

## WTO CASE REVIEW 2014<sup>1</sup>

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<sup>1</sup> This *WTO Case Review* is the fifteenth in our annual series on substantive international trade adjudications issued by the Appellate Body of the World Trade Organization. Each *Review* explains and comments on 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 2013*, 31 ARIZ. J. INT'L & COMP. L. 475-510 (2014).
- *WTO Case Review 2012*, 30 ARIZ. J. INT'L & COMP. L. 207-419 (2013).
- *WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287-476 (2012).
- *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239-360 (2011).
- *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83-190 (2010).
- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113-228 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75-155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299-387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99-249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317-439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

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The WTO reports we discuss are available on the web site of the WTO, at [www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm). The texts of the WTO agreements we discuss also are available on the WTO web site, [www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm), and are published in a variety of sources, including Raj Bhala, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE – DOCUMENTS SUPPLEMENT* (3d ed. 2008).

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## TABLE OF CONTENTS

I. INTRODUCTION .....	500
II. DISCUSSION OF THE 2013 CASE LAW FROM THE APPELLATE BODY .....	502
A. GATT Obligations: 2014 <i>Fur Seals</i> Case .....	502
1. Citation .....	502
2. Facts.....	502
a. Basic Regulation.....	505
b. Implementing Regulation .....	506
3. Overview of Key Appellate Issues .....	509
4. Issue 1: TBT Agreement Violation?.....	511
5. Issue 2: GATT Article I:1 Violation?.....	516
a. What Is the Status of Greenland in the EU and WTO? .....	516
b. Immediacy and Unconditionality .....	517
c. Losing Argument on Non-Discrimination Obligations Under GATT Versus TBT Agreement .....	520
6. Issue 3: Exception Under GATT XX(a) Public Morality?.....	523
a. Principal Object of Seal Regime?.....	523
b. Animal Welfare as “Public Morality”? .....	525
c. Identification of Risk to “Public Morality”? .....	527
d. Step One of the Two-Step Test: Provisionally Justified as “Necessary to Protect Public Morals”—Contribution Analysis?.....	531
e. Step One of the Two-Step Test: Provisionally Justified as “Necessary to Protect Public Morals”—Weighing and Balancing of Factors? ...	537
f. Step Two of the Two-Step Test: Satisfies <i>Chapeau</i> ?.....	541
7. Commentary .....	553
a. Too Long .....	553

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will appear in modified form in the 2<sup>nd</sup> edition of DICTIONARY OF INTERNATIONAL TRADE LAW and MODERN GATT LAW.

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b. De Facto Stare Decisis Again and Mopping up a Spill over National Treatment .....	555
c. Process Versus Product.....	559
B. WTO Accession Commitments and GATT Obligations: 2014 <i>China Rare Earths</i> Case.....	561
1. Citation .....	561
2. Background .....	561
3. Overview of Key Appellate Issues .....	563
4. Issue 1: Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of Chinese Accession Protocol.....	564
5. Issue 2: GATT Article XX(g) “Relating To” Conservation.....	566
a. Interpretation of “Relating to” Conservation.....	567
b. Application of “Relating To” Conservation Requirement .....	568
6. Issue 3: GATT Article XX(g) “Made Effective in Conjunction With” Domestic Restrictions .....	569
a. Interpretation of the Phrase ““Made Effective in Conjunction with” Domestic Restrictions” .....	570
b. Application of “Made Effective in Conjunction with” Requirement .....	571
7. Commentary .....	572
a. National Security Implications .....	572
b. Economic Adjustment Through New Supply Sources.....	573
C. Trade Remedies—Antidumping and Countervailing Duties: 2014 <i>China AD-CVD</i> Case .....	575
1. Citation .....	575
2. Facts.....	575
3. Overview of the Key Appellate Issue.....	576
4. Background for the Key Appellate Issue.....	577
5. Holdings and Rationales.....	579
a. Key claims under the GATT.....	579
i. Measures “Effecting an Advance in a Rate of Duty or Other Charge on Imports” .....	580
ii. Measures “Imposing a New or More Burdensome Requirement, Restriction or Prohibition on Imports” .....	582
iii. Determination of the Meaning of Municipal Law for Purposes of Article X:2 of the GATT .....	582
iv. Completion of the Analysis Under Article X:2 of the GATT .....	584
6. Commentary .....	586
a. Effectiveness of the DSB? .....	586
b. The Importance of Transparency in International Trade Law .....	586
D. Trade Remedies: 2014 <i>US—Carbon Steel (India)</i> Case .....	588
1. Citation .....	588
2. Facts.....	588
3. Overview of Key Appellate Issues .....	589
4. Summary of the Appellate Body’s Findings .....	591
5. The Appellate Body’s Rationale .....	593

a. NMDC as a “Public Body” .....	593
b. Financial Contributions .....	595
c. Benefit Under Article 14 of the SCM Agreement: “As Such” Claims .....	599
d. Article 14(d) of the SCM Agreement: “As Applied” Claims .....	611
e. Specificity Under Article 2 of the SCM Agreement .....	621
f. Article 12.7 of the SCM Agreement: “Facts Available” .....	627
g. New Subsidy Allegations in Administrative Reviews .....	633
h. Cumulative Assessment of Imports in CVD Investigations .....	637
6. Commentary .....	642
a. Post Hoc Presentation of Evidence is Largely Useless .....	642
b. Status as a Public Body Must Be Established by Evidence of <i>Actual Exercise</i> of Control .....	643
c. No Inferences May Be Drawn When Providing the Rationale for Choosing a Benchmark Price, and for Loans All Costs to the Recipient Must Be Included .....	643
d. Like It or Not, Foreign Producers Who Do Not Cooperate with the USDOC Will Be Hit with Adverse “Facts Available” .....	643
e. Cross-cumulation of Non-dumped, Dumped, and Subsidized Imports in Determining Material Injury is Prohibited .....	644
f. Current Practices with Regard to Specificity and Addressing New Subsidies in Administrative Reviews .....	644
g. The Appellate Body and the Members Both Have Responsibilities to Make the Appeals Process More Transparent .....	645

## I. INTRODUCTION

2014 was relatively busy year for the Appellate Body and its secretariat; four reports were issued. 2015 promises to be even more demanding; as of the end of February, 2015, two Appellate Body reports had already been adopted by the Dispute Settlement Body<sup>2</sup> and notices of appeal had been lodged in three others.<sup>3</sup> An appeal in 2015 seems highly likely in at least one other case.<sup>4</sup> One

<sup>2</sup> Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015) (adopted Jan. 26, 2015); *United States—Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (Dec. 18, 2014) (adopted Jan. 16, 2015).

<sup>3</sup> Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/RW, WT/DS386/RW (Oct. 20, 2014) (notice of appeal Nov. 14, 2014); Panel Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R (Nov. 17, 2014) (notice of appeal Jan. 26, 2015); Panel Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R (Oct. 14, 2014) (notice of appeal Jan. 26, 2015).

Appellate Body member has noted informally that while historically about sixty percent of panel reports have been appealed, the appeals rate seems to be increasing, perhaps to as much as ninety percent.<sup>5</sup>

The work of the Appellate Body was hampered by the fact that for much of the 2014 calendar year it was forced to operate with six instead of the usual seven members; the WTO membership was unable to agree on the approval of the seventh member until September 2014. Shree Baboo Chekitan Servansing, of Mauritius, began serving a four-year term on October 1, 2014—filling the position that had been vacated by David Unterhalter on December 13, 2013.<sup>6</sup> In 2015, at least, it seems highly unlikely that there will be any major disagreements over membership in the Appellate Body.

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<sup>4</sup> Panel Report, *China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSS)*, WT/DS454/R, WT/DS460/R (Feb. 13, 2015).

<sup>5</sup> Discussion with Judge Ricardo Ramirez (Mar. 30, 2015).

<sup>6</sup> See *Appellate Body Members*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited Feb. 19, 2015).

## II. DISCUSSION OF THE 2013 CASE LAW FROM THE APPELLATE BODY

### A. GATT Obligations: 2014 *Fur Seals* Case

#### 1. Citation

Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (*adopted* 18 June 2014).<sup>7</sup>

#### 2. Facts<sup>8</sup>

The *Fur Seals* case has triggered powerful emotions on all sides. Animal rights groups lambasted Canada for “promot[ing] the indefensible seal slaughter through misinformation” and pointed to “a half-century of veterinary evidence show[ing] the commercial seal hunt results in considerable and unacceptable suffering.”<sup>9</sup> Inuit seal hunters countered that the “assertion that what we have been doing for thousands of years is so morally wrong as to justify a trade prohibition is very troubling,” and that restriction was “blatant hypocrisy,” because it allowed seal products into Europe from Greenland, regardless of how the seals from which they were derived were killed.<sup>10</sup>

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<sup>7</sup> Hereinafter Appellate Body Report, *Fur Seals*.

The Appellate Body issued, and Dispute Settlement Body (DSB) adopted, the two Reports on the same day. For most purposes, the Appellate Body treated the two disputes as one. So, unless otherwise noted, such is the treatment herein, hence distinctions between the claims, arguments, and conclusions concerning Canada and Norway are not made.

The Panel Reports in the case were Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, WT/DS401/R (Nov. 25, 2013) (*adopted* June 18, 2014) [hereinafter, Panel Report, *Fur Seals*].

On appeal, the following WTO Members were third party participants: Ecuador, Iceland, Japan, Mexico, Namibia, and the United States.

Having lost the case, the EU agreed with the complainants, Canada and Norway, to a reasonable period of time (RPT) for compliance of sixteen months from the date of adoption of the Appellate Body Report by the Dispute Settlement Body (DSB). That date was October 18, 2015. See Brian Flood, *EU, Norway, Canada Agree on Timeframe for Compliance with WTO Seal Ruling*, 31 INT’L TRADE REP. (BNA) 1614 (Sep. 11, 2014).

<sup>8</sup> The Facts are set out at Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 1.1-17, 4.1-14.

<sup>9</sup> Daniel Pruzin, *WTO Appeal in EU Seal-Product Ban Case Stirs Trade Rules “Morality” Exception Debate*, 31 INT’L TRADE REP. (BNA) 577 (Mar. 27, 2014) (quoting Rebecca Aldworth, Executive Director, Humane Society International (HSI) Canada).

<sup>10</sup> *Id.* (quoting Aglukqaq, native of Nunavut Territory, Canada).

Celebrities such as Britain's Rhys Ifans and Jude Law, and Canadian Baywatch star Pamela Anderson, sided with the seals. The Americans did not have to; the United States banned imported seal products in 1972 via the *Marine Mammal Protection Act*—ironically the same statute that got the United States in trouble in the famous *Tuna Dolphin* cases. However, the United States did anyway by grabbing the mantle of moral relativism. In the third party submission to the *Fur Seals Panel*, the United States:

criticized what it said was Canada's claim that the EU is required to accord equal concern to all animal species in order to have a valid public morals defense under [GATT] Article XX(a).

It "is not Canada's (or the WTO's) prerogative to decide for the EU, or for any other Member, which public morals objectives are the most important to that Member or its citizens. . . . Article XX(a) does not require some prescribed degree of consistency between public morals concerns in different situations."<sup>11</sup>

That was fair enough, as a matter of textual interpretation, but was it wise as a matter of legal policy? Was there an irony in the United States grabbing the mantle of moral relativism? After winning the 2010 *China—Audio Visual Products* case, would the United States want to see the likes of China or Russia take up the same mantle?

Of course the industry had its say, with the explosion in the Canadian harp seal population from two million to seven million on the East Coast, fish stocks were nearly extinct. So seal hunters "should be championed," when in fact they had "only been condemned and vilified," even though the industry employed people, ensured seals were not simply shot then wasted, and stayed well within the Canadian government annual hunt limit: 100,000 of the 400,000 cap.<sup>12</sup> In response to these points, animal rights activists scoffed: "The idea that we need to—or, indeed, that we even can—manage the 'balance of nature' has been

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<sup>11</sup> *Id.* (quoting Submission of the United States (Mar. 17, 2014)). Perhaps not surprisingly, some legal academics endorse moral relativism in international trade law. See, e.g., *id.* (concerning the January 29, 2014 posting on the website of the American Society of International Law (ASIL) by Professor Robert Howse, noting the "widely differing political and social systems (from Saudi Arabia to the United States, Israel and Sweden [sic])," and counseling against "second-guessing" as to public morality content the "substantive choices of states" with "radically divergent" views). Query whether protections affecting women or other traditionally disadvantaged groups ought to be viewed through this same lens.

<sup>12</sup> *Id.* (quoting Dion Dakins, Chairman, Seals and Sealing Network (Canadian industry group)).

refuted by ecologists for decades.”<sup>13</sup> They would have done well to point out another irony: Canada and Norway, while generally known for being calm, environmentally-friendly countries, were making GATT-WTO arguments to justify the killing of cute seals.

Here, then, was another case illustrating an age-old point: for all the inter-disciplinary ballyhoo about economics, trade always has been about morality too. These moral outrages were triggered in 2009, when—arguably—the European Union tried to “do the right thing.” The EU opted to ban the sale and importation of products from seals. As producer-exporters of such merchandise, neither Canada nor Norway was happy. Immediately, the irony of the case became apparent: two nations stereotypically viewed as well-disposed to nature triggered one of the handful of animal rights cases in GATT-WTO jurisprudence. Ultimately, their claims against the EU ban ultimately would lead to a rare decision under the GATT Article XX(a) public morality exception—the first recognition that animal rights qualify as a moral concern.

