to be a conceptually distinct issue—namely, consistency of the measure with a GATT-WTO text. Accordingly, the Appellate Body set out a three-pronged test, which a complainant must meet with sufficient evidence:

> [W]hen bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments

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320. It is to be noted your authors and their families are fans and, as of this writing, plan to attend Kansas City Royals or Arizona Diamondbacks games.

321. *See U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶¶ 199-200, 203-05, 263(b).

322. *Id.* ¶¶ 199, 201.

323. *Id.* ¶¶ 199, 202.

324. *Id.* ¶¶ 204-05.

> and supporting evidence, at least that *the alleged "rule or norm" is attributable to the responding Member; its precise content*; and indeed, that *it does have general and prospective application*. It is only if the complaining party meets this high threshold, and puts forward *sufficient evidence with respect to each of these elements*, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm." Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[325]

In sum, a complainant must (1) prove the challenged rule is of general and prospective application, (2) prove that it is attributable to the respondent, and (3) articulate its precise content.

c. The Article 2.4.2 Violation

Having established zeroing as a norm or rule that is a measure susceptible to an "as such" DSU challenge, and having laid out a test for "as such" challenges to unwritten measures, the Appellate Body considered the substantive issue of consistency. Does Model Zeroing in original investigations run afoul of Article 2.4.2 of the Antidumping Agreement?[326] In short, "yes," said the panel and Appellate Body.

The American appellate argument was an invitation for the Appellate Body to clarify and extend a precedent from *U.S. – Corrosion-Resistant Steel Sunset Review*.[327] Surely a measure cannot be held inconsistent with a WTO obligation unless that measure mandates a breach of that obligation, contended the United States.[328] This argument resurrected the distinction between mandatory and discretionary measures. The Appellate Body, though, sidestepped the

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325. *Id*. ¶ 198 (second emphasis added) (footnote omitted).

326. Because of the American appellate argument, the issue was cast in terms of whether the panel made an objective assessment of the matter under DSU Article 11. *See id*. ¶ 206.

327. *U.S. – Corrosion-Resistant Steel Sunset Review* Appellate Body Report, *supra* note 281.

328. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 208.

opportunity to rule on the importance of the distinction, if any, between the two types:

> The Appellate Body explained in *US – Corrosion-Resistant Steel Sunset Review* that it had not, as yet, "pronounce[d] generally upon the continuing relevance or significance of the mandatory/discretionary distinction." The Appellate Body went on to observe that:
>
> > . . . as with any such analytical tool, the import of the 'mandatory/discretionary distinction' *may vary from case to case*. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion.[329]

The United States also urged that to hold that a measure "as such" is illegal, it is necessary to prove the measure causes the results.[330] The Appellate Body found no flaw in the evidence on which the panel relied to find an Article 2.4.2 violation, nor with the weighing of that evidence by the panel.[331]

6. Commentary

a. Summary of Zeroing Precedents

GATT obligations in general, and the national treatment requirement of GATT Article III in particular, may well be the most heavily litigated areas in WTO adjudication. If there is a candidate for the most heavily litigated practice of a WTO Member, then surely zeroing is at the top of the list. The Table below summarizes the precedents set by the Appellate Body on zeroing.[332]

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329. *Id.* ¶ 211 (emphasis added) (footnotes omitted).

330. *Id.* ¶ 209.

331. *Id.* ¶ 213.

332. Additional zeroing cases are working their way through the WTO dispute settlement system. First, the EU is challenging the use of zeroing in thirty-seven cases, covering a variety of EU products, in which the U.S. Department of Commerce applied this methodology in original investigations, administrative reviews, and sunset reviews. Rossella Brevetti, *Senate Letter Urges Administration to Stand Firm on 'Zeroing' Methodology*, 23 Int'l Trade Rep. (BNA) 1816 (Dec. 21, 2006). Second, Mexico is challenging the use by the Commerce Department of zeroing in original investigations and administrative reviews. *Id*. That case involves Mexican stainless-steel sheet and strip coils imported into the United States. *Id*. Third, Thailand is challenging the Commerce Department's use of zeroing in an original investigation on shrimp imports. *Id*.

Table

Summary of WTO Precedents on Zeroing

Context of Zeroing	Simple Zeroing	Model Zeroing
Original Investigation	Illegal under WTO rules. In the *Softwood Lumber Zeroing* Compliance Report, the Appellate Body (reversing the compliance panel) ruled Simple Zeroing is illegal. The Appellate Body emphasized it is "illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted-average-to-weighted-average methodology."[333] Thus, the Appellate Body held Simple Zeroing in transaction-to-transaction comparisons of normal value to export price violates the "fair comparison" requirement of Article 2.4 of the Antidumping Agreement, and also is inconsistent with Article 2.4.2 of that Agreement, because the methodology systematic disregards comparisons in which export price exceeds normal value. The *Japan Zeroing* panel upheld use of Simple Zeroing in original investigations, saying a prophylactic prohibition was "manifestly absurd and unreasonable."[334] The case	Illegal under WTO rules. In *EC – Bed Linens*, the Appellate Body ruled Model Zeroing violates Article 2.4.2 (first sentence) of the Antidumping Agreement. In *Softwood Lumber Zeroing*, the Appellate Body ruled Model Zeroing violates Article 2.4 and 2.4.2 of the Antidumping Agreement. In *U.S. – Zeroing (EC)*, the Appellate Body upheld a panel finding that Model Zeroing violates Article 2.4.2 of the Antidumping Agreement. The *Japan Zeroing* panel agreed with Japan that the use of Model Zeroing in original investigations violates the Antidumping Agreement. The United States did not appeal this ruling. The United States did not contest the facts or arguments made by Ecuador in the *Ecuador Zeroing* case,[338] the first time a respondent in a WTO case essentially has pled *nolo contendere* (no contest). Ecuador protested the imposition in three cases of AD

333. *See Softwood Lumber Zeroing* Appellate Body Report, *supra* note 271.

334. *See* Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, ¶ 7.140, WT/DS322/R (Sept. 20, 2006).

335. *Id.* ¶ 7.157.

336. *See* Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (adopted Jan. 23, 2007).

337. *Id.* ¶ 121.

	involved fifteen instances between 1999 and 2004 in which the United States imposed antidumping duties on Japanese carbon-quality steel plate products, and various kinds of bearings (antifriction, ball, cylindrical, spherical plain, tapered, and cylindrical roller bearings). The panel specifically rejected Japan's claim that Appellate Body precedents indicate zeroing is, or should be, prohibited in all contexts, because the method unfairly inflates the dumping margin and thereby the amount of antidumping duties imposed. The panel said the Appellate Body "has never actually made a legal finding in a specific case that the use of zeroing is inconsistent" with the Antidumping Agreement.[335] But, the *Japan Zeroing* Appellate Body reversed the panel's decision. The Appellate Body held Simple Zeroing violates Articles 2.4 and 2.4.2 of the Antidumping Agreement.[336] The Appellate Body chastised the panel, saying it had "no reason to depart" from its finding in the *Softwood Lumber Zeroing* Compliance Report.[337]	duties on frozen, warm-water shrimp ranging from 2.35% to 4.48%, claiming that but for Model Zeroing in the original investigation, there would have been no dumping margin. Under the *de facto nolo contendere* plea, arranged before the panel ruling, the United States agreed to a six-month compliance period, to recalculate dumping margins to conform to the foreseeable panel ruling (in accordance with section 129(b) of the 1994 Uruguay Round Agreements Act), and to give prospective effect only to any new cash deposit rate resulting from recalculated margins. In return, Ecuador agreed it would not ask the panel to recommend ways the United States ought to implement the ruling, thereby avoiding for the United States the discomfort of yet another call from Geneva for the United States to revoke an AD order. The two sides also agreed to share drafts of their written submission—a rare instance of such cooperation. At the same time, Ecuador did not drop the case, in order to retain its future rights, especially concerning implementation and, should it be necessary to exercise, retaliation. (Interestingly, Ecuador suffered no real injury from zeroing, because third-country competitors, i.e., shrimp

338. *See* Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (Jan. 30, 2007).