By no means is the EU alone among WTO Members in its concern over animal rights. Israel, along with the EU, bans the sale and marketing of cosmetics tested on animals.<sup>14</sup> In October 2014, India joined them—urged on by the People for the Ethical Treatment of Animals (PETA)—the *Lok Sabha* passed the *Drugs and Cosmetics (Fifth Amendment) Rules of 2014*, which states “[n]o cosmetic that has been tested on animals . . . shall be imported into the country.”<sup>15</sup> This ban complemented earlier 2014 legislation that forbade animal testing for cosmetics, ending the use of animals in pharmacy courses and striking a requirement that soaps and other surface-active agents be tested on animals to get approval for sale. India said computer-assisted modeling could substitute for animal testing.

China stands in stark contrast to the EU, Israel, and India. China explicitly requires cosmetics be tested on animals.<sup>16</sup> Could this have something to do with a cozy relationship between multinational corporations (MNCs) and the Chinese Communist Party (CCP)? Consider the fact the Indian ban adversely affected MNCs with factories in India, such as America’s Johnson & Johnson, England’s Unilever, and France’s L’Oreal S.A. Until the ban, those companies used India to manufacture animal-tested cosmetics, which were then exported to countries such as China. The European companies also sold those cosmetics in India after the EU barred them from doing so in Europe.

In any event, the EU concern about animal rights has its own vulnerabilities: little in the way of its law is efficient, clear, or thoroughly defined. The rules at stake in the *Fur Seals* case were no exception. Rather than one

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<sup>13</sup> *Id.* (quoting Sheryl Fink, Director, Canadian Wildlife Campaigns, International Fund for Animal Welfare (IFAW)).

<sup>14</sup> See Madhur Singh, *India Bars Imports of Cosmetics Tested on Animals*, *Expanding Bans*, 31 INT’L TRADE REP. (BNA) 1855 (Oct. 16, 2014).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*



simple, comprehensive measure, the EU used two legal instruments, one with missing definitions and no resolute policy statement.

#### a. Basic Regulation

On September 16, 2009, the European Parliament and Council passed Regulation (EC) Number 1007/2009 concerning trade in seal products. “Seal products” meant “all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.”<sup>17</sup> The Basic Regulation bans “the placing on the market” of seal products in all instances except one: those products that “result from hunts traditionally conducted by the Inuit and other indigenous communities and contribute to their subsistence.”<sup>18</sup> There are three key criteria to qualify for the exception: (1) the hunters must be “Inuit” or part of “other indigenous communities;” (2) the hunters must traditionally engage in such hunting; and (3) the hunting must “contribute to their subsistence.”

The Basic Regulation defines “Inuit” as:

indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognized by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia).<sup>19</sup>

This Regulation does not define “other indigenous communities,” but the Implementing Regulation, discussed below, does so. Collectively, the shorthand expression “ICs” refers to “Inuit” and “other indigenous communities.” So the above exception is called the “IC Exception.” Yet the Regulation fails to define “traditionally,” “contribution,” or “subsistence.”

This ban applies at the time and point of importation of imported seal products. Does that mean the Basic Regulation bans imports of seal products too? The answer is “yes,” in all instances except two: personal use by travellers, or in support of marine resource management (MRM). Each exception to the import ban has multiple criteria.

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<sup>17</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 4.4 (quoting Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, art. 2(2), 2009 O.J. (L 286) 36 [hereinafter Basic Regulation]).

<sup>18</sup> *Id.* ¶¶ 4.5-4.6 (quoting Basic Regulation, *supra* note 17, art. 3(1)).

<sup>19</sup> *Id.* at 98 n.817 (quoting Basic Regulation, *supra* note 17, art. 3(1)).

First, imports are allowed into the EU if the act of importation of seal products (1) is “occasional,” and (2) they are for the “personal use of travellers or their families.”<sup>20</sup>

The second exception technically is not concerning the import ban but attributable to the prohibition against placing seal products on the EU market. Presumably it allows for such placement whether via domestic EU production or importation. Under this exception, seal products may be placed on the market if (1) they are a “by-product of hunting,” (2) such hunting is “regulated by national law,” (3) the purpose of that hunting is solely for the “sustainable management of marine resources,” and (4) any sales are on a “non-profit basis.”<sup>21</sup>

Both exceptions are subject to the same non-commercial limit—they must be clear from the “nature and quantity” of the seal products at issue in that they are not being imported or placed on the market for “commercial” reasons.<sup>22</sup> Neither the Basic nor Implementing Regulation, discussed below, defines “commercial” or “commercial reasons.”

Technically, the Seal Regime contains a third exception. It is an implicit one, available for three types of transactions: transit through the EU of seal products, inward processing of those products, or their importation for auction and subsequent re-export. In sum, there are four exceptions in the Regime: IC, Travellers, MRM, or Implicit Transactions.

#### b. Implementing Regulation

Almost a year later, on August 10, 2010, the European Commission promulgated Commission Regulation (EU) Number 737/2010. Its details amplify the Basic Regulation.

First, filling in for an omission from the Basic Regulation, the Implementing Regulation defined “other indigenous communities”:

in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>23</sup>

<sup>20</sup> *Id.* ¶¶ 4.5, 4.7 (quoting Basic Regulation, *supra* note 17, art. 3(2)(a)).

<sup>21</sup> *Id.* (quoting Basic Regulation, *supra* note 17, art. 3(2)(a)).

<sup>22</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 4.7.

<sup>23</sup> *Id.* at 98 n.818 (quoting Commission Regulation (EU) No. 737/2010 of 10 August 2010 Laying down Detailed Rules for the Implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on Trade in Seal Products, art. 2(1), 2010 O.J. L (216) 1 [hereinafter Implementing Regulation]).

Second, the Implementing Regulation spells out the criteria for each exception by itemizing three criteria each for the IC, Travellers, and MRM Exception.

Three conditions allow for invocation of the IC Exception, and all three conditions must be satisfied:

- (1) The IC conducted the seal hunt and they have a “tradition of seal hunting in the community and in the geographical region;”
- (2) The ICs “at least partly use[], consume[], or process[]” the seal hunt products “within the communities according to their traditions;” and
- (3) The seal hunt “contributes to the subsistence of the community.”<sup>24</sup>

For the Travellers Exception, there are three different criteria, any of which must be satisfied for the exception to apply:

- (1) A traveller wears the seal product or carrier it in his or her personal luggage;
- (2) The seal product belongs to a person changing residence, namely, moving from another country to the EU;<sup>25</sup> and
- (3) A traveller buys the seal product in another country and imports later into the EU.

For the MRM Exception, there are three, yet different, conditions:<sup>26</sup>

- (1) The seal hunt was part of “a national or regional natural resources management plan that uses scientific population models of marine resources and applies the ecosystem-based approach;”
- (2) The number of seals killed did not exceed the Total Allowable Catch (TAC) quota under the applicable MRM plan; and
- (3) Any by-product of the seal hunt can be put on the market only in a non-systematic, non-profit basis.

The MRM Exception applies only if each of these three conditions are satisfied.

Also with respect to the MRM Exception, “placing on the market on a non-profit basis” means selling them “for a price less than or equal to the recovery of the costs borne by the hunter, reduced by the amount of any subsidies received

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<sup>24</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 4.9 (quoting Implementing Regulation, *supra* note 23, art. 3 (clarifying Basic Regulation art. 3(1))).

<sup>25</sup> *Id.* ¶ 4.10 (quoting Implementing Regulation, *supra* note 23, art. 4 (clarifying Basic Regulation art. 3(2)(a))).

<sup>26</sup> *Id.* ¶ 4.11 (quoting Implementing Regulation, *supra* note 23, art. 5 (clarifying Basic Regulation art. 3(2)(b))).

in relation to the hunt.”<sup>27</sup> So, for example, if the seal product is sold for \$100, but it cost the hunter \$130 to capture and manufacture, then the sale would be non-profit. Using the same figures, if the hunter received a subsidy of \$40, thus dropping net costs to \$90, then the sale would be at profit.

Logically following from the first and fourth exception, the terms “IC Hunt” and “MRM Hunt” signify the killing of seals in a manner conforming to the Basic and Implementing Regulation. Conversely, the term “Commercial Hunt” encompasses a hunt that does not. Norway argued this terminology conveyed a “moral judgment,” but both the Panel and Appellate Body assured Norway they used the terms in a value-free manner.<sup>28</sup>

Together, the Basic and Implementing Regulations constitute the “measure,” or “EU Seal Regime,” in dispute in the *Fur Seals* case. In sum, the Regime bars the sale or importation of seal products unless ICs traditionally hunt them for subsistence, travellers bring them into the EU for personal use, or hunters obtain them under hunting regulated for sustainable MRM and do not sell them at a profit.

Ironically, despite a Preamble (in the Basic Regulation) with twenty-one recitals, the EU Seal Regime does not identify its objective. But, by inference from those recitals and from the aforementioned rules, there are two goals:

- (1) The European public cares about the welfare of seals so some trade protection is needed to respond to this concern and promote the well-being of seals; and
- (2) The economic and social interests of IC must be preserved because their livelihood relies on seal hunting.

In other words, the first goal is to protect animal rights while the second is to protect indigenous peoples. The two goals need balancing via a set of rules that generally bans the marketing of seal products with the exception of those communities.

Conceptually, the easiest way to achieve those goals is to ban importation of seal products from “commercial” hunts but permit sales from “non-commercial hunts.” The EU opted for a more byzantine approach, eschewing the common sense distinction between “commercial” and “non-commercial” (which, in practice, can be difficult enough to apply), and creating the IC, Travellers, MRM, and the various implicit transactions Exceptions.

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<sup>27</sup> *Id.* ¶ 4.7 (quoting Implementing Regulation, *supra* note 23, art. 2(2)).

<sup>28</sup> *Id.* ¶ 4.13.

### 3. Overview of Key Appellate Issues<sup>29</sup>

The Appellate Body adjudicated three broad substantive issues, each of which encompassed several specific questions. Unfortunately, the Appellate Body did not state them in a clear manner. The abstruse, jargon-heavy prose needs to be re-read multiple times to understand what precisely was at stake in the case.

First, did the EU Seal Regime violate the WTO Agreement on Technical Barriers to Trade (TBT Agreement)? This issue begged a key question: was the Regime a “technical regulation” under Annex 1:1 of TBT Agreement? The Panel held in the affirmative but the Appellate Body disagreed. The Appellate Body reversed the Panel holding and thus declared the Panel findings moot and of no legal effect under Articles 2:1 and 2:2 of the Agreement.

What were those two Panel findings? One is the claim that the Seal Regime violated Article 2:1 of the TBT Agreement. In particular, was there a “rational relationship” between the IC Exception and the objective of the Seal Regime? The Panel said no. Moreover, did the EU design and apply the Seal Regime in an even-handed way? Again, the Panel replied no. In other words, the EU violated this provision in two ways, and the EU was justified in making a regulatory distinction between commercial and IC hunting. However, the Appellate Body rendered this finding void.

The second Panel finding was whether the Seal Regime violated TBT Agreement Article 2:2. That is, was the objective of the Regime to address public moral concerns about seal welfare? Additionally, did it fulfill the criteria of this provision, namely, contributing to this objective in light of less trade-restrictive means and the possible risk of failure in meeting the objective while not being an arbitrary or unjustifiable means of discrimination? The Panel sided with the EU by finding no violation of Article 2:2. However, the Appellate Body struck down this finding.

Of course, when the Appellate Body reversed the Panel holding concerning Annex 1:1, the ineluctable implication was the Seal Regime could not be in violation of the TBT Agreement because it was not a “technical regulation”

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<sup>29</sup> The issues are set out at Appellate Body Report, *Fur Seals*, *supra* note 7 ¶¶ 1.1-1.17, 3.1(a), 3.1(b)(ii)-(iii), 3.1(c), (d)(i)-(ii), (e)(i)-(ii), (f)(ii)-(iii), (h)(i)-(iii), 6.1(a)(i)-(ii), (b)(i)-(ii), (c)-(d). Only in respect of Paragraph 6.1(a)(i) do the Findings and Conclusions differ with respect to Canada and Norway: The Norwegian Report (WT/DS401/AB/R) did not raise a TBT Agreement Article 2:1 issue.

The Appellate Body also considered whether the Panel violated *DSU* Article 11 on various matters. *See* Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 3.1(b)(v). They are not discussed herein. Likewise, the Appellate Body issued rulings under Article 5:1(2) and 5:2(1) of the TBT Agreement, rendering the Panel findings on those provisions moot and of no legal effect. *Id.* ¶ 6.1(a)(iii)-(iv). Those rulings are not discussed herein. The Appellate Body made no finding on the conditional appeal of the EU concerning a GATT Article XX(b) defense to its Seal Regime. *See id.*, ¶¶ 5.290, 6.1(e).

under that Agreement. In turn, the dispositive questions in the case came under GATT. Did the Seal Regime violate any GATT rules and, if so, could it be justified by any GATT exceptions?