339. *See* Daniel Pruzin, *U.S. Does Not Contest Ecuador Shrimp Case After WTO Panel Rules Against U.S. Zeroing*, 24 Int'l Trade Rep. (BNA) 174, 174-75 (Feb. 1, 2007).

		producers-exporters from Brazil, China, India, Thailand, and Vietnam, were hit with relatively higher AD duties on their shipments to the United States. But, injury was irrelevant to its claim.[339]) Thus, the panel in *Ecuador – Zeroing* followed the *Softwood Lumber Zeroing* Appellate Body decision, and said Model Zeroing in original investigations violates Article 2.4.2 (first sentence) of the Antidumping Agreement. That was true, held the panel, in respect of the dumping margins calculated by the U.S. Department of Commerce for the three largest Ecuadorian shrimp producer-exporters, and for the "all others" rate computation.
Administrative (Periodic) Reviews	Illegal under WTO rules. The *Japan Zeroing* panel upheld use of Simple Zeroing in an administrative review of an existing AD order. But, the *Japan Zeroing* Appellate Body reversed this decision, holding Simple Zeroing violates Articles 2.4, 9.3, and 9.5 of the Antidumping Agreement, and GATT Article VI:2. The violation lies in the fact that Simple Zeroing leads to an artificial inflation of the dumping margin, which in turn leads to an AD duty that exceeds the margin. The dumping margin established for an exporter is a ceiling on the total amount of AD duties that can be levied on subject merchandise from that exporter, and this same ceiling applies in original investigations and reviews, in both prospective and retrospective antidumping regimes.	Illegal under WTO rules. In *EC – Zeroing (EC)*, the Appellate Body held Model Zeroing in administrative reviews violates Article 9.3 of the Antidumping Agreement and Article VI:2 of GATT. That is because systematic disregard of any individual transaction in which export price exceeds the contemporaneous weighted-average normal value leads to an assessment of an AD duty that exceeds the actual margin of dumping for a particular exporter.

Sunset Reviews	Illegal under WTO rules. The *Japan Zeroing* panel held Japan failed to prove zeroing is illegal in a sunset review of an existing AD order. But, the *Japan Zeroing* Appellate Body reversed this decision, holding Simple Zeroing violates Article 11.3 of the Antidumping Agreement. The Appellate Body said dumping margins calculated with zeroing did not, contrary to Article 11.3, provide a "rigorous examination," yield "reasoned and adequate conclusions [supported by] positive evidence," or have a "sufficient factual basis."	No case (yet).
New Shipper Reviews	Illegal under WTO rules. The *Japan Zeroing* panel upheld use of Simple Zeroing in new shipper reviews connected with an existing AD order. But, the *Japan Zeroing* Appellate Body reversed this decision, holding Simple Zeroing violates Articles 2.4, 9.3, and 9.5 of the Antidumping Agreement, and GATT Article VI:2. Essentially, it applied the same rationale in this context as in administrative reviews.	No case (yet).
Changed Circumstances Reviews	Illegal under WTO rules. The *Japan Zeroing* panel held Japan failed to prove zeroing is illegal in a changed circumstances review of an existing AD order. But, the *Japan Zeroing* Appellate Body reversed this decision, holding Simple Zeroing violates Articles 2.4, 2.4.2, 9.3, 9.5, and 11.3 of the Antidumping Agreement.	No case (yet).

Targeted Dumping[340]	No case (yet).	No case (yet).

Notably, following the *U.S. – Zeroing (EC)* decision, in a December 27, 2006 Federal Register notice, the U.S. Department of Commerce announced it would abandon Model Zeroing in original investigations.[341] It deferred the implementation date, originally in January, until February, at the request of Congress. Sections 123(b) and (g) of the Uruguay Round Agreements Act of 1994 require a sixty-day consultation period between the appropriate congressional committees (namely, the Senate Finance and House Ways and Means Committee) and an executive branch department or agency seeking to modify its regulation to implement a WTO decision.[342] During the sixty days, the appropriate committee may vote to show its support or opposition to the proposed regulatory change. Because of the November 2006 election and transition from the 109th to 110th Congress, the appropriate committees did not have enough time to consider the issue.[343] However, the change does not affect the use of Model Zeroing in other contexts, nor does it affect the use of Simple Zeroing.

b. Irresolute Zeroing Decisions?

Manifestly, the Appellate Body can decide only an issue properly before it. That legal fact, along with the application of judicial economy, limits the scope of decision-making. There are, moreover, good arguments for judicial restraint, including in the context of zeroing.[344] Still another constraint on judicial over-reach is political.

Well before the *U.S. – Zeroing (EC)* case, the Appellate Body was in enough trouble in the Congress—namely, for infringing on American sovereignty by being judicially active, exceeding its mandates, and riding roughshod over its

340. That is, rare investigations, using comparisons of average normal value to individual export price, of allegations that the pattern of export prices differs markedly across exporters of subject merchandise, buyers of that merchandise, or time periods.

341. *See* Rossella Brevetti, *Sen. Baucus and Rep. Rangel Urge Commerce to Delay Decision on Zeroing*, 24 Int'l Trade Rep. (BNA) 144 (Jan. 25, 2007).

342. *Id.*

343. *Id.*

344. *See* Roger P. Alford, *Reflections on* U.S. – Zeroing*: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196 (2006) (arguing that in the *U.S. – Zeroing (EC)* case, the Appellate Body ignores textual obligations to defer to administering authorities, improperly engages in fact-finding, and neglects the doctrine of justiciability, all resulting in an inappropriate expansion of its authority).

standard of review in DSU Article 17.6.[345] The Appellate Body appreciates that how it crafts its opinions, especially its legal reasoning, is being scrutinized by Congress. This explains the following paragraph, which the Appellate Body seems to have penned specially for Congress:

> In our analysis of whether the zeroing methodology, as applied by United States in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, we have been mindful of the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*. Article 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not, in our view, allow the use of the methodology applied by the United States in the administrative reviews at issue. This is so because, as explained above, the methodology applied by the USDOC in the administrative reviews at issue results in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping. Yet, Article 9.3 clearly stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."[346]

Congress—or at least six Democratic and five Republican Senators—not only failed to be impressed, but were moved to write to the U.S. Trade Representative (Susan Schwab) and Secretary of Commerce (Carlos Gutierrez) a letter stating (*inter alia*) the following:

> Implementing decisions of the Appellate Body on "zeroing" would result in a dramatic weakening of the antidumping laws. Dumped sales would be masked by non-dumped sales. Unfair trade would go undetected and without remedy. Opponents of fair trade would have achieved through litigation what the U.S. would never agree to in negotiation or through legislation: the

345. *See, e.g.*, Brevetti, *Senate Letter Urges Administration to Stand Firm*, *supra* note 332, at 1816.

346. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 134.

> evisceration of the antidumping remedy. This cannot be permitted.[347]

The Senators also intoned:

> It is time for the Appellate Body to abandon the ideological approach it has taken on this issue and return to making decisions on the merits, based on WTO negotiations agreed to by all parties.
>
> . . . Unilaterally disarming in the face of Appellate Body overreaching does not serve the interests of the United States.[348]

There is a lesson from the letter of the Senators, beyond its odd and possibly hypocritical conception of what qualifies as "ideological." The Appellate Body needs to appreciate that for any adjudicator, irresolute decisions can engender both political opposition and further litigation.[349]

That is, might it be prudent for the Appellate Body to ignore the political impact of its decisions, and focus on making the rationales in support of those

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347. Letter from Jay Rockefeller, Democratic Senator from West Virginia, et al., to Susan Schwab, U.S. Trade Representative, & Carlos Gutierrez, Commerce Secretary (Dec. 11, 2006), *quoted in* Brevetti, *Senate Letter Urges Administration to Stand Firm*, *supra* note 332, at 1816. The authoring Senators included the incoming Chairman of the Senate Finance Committee, Max Baucus (D-Mont.), plus Evan Bayh (D-Ind.), Robert Byrd (D-W. Va.), Kent Conrad (D-N.D.), Larry Craig (R-Idaho), Mike Crapo (R-Idaho), Elizabeth Dole (R-N.C.), Dick Durbin (D-Ill.), Lindsey Graham (R-S.C.), Jay Rockefeller (D-W. Va.), and George Voinovich (R-Ohio). Brevetti, *Senate Letter Urges Administration to Stand Firm*, *supra* note 332, at 1816.

348. Brevetti, *Senate Letter Urges Administration to Stand Firm*, *supra* note 332, at 1816-17.

349. The Senators' letter is not the only angry one from Capitol Hill on zeroing. In response to a January 2007 Appellate Body decision in the *Japan Zeroing* case, Representative Sander Levin (D-Mich.) wrote:

> This ruling provides yet another disturbing example of the WTO Appellate Body changing the rules in the middle of the game . . . . [The Appellate Body should not] create obligations out of thin air. When the police pull a driver over for exceeding the speed limit on a stretch of highway, it is not a defense that the driver was driving below the speed limit on some other stretch of highway.