Here, too, the “meta” issue turned on specific questions—two in particular. First, is the test for non-discrimination under Article 2:1 of the TBT Agreement the same as that under the most favored nation (MFN) and national treatment rules of GATT Articles I:1 and III:4? The Panel said they were similar but not identical. The Appellate Body agreed, holding that the legal standard for non-discrimination under TBT Agreement Article 2:1 “does not apply equally” to GATT Article I:1 or III:4 claims.<sup>30</sup> Note that national treatment was barely discussed on appeal. At the Panel stage, it arose in the context of the Panel holding that the IC and MRM Exemptions favored EU-produced seal fur products, in particular from two EU states, Finland and Sweden, over Canadian and Norwegian like products.

Second, did the Seal Regime violate the MFN rule? The Panel said yes because the EU failed to extend the same advantage “immediately and unconditionally” to seal products from Canada and Norway (which are non-EU countries) that was given to seal products originating in Greenland. The Appellate Body agreed. Whether of Greenlandic, Canadian, or Norwegian origin, the seal products were “like.”<sup>31</sup> The IC Exception was an “advantage,” but the EU did not offer it to the non-EU originating like products.

The third broad issue is the most interesting one in the case. Did the Seal Regime qualify for an exception to the GATT’s MFN rule due to the public morality exception in GATT Article XX(a)? These exceptions state:

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

(a) *necessary* to protect *public morals*. . . .<sup>32</sup>

The answer was “no.” The Regime passed the first, but not the second, step in the famous “two-step test” used in any Article XX case. Under the first step, provisional justification, there were two questions. First, are animal rights within the scope of Article XX(a)? The Panel examined both the prohibitive and permissive aspects of the Regime and concluded that the objective of that Regime was within the scope of the exception. The Appellate Body agreed. Second,

<sup>30</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 6.1(b)(i).

<sup>31</sup> *Id.* ¶ 6.1(b)(ii).

<sup>32</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (pt. 5) A3, 55 U.N.T.S. 187 [hereinafter GATT] (emphasis added).

given that animal rights fell within the scope of Article XX(a) was the Seal Regime “necessary to protect public morals”? Here, too, both the Panel and Appellate Body answered in the affirmative. So the Seal Regime was provisionally justified under the itemized exception in Paragraph (a).

However, the Seal Regime did not pass the second step of the Test. The question was whether this measure, though necessary to protect public morality in the EU, satisfied the requirements of the *chapeau* to Article XX. Was it an arbitrary or unjustifiably discriminatory measure? The Panel said no, the Regime satisfied the *chapeau*, and thus Article XX(a) saved it from the MFN violation. The Appellate Body disagreed, saying the Panel used the wrong legal test. The Appellate Body reversed the Panel by finding the Regime did not satisfy the *chapeau* requirements, because it—in particular, the IC Exception—did not bear a rational relationship to addressing the moral concerns of Europeans about seal welfare.

#### 4. Issue 1: TBT Agreement Violation?<sup>33</sup>

Obviously, the EU Seal Regime could not possibly violate the TBT Agreement if it were not subject to that Agreement. Canada and Norway had to prove the Regime was a “technical regulation” governed by the Agreement. Annex 1, paragraph 1 of the Agreement, defines “technical regulation” as a:

Document which *lays down product characteristics* or their related processes and production methods, *including the applicable administrative provisions*, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.<sup>34</sup>

Twice before, the Appellate Body has opined on the meaning of this term. In the 2012 *Tuna Dolphin* and 2002 *Sardines* cases, the Appellate Body said whether a measure is a “technical regulation” depends on its “characteristics,” and on the “circumstances” of the case.<sup>35</sup> This statement being unhelpfully broad,

<sup>33</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.1-70.

<sup>34</sup> *Id.* ¶ 5.8 (quoting WTO Agreement on Technical Barriers to Trade) (emphasis added).

<sup>35</sup> Appellate Body Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, ¶ 188, WT/DS381/AB/R (May 16, 2012) (adopted June 13, 2012); Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 192-93, WT/DS231/AB/R (Sep. 26, 2002) (adopted Oct 23, 2002). The *WTO Case Review 2012* and *WTO Case Review 2002*, respectively, discuss and analyze these Reports.

in the 2001 *Asbestos* case, the Appellate Body said the key “characteristics” and “circumstances” are the “design and operation” of the measure and its “integral and essential aspects.”<sup>36</sup>

In the *Seals* case, the Panel said the Annex 1:1 definition intimates a “Three Tier Test,” namely, does the disputed measure:

- (1) apply to an “identifiable group of products”?
- (2) “lay down[] characteristics” for all products in the group?
- (3) demand “mandatory compliance”?

Agreeing with Canada and Norway, the Panel answered yes with respect to each Tier, meaning the Seal Regime was a “technical regulation” subject to the TBT Agreement.

The EU did not contest the Seal Regime applied to an “identifiable group of products,” namely, seal items, or that “compliance” was “mandatory.” But the EU appealed that the Regime does not “lay down product characteristics, including the applicable administrative provisions.” Thus began a seventy-paragraph, seventeen-page, single-spaced discussion on the Second Tier of the Test. Some of the document was wasted on unnecessary, unenlightening matters such as what nouns like “document,” “process,” “production,” and “method” mean, and what the verb “lay down,” means (sometimes with customary citations to the trusty *Shorter Oxford English Dictionary*),<sup>37</sup> the effect of the disjunctive “or” on understanding a sentence,<sup>38</sup> and repeating quotes from the Basic Regulation.<sup>39</sup>

So, for instance, the Appellate Body writes:

Continuing with our review of the first sentence of Annex 1.1, we note the reference to “applicable administrative provisions,” which is linked to the words “product characteristics or their related processes and production methods” by the conjunctive “including.” The word “provision” is relevantly defined as “a legal or formal statement providing for some particular matter.” The adjective “administrative,” in turn, is defined as “[p]ertaining to management of affairs.” The term “applicable” in this context indicates that the relevant “administrative provisions” must “refer” to or be “relevant” to the product characteristics or their related PPMs as prescribed in the relevant document. The word “including” suggests that, where

<sup>36</sup> See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 72, WT/DS135/AB/R (Mar. 12, 2001) (adopted Apr. 5, 2001).

<sup>37</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.9-10.

<sup>38</sup> *Id.* ¶ 5.12.

<sup>39</sup> See, e.g., *id.* ¶¶ 5.16, 5.21, 5.40.



a mandatory document laying down product characteristics or their related processes and production methods also contains “administrative provisions” that refer to those “product characteristics” or “related processes and production methods,” those administrative provisions are to be considered as an integral part of the technical regulation and are thus subject to the substantive provisions of the TBT Agreement. In the context of Annex 1:1, we understand the appositive clause “including the applicable administrative provisions” to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods.<sup>40</sup>

The Appellate Body Report reader may be forgiven for asking the value added of such paragraphs to the outcome of the case. But at least he or she can be thankful for the grammatical nudge to recall that an “appositive clause” is a noun, noun phrase, or noun clause, usually set off by commas. The experienced lawyer-grammarians will note with annoyance that the Appellate Body neglected to decide whether the appositive clause is restrictive (providing information essential to the preceding phrase in apposition that begins with the word “document”) or non-restrictive.

In any event, the Panel reasoned the Seal Regime did “lay down product characteristics” in the negative—a product could be placed on the EU market only if it did not contain seal materials. The “administrative provisions” in the Regime were in the exceptions, such as the IC, MRM, and Travellers Exceptions, which concerned seal products with “certain characteristics.” In other words, the Panel reduced the Regime and its Exceptions to a simplistic negative that a product may not contain seal and thereby decided the entire Regime was a “technical regulation.”

To state the Panel reasoning is to appreciate its lack of common sense: if that reasoning is correct then virtually any feature in a measure that bears any relation to a product can be dubbed a “product characteristic,” and, in turn, that measure can be put within the TBT Agreement. That is, the Agreement would govern not only a measure addressing bona fide “product characteristics,” or a measure covering “related processes and production methods” (PPMs), but also a measure dealing with non-product PPMs. What then would the Agreement not cover? Surely the Uruguay Round drafters did not intend the over-inclusive outcome that nearly every measure would qualify as a “technical regulation.”

Overturning the Panel, the Appellate Body agreed with the EU appellate arguments that the Seal Regime is not a “technical regulation” subject to the TBT Agreement.<sup>41</sup> Consequently, the Appellate Body declared all of the Panel

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<sup>40</sup> *Id.* ¶ 5.13.

<sup>41</sup> *See id.* ¶¶ 5.58-59, 5.70.

holdings to be moot and of no legal effect under the Agreement, namely, Articles 2:1-2 5:1(2) and 5:2(a). The gist of the Appellate Body rationale was that the Seal Regime contained procedural requirements that had nothing to do with negative characteristics of a “product.” Instead, the Regime and its Exceptions concerned the identity of the hunter and the type and purpose of the hunt.

That is, the Appellate Body in *Fur Seals* applied its precedents.<sup>42</sup> The Appellate Body cited the 2001 *Asbestos* Report (in which the Appellate Body found the EU prohibition on imports containing raw asbestos fibers did make that ban a “technical regulation”). Relying on that report the Appellate Body said when deciding whether a measure is a “technical regulation”—specifically, whether under Annex 1:1 to the TBT Agreement the measure lays down binding product “characteristics”—it does not matter whether the measure is affirmative (i.e., mandates a product must possess a feature) or negative (i.e., requires it must not possess an attribute). Ultimately, the legal result is the same.

The argument, made by Norway, that seal products are mixed (meaning there are few pure seal products as most contain non-seal derived features so the Regime regulates all products containing seal inputs) was unpersuasive. Relying on its 2001 *Asbestos* Report, the Appellate Body thought the Panel did not assess the extent to which the distinction between pure versus mixed-seal products was an “integral and essential” part of the Regime, and, in turn, whether that distinction mattered in deciding if the Regime lays down product “characteristics” as a “technical regulation” must do.

Using the 2002 *Sardines* and 2012 *Tuna Dolphin II* precedents, along with the 2001 *Asbestos* Report, the Appellate Body found the “integral and essential aspect” of the Seal Regime was regulation of the placement on the market of seal products. To say this regulation prescribed attributes for those products, without more, was incomplete. True, in the words of the *Asbestos* Report, the Seal Regime did set “certain ‘objective features, qualities or characteristics’ on all products, namely, that they not contain seal.”<sup>43</sup> Yet, that bar was just one component of the Regime and the entire Regime had to be checked before deciding if it is a “technical regulation.” There were Exceptions based on the identity of the hunter and the type and purpose of the hunt. So, the prohibition, i.e., the barring of placement on the EU market of seal products, could not be vaulted to the status of being the main feature of the measure:

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The Appellate Body decided it was inappropriate to complete the legal analysis as to whether the Seal Regime might be a “technical regulation” because it lays down “related processed and production methods” under Annex 1:1 of the TBT Agreement. *See id.*, ¶¶ 5.61-69. Arguably, the Regime does so because it intervenes on how and under what circumstances seals may be hunted, and by whom. So, had the case been argued differently by Canada and Norway, they might well have succeeded in bringing the Regime within the Agreement.

<sup>42</sup> See Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.31-33.

<sup>43</sup> *Id.* ¶ 5.39.

the EU Seal Regime “consists of both prohibitive and permissive components and should be examined as such.” As we see it, when the prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics.<sup>44</sup>

Moreover, to the degree the Panel thought the identity of the hunter or the type and purpose of the hunt were product characteristics, the Panel was wrong. Likewise, the Panel erred in finding that “applicable administrative provisions” of the Seal Regime apply to product “characteristics,” and thereby somehow reinforced the notion the Regime laid down such “characteristics.” The “essential and integral” aspects of the Regime did not establish product “characteristics,” hence those provisions did not apply to any “characteristics.”<sup>45</sup>

A simpler way to make the point is the EU accepted seal products as they are, pure or mixed. The EU did not define what constitutes a “seal product,” in the way it did with respect to sardines in the 2002 *Sardines* case. That threshold matter was up to the market, i.e., hunters, producers, and exporters. What the EU did do was create exceptions to allow their importation, whatever “they” might be.

Could the Appellate Body be faulted for results-oriented jurisprudence on the Annex 1:1 definitional issue? The Appellate Body knew it had to leave the Seal Regime out of the ambit of the TBT Agreement. To include the Regime would be to start down the slippery slope of over-inclusion. To reach that result, the Appellate Body had to exalt the importance of the IC, MRM, and Travellers Exemptions. They were not just exceptions to the basic rule, namely, the import ban. Rather, they were part of that rule, on par with the ban. The Appellate Body turned to its own precedents. With words and phrases like “circumstances” and “integral and essential,” those precedents gave the Appellate Body the necessary flexibility to reach the desired result. They also allowed the Appellate Body to stay within the narrow confines of the plain meaning of Annex 1:1’s text and its immediate context, and avoid straying for further contextual guidance or supplementary means of interpretation (including the negotiating history to the Agreement). Notably, though, in obiter dicta the Appellate Body marked for a future case the possibility that it would stray.<sup>46</sup>

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<sup>44</sup> *Id.* ¶ 5.58.

<sup>45</sup> *Id.* ¶¶ 5.52, 5.57-58.

<sup>46</sup> *Id.* ¶ 5.60.

5. Issue 2: GATT Article I:1 Violation?<sup>47</sup>

## a. What Is the Status of Greenland in the EU and WTO?

In the excitement to get to the heart of a case, it is important not to rush past essential checks. They are akin to airport security screening before boarding. Similarly, in the move toward applying the MFN rule, it should be determined whether that is the right rule to apply. Unfortunately, neither the Panel nor Appellate Body did so.

They should have asked two “security screening” questions: is Greenland part of the EU, and is Greenland a WTO Member? First, for GATT Article I:1 to be the right rule to apply, it must be true that Greenland is not an EU state. Otherwise, the pertinent non-discriminatory obligation is national treatment under Article III:4. Second, for Article I:1 to be the appropriate rule, it also must be true either that Greenland is a WTO Member or that it is an “other country” within the language of Article I:1.

In fact, on the first question, Greenland is part of the “Danish Kingdom,” or “Danish Realm.” Denmark is an EU state, but Greenland is not—or, at least, it might not be. In 1985, Greenland voted to withdraw from the European Economic Community (EEC), the predecessor to the EU.<sup>48</sup> So, if priority is given to that withdrawal vote on the presumption Greenland is distinct from the Danish Realm as to EU status, then it could be said Greenland is not an EU state. In turn, the Article III:4 national treatment rule is irrelevant.

On the second question, Denmark is a WTO Member and an originating contracting party to GATT. But Greenland is not a WTO Member, unless it is deemed so for being part of the Danish Realm. That is, can Greenland be viewed as a WTO Member because of its status as part of Denmark? The problem with that approach is it is inconsistent with saying Greenland is not part of the EU: if it is part of the Danish Realm for purposes of WTO Membership, then why not, also, for purposes of EU membership? The answer might turn in part on the significance given to the 1985 EEC withdrawal vote. Fortunately, the MFN rule still is relevant to the case, even if Greenland is not viewed as a WTO Member, due to Article I:1’s language concerning “any other country.” The key issue in the case concerns discrimination against Canada and Norway (two WTO Members) on account of a favor or privilege—the IC Exception—which in a de facto sense Greenland received, but in reality did not. The MFN rule bars discrimination in favor of “any other country,” so as to assure the Members of the WTO Club get the best treatment, including treatment extended to non-Club countries.

So what did the Appellate Body do in *Fur Seals*? The answer is it, like the Panel, failed to spot the issue. Without explanation, both adjudicatory entities treated Greenland as a non-EU state, yet confusingly peppered their discussion

<sup>47</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.71-96.

<sup>48</sup> See *Withdrawal from the European Union*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Withdrawal\\_from\\_the\\_European\\_Union](http://en.wikipedia.org/wiki/Withdrawal_from_the_European_Union) (last visited Mar. 26, 2015).

with references to Article III:4 alongside Article I:1, thereby intimating both national and MFN treatment were at stake. Moreover, both left the status of Greenland as WTO Member thanks to Denmark, or as a non-WTO Member “other country,” ambiguous. That ambiguity was ironic given that the Appellate Body faulted the EU for ambiguities in the IC Exception—ambiguities that ultimately doomed the Seal Regime under the Article XX *chapeau*.

#### b. Immediacy and Unconditionality

The EU did not appeal the finding of the Panel that the Seal Regime violated the national treatment rule for non-fiscal measures set out in GATT Article III:4. Plainly, the Regime did treat domestic seal products (e.g., from Finland and Sweden) more favorably than like ones from abroad (e.g., from Canada and Norway). But the EU appealed the Panel ruling that the Seal Regime violated the GATT Article I:1 MFN rule.

The MFN rule states:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, *any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.*<sup>49</sup>

At issue was:

whether Article I:1 prohibits: (i) a detrimental impact on competitive opportunities for like imported products; or (ii) only a detrimental impact on competitive opportunities for like imported products that does not *stem exclusively* from a *legitimate regulatory distinction*.<sup>50</sup>

Ultimately, the EU argued for the second option. The argument was doomed from the outset; the EU was calling for an unprecedented restriction on the scope of the

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<sup>49</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.85 (quoting GATT, *supra* note 32, art. I:1) (emphasis added).

<sup>50</sup> *Id.* ¶ 5.84 (emphasis added).

MFN rule. Had the Appellate Body accepted the EU argument, then it would have been rightly criticized for undermining free and fair trade by weakening the non-discriminatory framework essential for both. Equally bad, the Appellate Body would have been faulted for judicial activism in straying beyond both the relevant textual language and a half-century of case law surrounding that text.

The Appellate Body did just the opposite. Beginning with a brief, handy tutorial of the MFN obligation and citing five of its precedents (1996 *Japan—Alcoholic Beverages*, 1999 *Korea—Alcoholic Beverages*, 2000 *Canada—Auto Pact*, 2002 *Section 211*, and 2004 *EC Tariff Preferences*),<sup>51</sup> it resolutely affirmed the long-standing meaning and importance of the rule:

5.86. Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. The obligation set out in Article I:1 has been described by the Appellate Body as “pervasive,” a “cornerstone of the GATT,” and “one of the pillars of the WTO trading system.” Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are “like” products within the meaning of Article I:1; (iii) that the measure at issue confers an “advantage, favor, privilege, or immunity” on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended “immediately” and “unconditionally” to “like” products originating in the territory of all Members. Thus, *if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded “immediately and unconditionally” to like products originating from all other Members.*

5.87. Article I:1 thus prohibits discrimination among like imported products originating in, or destined for, different

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<sup>51</sup> See Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (*adopted* Jan. 1, 1996) [hereinafter Appellate Body Report, *Japan—Alcoholic Beverages*]; Appellate Body Report, *Korea—Taxes on Alcoholic Beverages*, ¶¶ 119-20, 127, WT/DS75/AB/R, WT/DS84/AB/R (Jan. 18, 1999) (*adopted* Feb. 17 1999); Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry*, ¶¶ 69, 84, WT/DS139/AB/R, WT/DS142/AB/R (Feb. 11, 2000) (*adopted* June 19, 2000); Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 297, WT/DS176/AB/R (Jan. 2, 2002) (*adopted* Feb. 1 2002); Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 101, WT/DS246/AB/R (Apr. 7, 2004) (*adopted* Apr. 20, 2004). The 2000 *Canada—Auto Pact*, 2002 *Section 211*, and 2004 *EC Tariff Preferences* Reports are discussed in our *WTO Case Review* for 2000, 2002, and 2004, respectively.

countries. In so doing, Article I:1 *protects expectations of equal competitive opportunities for like imported products from all Members*. . . . [I]t is for this reason that an inconsistency with Article I:1 is *not contingent upon the actual trade effects of a measure*. We consider that an interpretation of the legal standard of the obligation under Article I:1 must take into account the fundamental purpose of Article I:1, namely, to *preserve the equality of competitive opportunities for like imported products from all Members*.<sup>52</sup>

What then, was the MFN problem in the European Seal Regime?

The Panel found the EU did not “immediately and unconditionally” extend to like seal products of Canadian and Norwegian origin the same market access advantage it gave to seal products from Greenland. Discriminating in favor of Greenlandic products meant favoring one country, Denmark, over two others, Canada and Norway, in breach of Article I:1. The Appellate Body agreed and upheld the Panel:

the Panel concluded that the measure at issue, although origin-neutral on its face, is *de facto* inconsistent with Article I:1. The Panel found that, *while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not meet the IC requirements for access to the EU market*. Thus, the Panel found that, “in terms of its design, structure, and expected operation,” the measure at issue *detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland*. Based on these findings, the Panel considered, correctly in our view, that the measure at issue is inconsistent with Article I:1 because it does not, “immediately and unconditionally,” extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland.<sup>53</sup>

Note the power of the MFN rule: it applies to *de facto* as well as *de jure* discrimination. The EU concocted its Seal Regime in a facially neutral manner but the consistent and nearly exclusive beneficiaries of the “advantage” of the IC Exception were from Greenland.

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<sup>52</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.86-87 (emphasis added).

<sup>53</sup> *Id.* ¶ 5.95. See also *id.* ¶ 5.130.

c. Losing Argument on Non-Discrimination Obligations Under  
GATT Versus TBT Agreement

The losing appellate argument of the EU was interesting but parlous at best. The EU argued the Panel misinterpreted both Article I:1 and III:4. The Panel was wrong to conclude that the legal standard for the non-discrimination obligations in Article 2:1 of the TBT Agreement does not “equally apply” to GATT Article I:1 and III:4 claims.<sup>54</sup> The topic of how the non-discrimination obligations in the TBT Agreement and GATT relate to one another (if at all) arose because Canada and Norway made claims of non-discrimination under both accords. The Panel cited the 2012 *Tuna Dolphin II* and 2012 *U.S.—Clove Cigarettes* Appellate Body Reports in support of the following legal points:

- (1) The test for “treatment no less favorable” under GATT Articles I:1 and II:4 is whether a measure “modif[ies] the conditions of competition in the marketplace” in favor of domestic like products to the detriment of imports.
- (2) Under GATT Article XX, each Member has a right to derogate from these GATT non-discrimination obligations.
- (3) The meaning of “treatment no less favorable” in Article 2:1 of the TBT Agreement is different from that in GATT in one respect. The TBT Agreement allows for a detrimental impact on imports that “stems exclusively from a legitimate regulatory distinction,” as

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<sup>54</sup> *Id.* ¶ 5.72. The non-discrimination obligation for non-fiscal measures in GATT Article III:4 states:

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

The key elements of an Article III claim, as the Appellate Body summarized, are:

- (i) that the imported and domestic products are “like products;” (ii) that the measure at issue is a “law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use” of the products at issue; and (iii) that the treatment accorded to imported products is “less favorable” than that accorded to like domestic products.

*Id.* ¶ 5.99.



opposed to discrimination. After all, this Agreement contains the rules for legitimate technical regulations and products from certain countries might not meet such regulations. Moreover, the Agreement does not have a general list of exceptions like GATT Article XX, which at least implicitly suggests it allows for disparate treatment of goods caused by application of a lawful technical regulation.<sup>55</sup>

To these points, the Appellate Body added four further ones:

- (4) The text of GATT Article III:4 expressly uses the “treatment no less favorable” test. The wording of Article I:1 is different. It expresses an obligation to extend any “advantage” a Member grants to any product originating in or destined to any other country “immediately and unconditionally” to the like product originating in or destined for all other Members.
- (5) Notwithstanding the textual distinction, both GATT Articles are fundamental non-discrimination obligations. The national treatment rule of Article III:4 “proscribes . . . discriminatory treatment of *imported* products vis-à-vis like *domestic* products.”<sup>56</sup> The MFN rule of Article I:1 “proscribes . . . discriminatory treatment *between and among* like products of different origins.”<sup>57</sup> The obligations aim to forbid “discriminatory measures by requiring . . . *equality of competitive opportunities* for like imported products from all Members [the MFN rule] and equality of competitive opportunities for imported products and like domestic products [the national treatment rule].”<sup>58</sup> Given their goal, neither “require[s] a demonstration of the *actual* trade effects of a specific measure.”<sup>59</sup>
- (6) That the two GATT non-discrimination obligations “overlap in . . . scope” is clear from the MFN rule. It incorporates all matters referred to in paragraphs 2 and 4 of Article III. Therefore, an internal matter within the scope of Article III:4 also may be in the purview of the MFN obligation.

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<sup>55</sup> *Id.* at 118 n.1002; Appellate Body Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 215, WT/DS381/AB/R (May 16, 2012) [hereinafter Appellate Body Report, *Tuna Dolphin II*]; Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 180-82, 215, WT/DS406/AB/R (Apr. 4, 2012) (*adopted* Apr. 24 2012). Our *WTO Case Review 2012* discusses this Report.

<sup>56</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.79.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ¶ 5.82 (emphasis added).

<sup>59</sup> *Id.*

- (7) The MFN proscription against granting an “advantage” to imports from certain origins has two explicit restrictions on time and manner.<sup>60</sup> As to time, a Member must extend any “advantage” “immediately” to all other like products. As to manner, the Member must extend any “advantage” “unconditionally,” i.e., “without conditions.” The discipline does not forbid a Member from attaching conditions to the “advantage.” It simply means the Member must attach the same conditions to all like products, regardless of origin and not skew the marketplace, i.e., the conditions must not have a “detrimental impact on the competitive opportunities for any Member.”

Despite these points, on appeal the EU insisted the non-discrimination obligations in the TBT Agreement apply equally to claims under GATT. The logic of the EU position was that if its Seal Regime was a legitimate technical regulation, then under the Agreement, that Regime could have a detrimental impact on foreign seal products. In turn, if the same allowance under the Agreement for detrimental impact applied to GATT then the Seal Regime was excused from such an impact under GATT too.

If there was going to be any force in an argument about disparate impact, then it might have been in a different context: GATT Article XI:1. Suppose Canada and Norway had sued the EU claiming its Seal Regime was a forbidden quantitative restriction. The EU might have defended its measure under Article XI:2(b) as an “[i]mport . . . prohibition[] or restriction[] necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.” Of course, Canada and Norway did not make that claim, probably anticipating the defense.

On appeal, the EU was left arguing that a proper Article I:1 analysis of detrimental impact on competitive opportunities requires an investigation into the “rationale for such impact . . . specifically, whether it stems exclusively from a legitimate regulatory distinction.” In other words, the EU tried to shoehorn into the MFN rule the standard in Article 2:1 of the TBT Agreement. The EU had no jurisprudence under Article I:1 to support its arguments. Hence, the Appellate Body quickly and easily rejected the attempt, repeating that “where a measure modifies the conditions to competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1.”<sup>61</sup> No more study is needed, i.e., under the MFN rule. Thus, once a measure has been determined to have this effect, a panel is not required to determine as well whether a differential competitive impact from a measure stems from a legitimate regulatory distinction.