Letter from Rep. Sander Levin, *quoted in U.S. Zeroing Methodology Hit Again by WTO Appellate Body*, 24 Int'l Trade Rep. (BNA) 52-53 (Jan. 11, 2007).

The speed-limit analogy, which is noted in the *WTO Case Review 2004*, and which the authors (as far as their dimming memories permit!) trace to a conference presentation years ago by John Ragosta, Esq., has a rebuttal. That rebuttal also is set out in the earlier *Case Review*.

decisions as strong as possible? It will never compete with Congress on a political level, nor will it ever please all 435 Representatives and 100 Senators. The power of the Appellate Body in combating politically charged criticisms and discouraging litigation is in its reasoning. Over time, the Appellate Body can gain ever-greater respect—grudgingly in some quarters, to be sure—if that reasoning is world class. In particular, it must work hard, or harder, to show its decisions are valid outcomes based squarely on the negotiated text of a GATT-WTO agreement at issue, and reinforced by other complementary or supplementary justifications. The extra-textual rationales will depend on the case at bar, but may include economic and jurisprudential considerations appropriate across continents.

True, the first zeroing case, *EC – Bed Linens*, did not present the Appellate Body with an "as such" challenge to zeroing in all contexts. Yet, the approach of the Appellate Body, in and after that case, has been to chip away at zeroing in an incremental, technical point-by-point manner. Has its judicially incremental approach to zeroing both failed to placate Congress, leading to the ironic criticism that its work corrodes the WTO dispute settlement, and catalyzed the United States to defend the methodology?[350] The Appellate Body seems to have put itself in the worst of all worlds—it has issued several opinions against zeroing and thus contributed to the perception among many on and outside of Capitol Hill of a flood of anti-American cases. Might the Appellate Body have been better off to be bold, that is, to issue strong opinions early on against zeroing, and in them provide *obiter dicta* condemning—with the rationale to back it up—zeroing in contexts beyond the case at bar?

Further, in *U.S. – Zeroing (EC)*, the Appellate Body seems to have darted away from opining on the bottom-line issue about zeroing: Is it "fair"? Publicly, at least, in WTO adjudication, the United States has not made the case that zeroing is "fair." Possibly, the United States assumes Uruguay Round negotiators (expressly or impliedly) believed zeroing to be "fair." Irresolute Appellate Body reports permit the United States to maintain this stance and to accuse the Appellate Body of what in reality may have been an American negotiating oversight or mistake. Had the Appellate Body confronted the "fairness" question head on, even by way of comment, might it have discouraged at least a few of the zeroing challenges? Had it been willing to talk about whether a fair comparison between normal value and export price is possible through zeroing, might it have saved legal resources at the WTO, the USTR, the EC, and in other countries?

It is impossible to answer definitively these questions. They are historically counter-factual, so any response is speculative. Moreover, animating

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350. The charge was made, for example, by Senator Max Baucus (D-Mont.) and Charles Rangel (D-N.Y.) in a letter urging the U.S. Department of Commerce to defer its planned abandonment of Model Zeroing in original investigations so as to comply with the Appellate Body Report in *U.S. – Zeroing (EC)*. Letter from Sen. Baucus & Rep. Rangel to Sec. Gutierrez, *cited in* Rossella Brevetti, *Sen. Baucus and Rep. Rangel Urge Commerce to Delay Decision on Zeroing*, 24 Int'l Trade Rep. (BNA) 144 (Jan. 25, 2007).

in them may be a clash of paradigms between civil law case-by-case determinations, and common law evolution through *stare decisis*. Nevertheless, in light of its self-image and aspirations, the Appellate Body might consider the questions. It is remarked in some circles that the Appellate Body seeks to be a world supreme court for international trade, evidenced in part by its relatively new physical facility in Geneva, separate from the WTO Secretariat headquarters. Whether or not that is true, the Appellate Body might do well to consider the relative merits of incrementalism versus activism, of a paragraph targeted for American politicians versus an intellectually mighty decision about fairness. After all, without courage to take action, or to craft weighty opinions, how can it develop the legitimacy that would befit a supreme court for trade?