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<sup>60</sup> *Id.* ¶ 5.88.

<sup>61</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.90.

### 6. Issue 3: Exception Under GATT XX(a) Public Morality?<sup>62</sup>

#### a. Principal Object of Seal Regime?

Easily the most interesting discussion in the *Fur Seals* case concerned GATT Article XX. The Appellate Body applied precedent, namely, the two-step test for controversies under this provision. In step one, it asked whether the EU Seal Regime was provisionally justified under one of the ten itemized exceptions in Article XX, in particular, Paragraph (a) concerning public morality. Canada and Norway argued the Regime was not “necessary” to protect public morals, but that argument lost at both the Panel and Appellate Body stage. Hence, the Appellate Body proceeded to step two: did the Seal Regime meet the requirements of the *chapeau* to Article XX? Here the complainants prevailed, the EU failed to prove its Regime was not an arbitrary, unjustifiable, and non-discriminatory measure. Thus, animal rights could come within the scope of public morality, thanks to the ruling in step 1. But, in this case, thanks to the ruling in step 2, the respondent could not show its derogation from the “immediately and unconditionally” requirement of Article I:1 satisfied the rigorous terms in the Article XX *chapeau*.

The Appellate Body commenced its two-step test with an examination of the objective of the Seal Regime. It did so not because it was setting a new precedent, such as transforming the two- to a three-step test. Rather, the objective of any controversial measure bears on the application of the two-step test. To answer whether a measure is necessary to protect public morality, and to answer whether that measure is not arbitrary, unjustifiable, or discriminatory, is to invite a question: what is the point of the measure? What is the measure designed to do? The answer to that question, following the 2012 *Tuna Dolphin* Appellate Body Report, requires an examination of the (1) text of the measure, (2) its legislative history, and (3) any other evidence as to its structure or operation.

The EU, Canada, and Norway all agreed the object of the Seal Regime was to address European public concerns about the welfare of seals. They disagreed, however, on two points about that objective. First, is seal welfare a “moral” concern for the European public? Second, are the other interests the Regime addresses through its IC, MRM, and Travellers Exceptions part of that same objective about seal welfare, or are they a distinct set of concerns, i.e., a

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<sup>62</sup> See *Id.* ¶¶ 5.131-40.

Is the public morality exception of GATT a “legitimate objective” under the TBT Agreement, even though that Agreement does not mention morality?

The Panel noted that public morality concerns under GATT Article XX(a), which also are in GATT Article XIV(a), are incorporated into the TBT Agreement thanks to the Preamble of that Agreement. The Preamble (in the second recital) says an objective of the Agreement is to advance the goals of GATT. One goal of GATT is to protect public morality. Thus, public morality is a “legitimate objective” under Article 2:2 of the TBT Agreement. On this point, the Panel appears to have been making new law.

separate objective? Predictably, Canada and Norway said seal welfare is not a “moral” concern and the Exceptions constitute a separate objective. The EU took the opposite approach: seal welfare—in effect animal rights—are about public morality and so are the Exceptions.

Based on the text of the Basic and Implementing Regulations, their legislative history, and extrinsic evidence (namely, a survey of European public opinion), the Panel held the Seal Regime was designed to address public concerns about the welfare of seals. The Panel also said legislative history showed the EU took into account other interests, specifically those of Inuit peoples, marine management, and the personal use by travellers of seal products, through its IC, MRM, and Travellers Exceptions, respectively. Certainly a measure can have multiple objectives, but not here: the text, legislative history, structure, and design of the Regime did not indicate the “aim,” “target,” or “goal” of the Regime was to protect the interests of Inuit, marine managers, or travellers.<sup>63</sup> Grounded firmly on concerns of EU citizens, the seal welfare was its principal objective. It so happened that the EU added the Exceptions during the legislative process and they embodied interests not predicated on the concerns of EU citizens.

So while distinguishing those interests from seal welfare, the Panel found they did not constitute independent policy objectives. The entire GATT Article XX analysis could focus on seal welfare, and not worry that the interests in the IC, MRM, or Travellers Exceptions were a distinct objective from that of welfare thereby needing a separate inquiry into their connection to European public morality. With this finding, the Panel confined its morality, thereby making the European burden far lighter. Had the Panel held otherwise, the European countries would have had to show that European citizens, as a matter of public policy, regarded of public morality the interests of Inuit, marine management, or travellers. Doubtless, the EU could not have shown they were “articulations of the same standard of morality.”<sup>64</sup>

The Appellate Body found no fault with the work of the Panel as to the objective of the EU Seal Regime. Rather, the problem was with the Norwegian appellate argument. According to the Appellate Body, Norway mischaracterized the Panel finding that the “sole objective” of the Regime was to address seal welfare. Norway said the reality of the Regime was the pursuit of other objectives, such as helping the Inuit, managing marine resources, or tolerating personal idiosyncrasies of travelers. This approach was not accepted by the Appellate Body, although as noted below it did not fully accept the EU approach either.

The Appellate Body agreed the characterization by a respondent (Norway) as to the objective of its controversial measure need not be accepted by a panel or by the Appellate Body. The Appellate Body said so precisely in its 2005 *Antigua—Gambling* and 2012 *Tuna Dolphin* Reports, and had cited those

<sup>63</sup> *Id.* ¶ 5.136 (quoting Panel Report, *Fur Seals*, *supra* note 7 ¶¶ 7.400-01).

<sup>64</sup> *Id.* (quoting Panel Report, *Fur Seals*, *supra* note 7, ¶ 7.404).

precedents.<sup>65</sup> Nevertheless, in this case, the EU got it right, and the Panel was correct in accepting the EU (rather than the Norway) characterization.

The text of the Basic Regulation, its legislative history, and its structure and design adduced that the Regime “was adopted . . . to respond to EU public moral concerns with regard to the welfare of seals.”<sup>66</sup> If the main objective of the EU legislators had been to protect the Inuit, manage marine resources, or accommodate travellers, then they never would have adopted the Regime. As the EU said, the Regime “reflects a moral standard of ‘animal welfarism,’ pursuant to which ‘humans ought not to inflict suffering upon animals without a sufficient justification.’”<sup>67</sup> As for the IC Exception, it did not embody a separate objective. Rather, EU legislators judged “the subsistence of Inuit and other indigenous communities and the preservation of their cultural identity ‘provide benefits to humans which, from a moral point of view, outweigh the risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.’”<sup>68</sup> Neither the Panel nor the Appellate Body was willing to go that far; neither accepted the EU characterization that the European public gave a “higher moral value” to protecting Inuit than to saving seals.<sup>69</sup> Fortunately for the EU, opining on that moral balance was unnecessary, if not irrelevant.

What mattered most based on its text, legislative history, structure, design, and operation was that the “principal” objective of the Seal Regime was to respond to the moral concerns of the European public about seal welfare. The IC, MRM, and Travellers Exceptions embodied accommodations for other interests within that Regime but did not undermine its “main objective.” In other words, their “relative significance” as policy interests was less than seal welfare—the key goal—but the EU addressed them so as to “mitigate the impact” of the rules protecting seals on those interests.<sup>70</sup> That was good enough.

#### b. Animal Welfare as “Public Morality”?

With its finding that the principal objective of the EU Seal Regime concerns public morality, the Panel moved to the first disputed point: was seal welfare (with the Exceptions and all) within the scope of “public morals”? That

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<sup>65</sup> See *id.* at 133 n.1108 (citing Appellate Body Report, *Tuna Dolphin II*, *supra* note 55 ¶ 314; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 304, WT/DS285/AB/R (Apr. 7, 2005) (*adopted* Apr. 20, 2005) [hereinafter Appellate Body Report, *U.S.—Gambling*]). Our *WTO Case Review 2005* discusses this Report.

<sup>66</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.142.

<sup>67</sup> *Id.* ¶ 5.143 (quoting Submission by the European Union).

<sup>68</sup> *Id.* (quoting Submission by the European Union).

<sup>69</sup> *Id.* ¶ 5.148.

<sup>70</sup> *Id.* ¶ 5.167.

is, is seal welfare “anchored in the morality of European societies”?<sup>71</sup> The Panel answered in the affirmative.

Yet notice, by framing the question in this manner, the Panel showed its moral relativism. The question was not whether seal welfare is an objectively and universally shared moral concern. Rather, under the text of GATT Article XX(a), the question was a subjective one, specific to a particular society at a particular time. In turn, if public morality is context-specific, contingent on time and place, then it is susceptible to change. Seals can be clubbed to death for their fur in one country at one time, but not in that same country at another time, or in another country at the same or a different time.

How did the Panel determine that the European citizens cared, in a moral sense, about seals? It looked to (1) the legislative history of the Seal Regime, (2) actions taken by the EU and individual EU states to protect animal welfare, and (3) domestic legislation and international conventions the EU adopted to protect animal welfare. It cannot be said that the Panel used a totality of the circumstances test, for such a test was beyond its reach. Obviously, the Panel could not conduct its own fact-finding mission by scouring the public squares of Old and New Europe to see what people thought. It was ill-equipped to consider the extent to which the animal rights views of the famous philosopher, Peter Singer, were accepted in those public squares.<sup>72</sup> Nonetheless, based on those three sources, as the Appellate Body put it, the Panel found evidence of “*standards of right and wrong conduct* maintained by or on behalf of the *European Union* concerning seal welfare.”<sup>73</sup> Or, as the Panel itself said, the evidence “*as a whole sufficiently demonstrates* that animal welfare is an issue of *ethical or moral nature* in the *European Union*.”<sup>74</sup> Note again the contextual nature of this finding and that, by extension, the Panel avoided even a discussion of what exactly is “ethics” or “morality.”

Logically, the next move in the analysis by the Panel was to ensure that the objective of the EU Seal Regime was to address the moral concerns of the EU with respect to seal welfare. That is, having established that seal welfare is a matter of public morality under GATT Article XX(a), was the aim of the Seal Regime to advance that moral interest? The answer again was yes. The Panel looked at the design, structure, and operation of the Regime by focusing on its text and legislative history. From these sources, three points were clear. The Regime was designed, structured, and operated to: (1) decrease the incidence of inhumane killing of seals; (2) reduce the extent to which Europeans abetted inhumane seal hunting, individually and collectively as consumers, through their exposure to

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<sup>71</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.137 (quoting Panel Report, *Fur Seals*, *supra* note 7, ¶ 7.404) (emphasis added).

<sup>72</sup> See *Peter Singer*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Peter\\_Singer](http://en.wikipedia.org/wiki/Peter_Singer) (last visited Apr. 7, 2015).

<sup>73</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.138 (emphasis added).

<sup>74</sup> *Id.* ¶ 5.138 (quoting Panel Report, *Fur Seals*, *supra* note 7, ¶ 7.409) (emphasis added).

economic activity in a market that sustains inhumane hunting; and (3) tolerate to a limited extent certain non-commercially hunted seal products.

However, the Appellate Body did not examine the work of the Panel on this matter. It left untouched the finding that animal morality comes within the ambit of the GATT Article XX(a) “public morality” exception.

### c. Identification of Risk to “Public Morality”?

Canada unsuccessfully argued that it is illogical to say sub-paragraph (a) provisionally justifies the Seal Regime without identifying a specific “risk” to public morality that the Regime “protects.”<sup>75</sup> The Panel said Canada was wrong to eschew discussion of the content of the relevant public moral at stake, for example to avoid this question: what is the risk to the European standard of right-versus-wrong conduct? If the Panel had examined this question, then it would have realized the hypocrisy in the EU position: the EU allows for animal suffering in the context of slaughterhouses. If Europeans do not regard the meat-producing industry as a risk to animal welfare, then how can they justify singling out the seal hunting business as a risk?

Moreover, Canada urged, when WTO adjudicators weigh GATT Article XX(b) cases, they examine the risk to human, animal, and plant life or health at stake. Panels and the Appellate Body seek to know the risk under which a controversial sanitary or phytosanitary (SPS) measure is structured, designed, and operated. The Article XX(b) exception, like Article XX(a), uses the verb “protect.” So, under Sub-Paragraph (a), surely it is essential to identify the risk to public morality.

If the Appellate Body sought seamless truth with capitals “S” and “T,” then Canada would have prevailed on this argument. If animal welfare is the moral goal, then only strict vegetarianism is acceptable: allowing omnivorous behavior entails killing and killing obviously is a risk to animal welfare. So, either all animal product imports should be banned or the goal of animal welfare should be abandoned. This was the basis of Canada’s underlying point—if the EU is serious about animal welfare then they should not be allowed to pick and choose among types of animals. Otherwise, any WTO Member will have free reign to behave in an economically opportunistic manner under the guise of its self-defined morality. Obviously, the EU had not (yet) persuaded all of Europe to “go vegetarian.”

Ultimately, what the Canadians wanted was too much and too difficult to achieve. As the EU put it, if Canada succeeded, then there would be a new “Strict Consistency” Test (the name dubbed by the EU) under Article XX(a). Parties invoking this exception would have to prove “the relevant standard of morality is

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<sup>75</sup> *Id.* ¶¶ 5.194-201.

consistently applied by them in each and every situation involving similar risks.”<sup>76</sup> What the Canadians wanted also was ironic; here was the nation famed for environmentalism, splendid landscape, and thriving wildlife, as well as the land of environmental novelist Farley Mowatt (1921-2014) and his *Never Cry Wolf* (1963), railing against a ban on seal products. However philosophically rigorous the Canadian argument might have been, the practical legal and economic repercussions undermined the symbol of the Maple Leaf. Arguably the best explanation for the incongruity was that Canada thought it was helping a people it had previously harmed: the Inuit. Fighting for the Inuit Exception to help its IC was correcting an historical wrong done to Canadian Aboriginals.

The Appellate Body rejected the Canadian-backed “Strict Consistency” Test.<sup>77</sup> Lacking stylistic elegance in its pronouncement, the Appellate Body essentially said that just because animal welfare cannot be protected across all species does not mean it should not be protected for any of them. Under the 2005 *Antigua—Gambling* decision, WTO Members have the sovereign right to not only to define their “public morality,” but also the latitude to apply that definition in different ways. Nothing in Article XX(a) mandates that similar public moral concerns must be regulated in similar ways. The EU is free to regulate slaughterhouses and seal hunts differently, pursuing the latter but not the former, with an import ban.

As to analogizing sub-paragraph (a) to (b) in GATT Article XX, Canada failed to appreciate the distinct nature of those exceptions. Reading an “identification of risk” standard into Article XX(b) made sense, but not into Article XX(a). The Appellate Body looked to the meaning of “protect” in the *Oxford English Dictionary*: “defend or guard against injury or danger; shield from attack or assault; support, assist . . . ; keep safe, take care of . . . .”<sup>78</sup> From this lexicography, the Appellate Body did not infer an implicit notion of an identifiable risk. But in certain contexts in which “protect” is used, this notion may be implied. One such context is Article XX(b), which is all about protection of human, animal, and plant life or health from disease or disease-bearing pests. Those dangers—and risks—are the subject of the SPS Agreement, which elaborates on the proper deployment of Article XX(b).

In contrast, the Appellate Body said Article XX(a) has no implicit risk identification metric:

5.198. . . . [T]he notion of risk in the context of Article XX(b) is difficult to reconcile with the subject matter of protection under Article XX(a), namely, public morals. While the focus on the dangers or risks to human, animal, or plant life or health in the context of Article XX(b) may lend itself to scientific or other

<sup>76</sup> *Id.* ¶ 5.195 (quoting Submission by the European Union).

<sup>77</sup> *Id.*

<sup>78</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.197 (quoting SHORTER OXFORD ENGLISH DICTIONARY (A. Stevenson ed., 6th ed. 2007)).



methods of inquiry, such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals. We therefore do not consider that the term “to protect,” when used in relation to “public morals” under Article XX(a), required the Panel, as Canada contends, to identify the existence of a risk to EU public moral concerns regarding seal welfare.

5.199. For this reason, we also have difficulty accepting Canada’s argument that, for the purposes of an analysis under Article XX(a), a panel is required to identify the exact content of the public morals standard at issue. The Panel accepted the definition of “public morals” developed by the panel in *US—Gambling*, according to which “the term ‘public morals’ denotes ‘standards of right and wrong conduct maintained by or on behalf of a community or nation.’” The Panel also referred to the reasoning developed by the panel in *US—Gambling* that the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values. . . .

5.200 Finally, by suggesting that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appears to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement “to protect” public morals under Article XX(a). In this regard, we note that the panel in *US—Gambling* underscored that Members have the right to determine the level of protection that they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern. Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals, and must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, we do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns in the same way.

5.201. . . . [W]e reject Canada’s argument that the Panel was required to assess whether the seal welfare risks associated with seal hunts exceed the level of animal welfare risks accepted by the European Union in other situations such as terrestrial wildlife hunts. . . . Accordingly, we find that the Panel did not

err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994.<sup>79</sup>

Put undiplomatically, the Appellate Body said the SPS measures are a matter of objective science, and moral legislation is “squishy, touchy-feely, and subjective.” All that matters is a WTO Member denotes a standard of right or wrong its community or society maintains, under its “own system[] and scale of value[.]” That the community does not apply that standard invariably, “set[ting] different levels of protection even when responding to similar interests of moral concern,” is not in itself a violation of Article XX(a). Again, regulation of similar public morality concerns through similar levels of protection is not required.

Here again in its *Fur Seals* Report, the Appellate Body discussion is parlous. The Appellate Body seemed oblivious to the profundity of the point it was defending: “whether to imply risk identification as part of the meaning of ‘protect’ depends on the context in which that verb is used. ‘Yes’ in Article XX(b), ‘no’ in Article XX(a).” In theory and practice, and in all contexts, “protection” has no meaning unless there is an actual or potential threat. No individual takes a vitamin pill, no community builds a retaining wall, and no country bans importation of a product, without reason. Each is free to set the level of protection, i.e., to decide how many pills to take, how high to build the wall, or how extensively to enforce the ban. But none takes the precaution simply for fun.

Put differently, protection is not purposeless nor is it purely a matter of enjoyment. Just as with the health risks that the SPS Agreement and Article XX(b) is designed to cover; just as with the risk to public morality from gambling services in *Antigua—Gambling* case; and just as with the animal welfare concerns in the Seal Regime, there is a risk that gives rise to those concerns.

Consider a provocative example. Suppose a WTO Member implements a “contraceptive measure” under which it banned artificial birth control, such as condoms. It justifies the measure as necessary to protect public morality which is grounded in the 1968 Encyclical of Pope Paul VI, *Humane Vitae*. Why would the Member take this action? The answer surely is that it believes condoms to pose a risk to the dignity of the human person and sexual intimacy. The world—Catholic and non-Catholic—regards this answer as controversial. Should the WTO Member be allowed to maintain its ban without even having to identify the purported risk? If so, then is there a slippery slope in Article XX(a) jurisprudence, whereby any Member can define nearly any moral concern it wants and ban the relevant product, but not have to show the risk the product poses to that concern?

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<sup>79</sup> *Id.* ¶¶ 5.198-201 (footnotes omitted) (emphasis added).

d. Step One of the Two-Step Test: Provisionally Justified as  
“Necessary to Protect Public Morals”—Contribution Analysis?

The Appellate Body began its examination of Europe’s mounted defense under GATT Article XX(a) in light of its violation of the “immediacy and unconditionality” mandate in the Article I:1 MFN rule with a useful tutorial. Citing six of its precedents, explained that any Article XX defense must satisfy a two-step test:

As established in WTO jurisprudence, the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the *chapeau* of Article XX. [Here the Appellate Body cited its 1996 *Reformulated Gas* and 1998 *Turtle Shrimp* decisions.<sup>80</sup>] As the Appellate Body has stated, provisional justification under one of the subparagraphs requires that a challenged measure “address the particular interest specified in that paragraph” and that “there be a sufficient nexus between the measure and the interest protected.” [Here the Appellate Body cited its 2005 *Antigua—Gambling* case, and restated that the two-step test applies equally to GATT Article XX(a), or—as in *Antigua—Gambling*—GATT Article XIV(a).] In the context of Article XX(a), this means that a Member wishing to justify its measure must demonstrate that it has adopted or enforced a measure “to protect public morals,” and that the measure is “necessary” to protect such public morals. [Here the Appellate Body again cited the *Antigua—Gambling* precedent.] As the Appellate Body has explained, a necessity analysis involves a process of “weighing and balancing” a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. [Here the Appellate Body pointed to its *Korea—Beef* and *Brazil—Retreaded Tires*

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<sup>80</sup> See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996) (*adopted* 20 May 1996) [hereinafter Appellate Body Report, *U.S.—Gasoline*]; Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998) [hereinafter Appellate Body Report, *U.S.—Shrimp*]. Many sources discuss both cases, including Raj Bhala, *INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON WESTERN APPROACH* (4th ed. forthcoming 2015).

Reports.<sup>81</sup>] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. [Here the Appellate Body referred to its *Antigua—Gambling* and *Tuna Dolphin* holdings.]

The burden was on the EU, as it is with any respondent, to prove its entitlement to the defense. Yet the burden was on Canada and Norway, as it is with any complainant, to show the respondent had alternative measures that the respondent could have deployed that would have been less trade-restrictive than the disputed measure. The tutorial itself was of pedagogical value not only for its substance, but also its methodology: indubitably, the Appellate Body regarded its prior jurisprudence as precedent binding on new parties.

In step one, the Appellate Body focused on whether the Seal Regime was “necessary” to protect public morality in the EU.<sup>82</sup> As it said in the 2007 *Brazil—Retreaded Tires* case, “necessity” is not a yes-or-no, black-or-white matter. At issue is how “necessary” is a disputed measure? There are degrees of necessity, from “indispensable” to fulfilling an objective at one end of a continuum, to “making a contribution to” that objective at the other end. Two exercises are needed to discern where on the continuum a disputed measure lies: first, consideration of the extent the measure contributes (qualitatively or quantitatively) to its objective; and, second, weighing and balancing a variety of factors against alternative measures.

The first exercise, asking about the materiality of the contribution of the disputed measure to the objective, is a so-called “Contribution Analysis.” Canada and Norway argued the Panel erred by looking only at the prohibitive aspect of the Seal Regime—that is, the ban—when determining that the Regime made a “material” contribution to its objective of protecting European public morality concerns about seal welfare.<sup>83</sup> It was argued that was a mistake because the Panel said examining the Regime “as a whole” was necessary under Article XX(a). How could the Panel look only at the import ban, and not the Exceptions, if it was making a holistic analysis of “necessity”?

The Appellate Body found that not to be the case: the Panel did examine the contribution of both the prohibitive and permissive aspects of the Regime. The Appellate Body agreed the Panel rightly looked at both the prohibitive and permissive features of the Seal Regime (i.e., the import ban on seal products and the IC, MRM, and Travellers Exceptions, respectively), together when considering whether that Regime was “necessary” under Article XX(a).

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<sup>81</sup> See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tires*, WT/DS332/AB/R (Dec. 3, 2007) (adopted Dec. 17, 2007) [hereinafter Appellate Body Report, *Brazil—Retreaded Tires*] (discussed in our *WTO Case Review 2007*).

<sup>82</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.204-90.

<sup>83</sup> *Id.* ¶ 5.207.

Canada and Norway also argued the Panel was wrong to find that the Regime actually did make a “material” contribution to its objective. The EU countered by citing precedent, namely, the 2007 *Brazil—Retreaded Tires* case. There the Appellate Body held in the Article XX context that “a contribution should be deemed ‘material’ provided that it is not ‘marginal or insignificant.’” Surely, said the EU, the contribution of the Regime, though not quantifiable, is more than marginal or insignificant.

The Appellate Body agreed a quantitative or qualitative Contribution Analysis is required to assess the necessity of a measure under Article XX. While it was not specifically stated, the underlying logic was that a measure could not be “necessary” to achieve an objective under Article XX if it did not contribute to that objective to some degree. The Appellate Body also accepted *Brazil—Retreaded Tires* as the relevant precedent, as that case involved an import ban of retreaded tires so as to advance the objective of reducing the risk of adverse public health and environmental consequences of waste tires. In that case, the import ban did not have an immediately discernible impact on its objective so the Appellate Body said the Contribution Analysis took the form of whether the ban was “apt to” achieve its objective. From this “apt to do so” methodology in the *Retreaded Tires* case, the Appellate Body inferred in the *Seals* case that there was no pre-determined threshold of contribution.

The Appellate Body found Canada and Norway were mistaken in thinking “necessity” involved a generally applicable, pre-determined threshold of “materiality” in the Contribution Analysis. To the contrary, the threshold depended on a context-specific examination and could differ from case to case. The Panel found the Seal Regime was capable of, and did make, some contribution to its stated objective of addressing public moral concerns. The prohibitive aspect of the Regime (i.e., the import ban) contributed “‘to a certain extent’ to reducing global demand, and ‘may have contributed’ to reducing EU demand.”<sup>84</sup> In doing so, Canada and Norway thought the Panel did not offer clear or precise conclusions. Without a quantitative identification of the degree to which each aspect of the Regime contributed to its objective, the Panel analysis, was nothing more than qualitative. The Panel failed to show how the positive and negative contributions of the different aspects of the Regime resulted in a net positive contribution of the Regime to its objective and wrongly took into account the capability (or possibility) a measure would contribute to that objective, rather than considering only the actual contribution of the measure.

Agreeing with the EU, the Appellate Body said the GATT-WTO texts do not prescribe a single way for assessing the contribution of a measure to its objective, nor do they explain how specific the assessment must be. Rather, they give wide latitude to Panels—a point the Appellate Body made in its 2007 *Brazil—Retreaded Tires* Report. That is for good reason.

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<sup>84</sup> *Id.* ¶ 5.225 (quoting Panel Report, *Fur Seals*, *supra* note 7, ¶ 7.459).

Assessment of the extent to which a measure contributes to its objective, and in turn qualifies for an exception under GATT Article XX, may be quantitative or qualitative, because it depends on the nature, quantity, and quality of available evidence. In *Fur Seals*, data on the actual operation of the Seal Regime—both the import ban and the exceptions to the ban—were inclusive. The Appellate Body said the *Fur Seals* Panel acted properly by looking at qualitative evidence. Because of the incomplete trade data, the Panel could not possibly discern the extent of the connection between the import ban on seal products and the reduction in the number of seals killed. The EU did not have statistics on seal products other than seal skins (i.e., the EU had data only for categories of seal products for which tariff classification consisted exclusively of seal or seal-containing products, and after 2006, there was no data on raw seal skins either). So the Panel did its best to look at the design and expected operation of the measure.