c. Amicus Briefs Again

The Committee to Support U.S. Trade Laws (CSUTL) filed an amicus curiae brief in the *U.S. – Zeroing (EC)* case at the panel stage.[351] The panel observed, based on the Appellate Body precedent from the *Turtle-Shrimp* case,[352] that it has discretion to consider whether to reject or accept facts and arguments from an amicus brief. To decide whether to consult the brief, the panel essentially applied its understanding of that precedent from the *Turtle-Shrimp* case. The panel asked the complainant, respondent, and third parties their views on how to handle the CSUSTL brief. Second, it reviewed their comments. Third, the panel came up with a consensus position, namely, to reject the arguments in the amicus brief except to the extent a party in the case adopted, either in its brief or in oral argument, an argument from the brief.[353]

In the end, the CSUSTL amicus brief had little if any impact in the case. But, notably, the panel neither disregarded it out of hand, nor ignored what is now apparently standard practice in handling amicus briefs. Indeed, in this later respect, the panel observed that a similar approach—considering amicus brief

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351. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 1.7.

In the *Mexico – HFCS* case, the Appellate Body received an amicus brief from the National Chamber of the Sugar and Alcohol Industries of Mexico. *Mexico – HFCS* Appellate Body Report, *supra* note 12, ¶ 8. Mexico said it would not object to the Appellate Body accepting it. *Id.* ¶ 8 n.21. The United States observed the amicus brief was received late in the proceedings and presented new arguments and claims not part of Mexico's appeal. *Id.* The United States did not challenge the authority of the Appellate Body to use the brief, but said it should not in the particular case. *Id.* The Appellate Body found it unnecessary to use the brief. *See id.* ¶ 8.

352. *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 108, WT/DS58/AB/R (adopted Nov. 6, 1998).

353. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶ 1.7.

arguments to the extent the parties adopt them—was used by panels in the *Softwood Lumber IV* [354] and *Softwood Lumber VI* [355] cases.

d. Computer Programs

As noted earlier, one measure the EC cited for its "as such" challenge was the Standard Zeroing Procedures contained in the DOC Standard AD Margin Program. The Program is the software the DOC uses to calculate dumping margins. In particular, whenever the DOC develops a specific computer program to calculate a dumping margin in a particular AD case, it uses lines of computer code in its Standard AD Margin Program. Encoded among those lines of programming code in the Standard Program are the Standard Zeroing Procedures.[356] Those Procedures are the particular lines of code that incorporate the zeroing methodology, as the Appellate Body explained:

> We briefly describe the "Standard Zeroing Procedures" as identified by the European Communities in this case. Standard programming used by the USDOC to calculate margins of dumping contains the following line of computer code: "WHERE EMARGIN GT 0". The European Communities explains that this line contains the instruction to select only the results of intermediate comparisons that are positive, and to ignore those that are negative. The European Communities further explains that this is "the key feature of the architecture that the [European Communities] refers to as 'zeroing'." . . . The European Communities describes this line of computer code, along with the lines surrounding it as the "Standard Zeroing Procedures." . . . The Panel noted that the term "Standard Zeroing Procedures" is not used in United States anti-dumping laws and regulations.[357]

In effect, the critical line of code containing the zeroing algorithm is the instruction "WHERE." This instruction selects for inclusion in the numerator of the overall dumping margin only the results of comparisons of normal value to export price that are greater than zero.

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354. *See* Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (Aug. 29, 2003).

355. *See* Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004).

356. *See U.S. – Zeroing (EC)* Panel Report, *supra* note 234, ¶¶ 4.139-.140.

357. *U.S. – Zeroing (EC)* Appellate Body Report, *supra* note 234, ¶ 173 n.286 (citations omitted).

To be sure, whether a computer program is a "measure" was not at issue in the *EC – Zeroing* case. Had it been, the Appellate Body likely would have responded "yes," given the many precedents on the breadth of the term. The point is, by way of comment, that perhaps the EC challenge is the first WTO case, even the first case in the annals of international trade law, to involve computer software (excepting, of course, intellectual property infringement cases). Surely the EC is to be commended for its detailed work in gathering and synthesizing evidence on zeroing. It did nothing less than delve into hundreds of lines of computer programming code and pluck out the nettlesome ones. In doing so, it illustrated the proposition familiar to lawyers: the devil is in the details.

Further, when those details involve computer software, there could be yet more work to be outsourced to places like Bangalore and Hyderabad. Who would have thought India might be involved in zeroing cases, not only as a complainant at the WTO, but also possibly as a propagator of zeroing, in producing, maintaining, or analyzing zeroing code?