That was fine, said the Appellate Body. Herein lay an irony: the EU had made the same argument in *Brazil—Retreaded Tires* that Canada and Norway made in *Fur Seals*, namely, that in a GATT Article XX necessity analysis to consider whether a challenged measure is “capable of making a contribution to the objective” is an erroneous legal standard.<sup>85</sup> In truth, that is an appropriate standard in certain contexts: if the impact of the measure has not yet been realized, so the quantitative metrics are few, then focusing on whether the measure is “‘apt to’ induce changes over time in the behavior and practices of commercial actors” that contribute to the stated objective is appropriate.<sup>86</sup> Put bluntly, the EU used a precedent that had been adverse to it (its losing argument in *Brazil—Retreaded Tires*) with success in the case at bar.

Similarly, the Appellate Body rejected the Canadian and Norwegian arguments that the Panel failed to substantiate properly its conclusion that the Seal Regime contributed to its objective. That is, just as the Appellate Body rejected their arguments about the proper legal standard for a Contribution Analysis, it brushed away their contentions that the Panel breached DSU Article 11. Canada and Norway said a proper Contribution Analysis showed the Regime (1) did not cut either global or EU demand for seal products, and (2) actually worsened the welfare of seals.<sup>87</sup> In doing so, the Appellate Body accepted the Canadian and Norwegian points as not contesting the facts found by the Panel (which would not

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<sup>85</sup> *Id.*, ¶ 5.224 (quoting Appellate Body Report, *Brazil—Retreaded Tires*, *supra* note 81, ¶ 154).

<sup>86</sup> *Id.* (quoting Appellate Body Report, *Brazil—Retreaded Tires*, *supra* note 81, ¶ 136).

<sup>87</sup> Norway further argued that the Panel, in its Contribution Analysis, undervalued evidence of the negative contribution of Exceptions to the Seal Regime ban and wrongly concluded indigenous communities had not been able to benefit from the IC Exception (which the Panel said limited that negative impact). Norway lost both points. Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.255-59.

be appealable), but rather about either the Panel's legal application of GATT Article XX(a) to the facts or the objectivity of the Panel's assessment of the facts.

Did the Seal Regime contribute to diminished global and European demand for seal products and, therefore, a lower incidence of inhumanely killed seals? Canada and Norway said there was no evidence to support the Panel's affirmative answer to this question. They also faulted the Panel for subtly changing the objective of the Seal Regime from reducing the number of inhumanely killed seals to reducing global and EU demand for seal products. Demand was not a proxy variable for inhumanity, so it was never proven that cutting demand leads to fewer inhumanely killed seals.

The EU disagreed, and the Appellate Body sided with them and the Panel. Data were sufficient to show the Seal Regime brought about a decline in EU demand which contributed to a decline in global demand because Europe's demand is an important component of world-wide demand. Moreover, the Panel was entitled to assume that reducing the number of seals killed, thanks to a decline in demand, necessarily would lead to a reduction in the number of seals killed inhumanely. Simply put, the causation nexus that the Regime made a "partial contribution to addressing the public moral concerns regarding seal welfare" through the variable of global demand for seal products from commercial hunts was good enough.<sup>88</sup>

Put bluntly, the Canadian and Norwegian point about causation was pedantic: common sense indicates cutting demand translates into reduced inhumane killing—unless the utterly implausible and uneconomic assumption is made that commercial hunters are bloodthirsty operators eager to kill and pile up seal carcasses in cold storage. The Appellate Body was not blunt. Instead, it opted to dilate its Report unnecessarily by another eleven paragraphs (or 3½ pages) to reach the conclusion that Canada and Norway were whining that the Panel did not give their arguments the attention they would have liked.<sup>89</sup> Such whining—that is, in the words of the 1999 *Korea—Alcoholic Beverages* Report which the Appellate Body recalled, "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it"—is not a violation of DSU Article 11.<sup>90</sup>

Did the Seal Regime lead to worse seal welfare outcomes? Canada and Norway concocted an argument that economists would consider a "substitution effect." They alleged the ban on importation causes:

- (1) the replacement of seal products from commercial hunting in Canada and Norway with seal products from Greenland or the EU under the IC and MRM Exceptions, and

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<sup>88</sup> *Id.* ¶ 5.246.

<sup>89</sup> *See id.* ¶¶ 5.244-54.

<sup>90</sup> *Id.* ¶ 5.254.

- (2) a higher rate of inhumane killing of seals in IC and MRM hunts than with commercial hunts.

On the first point, Canada and Norway said all seal products in the EU market come from hunts in Greenland and the EU under the IC and MRM Exceptions, not from Canada or Norway. Canadian and Norwegian seal products do not meet the requirements of these Exceptions. Indeed, the only beneficiary under the IC Exception is Greenland; almost all seal products from Greenland qualify for this Exception, and the Greenlandic supply easily could fulfill all EU demand.

On the second point, Canada and Norway pointed out the Seal Regime does not impose quantitative limits on the number of qualifying seal products that may be placed on the EU market, nor does it mandate that such products be derived from seals that were, in fact, killed humanely. Moreover, the Greenlandic Inuit use two inhumane methods of killing seals: (1) open-water hunting, and (2) trapping and netting. With the first method, seals are shot with rifles from a boat which leads to many of them being struck and lost. The second method (specifically, the use of nets) actually is illegal in Canadian and Norwegian commercial hunts.

Rather shocking statistics backed both points: between 1993 and 2009, an annual average of 163,000 seals were killed in Greenland, of which about half—that is, 80,000 skins—were traded. In contrast, between 2002 and 2008, the combined total of Canadian and Norwegian exports of skins to the EU was 20,000. Worse yet, said Canada and Norway, once the EU introduced the Seal Regime, Greenland stored in inventory 300,000 skins. However, the EU had plausible rebuttals:

5.238. The European Union identifies other facts that, in the European Union's view, contradict the appellants' position: (i) the number of seals hunted in Canada and Norway has traditionally exceeded the number of catches in Greenland; (ii) unlike in Canada and Norway, a large part of the seal skins in Greenland are consumed domestically rather than traded internationally; (iii) a large part of the seal skins are exported from Greenland to markets outside the European Union; (iv) there are Inuit exceptions under other countries' bans that would absorb exports of seal skins traded by Greenland; (v) global demand for seal products may not remain unchanged at currently depressed levels; (vi) the IC exception is subject to conditions that constrain Greenland's ability to expand supply more than traditional levels; (vii) Greenland's supply capacity is declining; and (viii) Greenlandic export data shows stable or declining exports to the European Union.

5.239. The European Union further contends that this evidence demonstrates that, due to depressed global demand and prices resulting in part from the EU Seal Regime, imports from



Greenland “have not even returned to their usual level” before seal product bans were first introduced in the European Union in 2007. The European Union also maintains that Norway’s assertion that Greenland’s supply of 80,000 seal skins per year can easily supply the European Union’s average imports of 20,000 skins is flawed. This [sic] data, the European Union argues, only covers tanned skins, whereas Canada’s principal exports to the European Union consisted of raw skins. Noting that Canada exported more than 100,000 raw skins to the European Union in 2006, the European Union asserts that Norway’s own estimates show that “Greenland could not supply that volume on its own, even if it were to discontinue its exports to all other countries.”<sup>91</sup>

In view of the EU’s rebuttal, the Appellate Body opted not to disturb the findings of the Panel in respect of the Contribution Analysis. The record showed the Panel had reasonable grounds “for not concluding that: (i) IC and MRM hunts lead to poorer seal welfare outcomes than commercial hunts; and (ii) the EU Seal Regime resulted in the replacement of seal product imports from commercial hunts with such products from IC and MRM hunts.”

e. Step One of the Two-Step Test: Provisionally Justified as “Necessary to Protect Public Morals”—Weighing and Balancing of Factors?

The second of the two exercises associated with any consideration of “necessity” complimented the flexible approach to materiality in the Contribution Analysis: a “weighing and balancing” of factors. Here again the Appellate Body cited 2007 *Brazil—Retreaded Tires*, plus *Korea—Beef* and *Antigua—Gambling*.<sup>92</sup> A series of factors must be weighted and balanced in a “holistic” manner, particularly the (1) importance of the objective, (2) contribution of the measure to the objective, and (3) trade restrictiveness of the measure. It is in this setting that the challenged measure and possible, reasonably available, WTO-consistent alternatives are compared.

As with the Contribution Analysis, the weighing-and-balancing factors moved the Appellate Body to agree the Seal Regime was “necessary” to protect European public moral concerns about the inhumane killing of seals. First, the

<sup>91</sup> *Id.* ¶¶ 5.238-5.239.

<sup>92</sup> See Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.169 (citing Appellate Body Report, *Brazil—Retreaded Tires*, *supra* note 81, ¶ 182; 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); Appellate Body Report, *U.S.—Gambling*, *supra* note 65, ¶ 306).

objective was indisputably important. That is, no one in the case contested the importance of protecting seals. Second, as above, the Seal Regime contributed to its objective. Third, while the Regime was trade restrictive, the Panel correctly analyzed reasonably available alternatives.

As to this third factor, the Appellate Body applied the legal standards it established in 2001 *Korea—Beef*, 2005 *Antigua—Gambling*, and 2007 *Brazil—Retreaded Tires* precedents:

We recall the Appellate Body’s view that the weighing and balancing exercise under the necessity analysis contemplates [quoting *Korea—Beef* at ¶ 166] a determination as to “whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available.’” An alternative measure may be found not to be reasonably available where [quoting *Brazil—Retreaded Tires* at ¶ 156] it is “merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.” Furthermore, in order to qualify as a “genuine alternative,” the proposed measure must be not only less trade restrictive than the original measure at issue, but should also [under *Brazil—Retreaded Tires* at ¶ 156 and *Antigua—Gambling* at ¶ 308] “preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.” The complaining Member bears the burden of identifying possible alternatives to the measure at issue that the responding Member could have taken [citing *Brazil—Retreaded Tires* at ¶ 156 and *Antigua—Gambling* at ¶ 311].<sup>93</sup>

Canada and Norway disagreed with the Panel conclusion that the EU had no reasonably available alternative to the Seal Regime.

Canada and Norway identified a reasonably available alternative conditional market access for seal products, that is, the EU could allow importation of seal products on the conditions the products (1) are produced in a manner compliant with animal welfare standards, and (2) satisfy certification and labeling requirements. In effect, Canada and Norway proposed an alternative measure that would limit access to the EU market only to products derived from humanely-killed seals. Their alternative—indeed, most of the arguments on both sides—prompted the question of whether killing seals ever is “humane.”

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<sup>93</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.261.

Manifestly, conditional market access would be less trade restrictive than an import ban.

Moreover, Canada and Norway asked, when the Panel examined this alternative, whether the alternative would lead to “complete fulfillment” of the EU public morality objective. So, for instance, the Panel evaluated the alternative measure to stringent animal welfare standards such as seal-by-seal certification at the country or hunter level. That was both erroneous and unfair. When the Panel examined the Seal Regime, a lower threshold was used: whether the Regime “actual[ly] contribut[ed]” to the objective. Following the same example, that Regime does not meet a seal-by-seal certification metric. It is much easier to show a measure makes an actual contribution to a moral objective than to show an alternative measure completely fulfills that objective. Stated differently, the same yardstick must be used in the Contribution Analysis of a proposed alternative as was used in that Analysis for the disputed measure. If a more lenient yardstick is used for the disputed measure, then how can the alternative ever be said to be “reasonably available”?

The EU went to the heart of the Canadian and Norwegian argument by saying the reasonable alternative was insufficiently precise. Because it was vague, a “meaningful assessment of its contribution” to the objective was impossible.<sup>94</sup>

Upholding the Panel assessment, the Appellate Body ruled in favor of the EU. The Canadian and Norwegian proposed alternative was difficult to assess because they did not clearly define the contours of animal welfare in the measure. How strict did they believe the animal welfare requirements for permissible importation should be? The alternative actually created many possibilities across a spectrum defined by “stringency” at one end and “leniency” at the other. Given the various permutations of the alternative, the Panel had good reasons to rule it was not reasonably available:

(1) Logistical problems:

Monitoring and compliance could be difficult and costly, depending on how accurately humanely versus inhumanely killed seals were differentiated. The greater the accuracy the proposed alternative certification system demanded, the greater the logistical aspects of assuring that accuracy.

(2) Compliance and Cost Problems:

The ability and willingness of seal hunters to fulfill monitoring and compliance requirements, and incur the costs of doing so, depended on the severity of those requirements. If obtaining certification under the alternative was too difficult, they might ignore or circumvent it, which hardly would lead to seal welfare protection. This problem also existed with respect to

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<sup>94</sup> *Id.* ¶ 5.262.

downstream stages of seal product production and sale. Operators subsequent to hunters might balk at enforcing burdensome, costly rules.

(3) Unintended Consequences:

Even if the aforementioned problems were overcome, the desire of hunters and downstream operators to comply with the alternative certification system might increase the inhumane killing of seals. That could occur precisely because the hunters and operators knew they could comply, so in their rush to do so, they ramped up production. More seals would be killed humanely, but in the frenzy for profit-driven market access, more would be killed inhumanely, too.

With these uncertainties, it was difficult to say the alternative would achieve the EU objective of protecting public morality regarding seal welfare.

Further, the fact the hypothetical alternative was unclear, requiring the Panel to examine versions of it on the stringent-versus-lenient spectrum, meant the Panel did not evaluate it against the unflagging benchmark in that the alternative fulfill completely its objective. Complete fulfillment seemed to be associated with more stringent certification systems and that would be hard to enforce. Conversely, more lenient systems would be easier to enforce, as some of the uncertainties would be attenuated, but they would be a weak contribution to the moral objective of protecting animal welfare. So the Appellate Body approvingly said of the Panel:

The fact that the Panel entertained, and compared, the possibility of stringent versus lenient versions of a certification system, in order to consider how a loosely defined alternative measure might contribute to the identified objective, confirms in our view that the Panel was undertaking considerable efforts to understand how such variations of the alternative measure might operate. We understand the Panel to have concluded that, irrespective of the level of stringency, a certification system would be beset by difficulties in addressing EU public moral concerns regarding seal welfare.<sup>95</sup>

Succinctly put, Canada and Norway had misread, or mischaracterized, the Panel's methodology; the Panel did not use a different yardstick from that by which it measured the Seal Regime. In turn, the Panel was right: the alternative (or, better put, alternatives) was not reasonably available to the EU.

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<sup>95</sup> *Id.* ¶ 5.272.

Interestingly, Canada and Norway battled the EU over the meaning of a precedent set in the 2007 *Brazil—Retreaded Tires* and 2005 *Antigua—Gambling* cases. The key passage was:

In *Brazil—Retreaded Tires*, the Appellate Body stated as follows:

As the Appellate Body indicated in *U.S.—Gambling*, “[a]n alternative measure may be found not to be ‘reasonably available’ . . . where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.”<sup>96</sup>

In deciding whether an alternative measure is reasonably available, based on the costs of that measure, what is the relevant party to examine as to assumption of those costs, the respondent WTO Member or the adversely affected industry? Reading the above-quoted passage narrowly, Canada and Norway said the former, i.e., what matters are the costs borne by the EU of the alternative they proposed. The EU said the above-quoted passage should be read broadly; it is permissible to examine the costs as borne by the affected industry. The Panel sided with the EU and evaluated costs as borne by seal hunters and downstream operators. The Appellate Body said that was fine, what matters is that the alternative not be merely theoretical, but if it is not, there is no foreclosure of possibilities as to examining what party bears the cost burden.

#### f. Step Two of the Two-Step Test: Satisfies *Chapeau*?

The Appellate Body upheld the EU Seal Regime as provisionally justified under GATT Article XX(a), i.e., the Regime is “necessary to protect public morals.” Unfortunately for the EU, it also found the Regime unacceptable under the *chapeau* to Article XX.<sup>97</sup> The IC and MRM Exceptions were the problem. Thus, in both steps of the two-step test, the Appellate Body agreed with the Panel.

The Panel held the Seal Regime was discriminatory under the MFN obligation of GATT Article I:1 (as well as the national treatment rule of Article III:4). The discrimination took the form of different regulatory treatment for seal products derived from (1) commercial hunts, as distinct from (2) IC hunts. Canadian and Norwegian seal hunting is primarily commercial in nature.

<sup>96</sup> *Id.* ¶ 5.276 (quoting Appellate Body Report, *Brazil—Retreaded Tires*, *supra* note 81, ¶¶ 156).

<sup>97</sup> *Id.* ¶¶ 5.291-339.

Greenlandic seal hunting is primarily IC in nature. So the Exceptions to the import ban—especially the IC Exception—favored Greenland over Canada and Norway. Another way to put the point is the IC Exception favored indigenous communities in Greenland over those in Canada and Norway.

This favoritism was not *de jure*, i.e., the Regime did not expressly say “only seal hunting by Inuit communities in Greenland qualifies as non-commercial and, therefore, products from such hunting may be imported into the EU.” Rather, the discrimination was *de facto*. The design of the Exception was such that it was unlikely Canadian or Norwegian hunting would qualify, and thus in its operation, the Exception permitted Greenlandic, but not Canadian or Norwegian, seal products. To use a stark analogy from contemporary American history, one criticism of voter identification laws enacted in certain states (including Kansas) is they are *de facto* discriminatory against minorities and the elderly. Such laws mandate the showing of an approved, government-issued ID (such as a passport or driver’s license) before an individual is permitted to cast a ballot. Of course, the laws never target African-Americans, Hispanic-Americans, Native Americans, or the elderly. But individuals in these diverse communities are less likely to have the required IDs, and thus more likely to be disenfranchised than average Americans in the majority population.

As a legal matter under GATT Article XX, the key question was whether that “discrimination” was either “arbitrary” or “unjustifiable” under the *chapeau*? Only if the answer was “no” could the discrimination be excepted under the *chapeau*. The answer, however, was “yes.” The problem was the EU did not design, nor did it apply, the IC (and MRM) Exceptions in an even-handed manner.

Naturally, the EU appealed the Panel finding, specially arguing against its conclusion that the IC Exception does not meet the requirements of the *chapeau*. Interestingly, Canada and Norway, while agreeing with this ultimate conclusion (and thus not contesting it) appealed the Panel rationale, saying that the Panel wrongly used the same test for “arbitrary or unjustifiable discrimination” under the Article XX *chapeau* as it used for determining inconsistency with TBT Agreement Article 2:1. They said the “scope, content, and text” of the Article XX *chapeau* and Article 2:1 are different.<sup>98</sup> The Panel applied a so-called “three step test” under Article 2:1 to determine whether a “legitimate regulatory distinction” exists, which Canada and Norway said is incongruous with the *Brazil—Retreaded Tires* test of whether the discrimination at issue is “rationally connected” to the objective of the controversial measure. In other words, the Panel substituted the three-step test for the “rational connection” test, importing the latter from the context of Article 2:1 into the context of the Article XX *chapeau*.

The EU replied that *Brazil—Retreaded Tires* does not mandate that an adjudicator inquire whether the cause of underlying discrimination is “rationally connected” to the objective of the measure. The adjudicator may look into other

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<sup>98</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.308.

factors. The Appellate Body agreed with Canada and Norway that the Panel ought to have explained more clearly why Article 2:1 was relevant to the *chapeau*. Certainly the concepts of “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” and “disguised restriction on trade” appear both in the *chapeau* and in the sixth recital of the Preamble to the TBT Agreement. Moreover, as under *Clove Cigarettes*, Article 2:1 allows for a detrimental impact on competitive opportunities for imports if that impact stems exclusively from a legitimate regulator distinction. Similarly, Article XX allows for discrimination if it is not arbitrary or unjustifiable.

However the Appellate Body said there are key differences between an Article 2:1 versus an Article XX *chapeau* analysis. First, their legal standards differ, at issue under the TBT Agreement, following *Clove Cigarettes*, is whether the detrimental impact of a measure on imports “stems exclusively from a legitimate regulatory distinction, rather than reflecting *discrimination* against” imports.<sup>99</sup> Under the *chapeau*, at issue is whether an admittedly discriminatory measure is “applied in a manner that would constitute . . . *arbitrary or unjustifiable discrimination*.”<sup>100</sup> Second, the purposes of the two provisions differ. Article 2:1 concerns non-discrimination in the context of regulatory distinctions with a view to whether those distinctions are “legitimate.” In contrast, the *chapeau* is a balance between the right of an importing Member to invoke an exception to its free trade obligations under GATT and the right of exporting Members to expect compliance with those obligations.

Therefore, the Appellate Body ruled in favor of Canada and Norway in this respect: it overturned the finding of the Panel that the EU failed to prove the discriminatory impact of the IC and MRM Exceptions was justified under Article XX(a). The Appellate Body did so because it said, as per the Canadian and Norwegian argument, that the Panel used the wrong legal test—the Panel erred in applying the legal test of Article 2:1 to the *chapeau*. With this conclusion, there was no need for the Appellate Body to address the EU point about the meaning of *Brazil—Retreaded Tires* with respect to the rational relationship test.

However, this reversal did not mean the EU won the case. To the contrary, the EU still lost. Indeed, in *Fur Seals*, the most important part of the *chapeau* discussion was not about the successful Canadian and Norwegian appellate argument. It was the conclusion of the Article XX analysis by the Appellate Body. The Appellate Body held that even under a correct *chapeau* analysis, the EU could not justify its Seal Regime. The IC Exception in that regime was discriminatory in an arbitrary or unjustifiable way. Simply put, the Panel reached the right conclusion (the Regime could not stand under the *chapeau*) but for the wrong reason (the TBT Agreement Article 2:1 rationale). The Appellate Body filled in the right reason.

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<sup>99</sup> *Id.* ¶ 5.311 (emphasis added).

<sup>100</sup> *Id.* (emphasis added).

The essence of the *chapeau*, as the Appellate Body explained citing the 1996 *Reformulated Gas* and 1998 *Turtle Shrimp* precedents, is to “prevent the abuse or misuse” of the right each WTO Member has to invoke one of the ten itemized exceptions in Article XX. In that sense, the *chapeau* is a jurisprudential “balance” to preserve an “equilibrium” between a protection-seeking respondent and a free-trade-oriented complainant. Quoting the *Turtle Shrimp* decision, the Appellate Body said:

the *chapeau* operates to preserve the balance between a Member’s right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994. Achieving this equilibrium is called for [as in *Turtle Shrimp*] “so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves.”<sup>101</sup>

The burden of proof a measure must have to satisfy the *chapeau* is on the respondent and following the *Reformulated Gas* decision, this burden is a “heavier task” than showing an Article XX exception “encompasses the measure at issue,” i.e., a provisional justification. In sum, the *chapeau* is the check on whether a measure (e.g., the EU Seal Regime) violates GATT (e.g., the MFN rule), but which is provisionally justified (e.g., as “necessary to protect public morality”) is applied in a way that constitutes (1) “arbitrary or unjustifiable” discrimination between or among WTO Members where the “same conditions” exist in adversely affected Members, or (2) is a “disguised restriction on international trade.”

The Appellate Body scrupulously noted that “applied” does not really mean just “applied.” It also refers to the “design architecture, and revealing structure of a measure.” This note was a reminder of Appellate Body jurisprudence that ought to be revisited and perhaps overturned. The *chapeau* expressly says “applied.” In 1996, the Appellate Body defined in the *Japan—Alcoholic Beverages* Report this term expansively includes non-application parameters, i.e., factors other than how a measure is manifest in the world, reasoning that how a measure is applied “*can most often be discerned from . . . its design, . . . architecture, and . . . revealing structure.*”<sup>102</sup> Arguably, this definition of “applied” is over-expansive. It is at odds with the clear *Vienna Convention* methodology of the Appellate Body to interpret terms according to their ordinary meaning. Simply put, if there is a difference between practice (application) and

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<sup>101</sup> *Id.* ¶ 5.297. Though Appellate Body Reports are anything but literary, much less whimsical, the Appellate Body might have analogized the balance to the Hindu *Trimurti*, in particular, Vishnu seeking to preserve free trade, and Shiva seeking to destroy it.

<sup>102</sup> *Id.* ¶ 5.302 (citing Appellate Body Report, *Japan—Alcoholic Beverages*, *supra* note 51, at 120) (emphasis added).



theory (design), then the Appellate Body fools only itself and clings to a foolish consistency, when it says otherwise.

In any event, in the *Seals* case, attention was on discrimination caused by the IC Exception. The Appellate Body—again citing the *Turtle Shrimp* case—said the nature and quality of discrimination that brings about the violation of a substantive GATT obligation is different from the nature and quality of the discrimination of which the *chapeau* speaks.<sup>103</sup> Obviously, the measure is discriminatory under a rule such as Article I:1 or III:4. That is why the respondent needs to invoke Article XX. An adjudicator must find out whether, among affected WTO Members, the “same conditions” prevail and the discrimination is “arbitrary or unjustifiable.”

On the first inquiry, the Appellate Body reached to the online *Merriam-Webster Dictionary* to define “conditions,” which (not surprisingly) means “[a] way of living or existing,” or “the state of something,” and thus which could comprise an array of circumstances in a country.<sup>104</sup> But, noticing the word “conditions” appears in the context of the *chapeau*, the Appellate Body added—and, again, cited *Turtle Shrimp*—for the proposition that not all conditions matter. Only conditions relevant to the measure at issue, that is, establishing whether “arbitrary or unjustifiable” discrimination exists, matter. Particular attention should be paid to “conditions” associated with (1) the policy objective under the applicable Paragraph of Article XX (e.g., the “public morality” goal of the EU), and (2) the type or cause of underlying substantive violation.

There was no doubt “the same conditions” prevailed in Canada, Norway, and Greenland. The EU did not seriously contest the proposition that “the same animal welfare conditions prevail in all countries where seals are hunted,” nor did it appeal the Panel finding that “the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts.”<sup>105</sup> Further, the EU accepted that differences in the identity of seal hunters, or in the purposes of seal hunting as between commercial and IC, did not mean the conditions in Canada and Norway, vis-à-vis Greenland, were distinct. The best point the EU could muster in favor of a claim to differential conditions was that the development of marketing structures achieved by Greenlandic versus Canadian Inuit. That was not enough for the Appellate Body.

After this determination, the Appellate Body turned to “discrimination” within the meaning of the *chapeau*, i.e., when WTO Members, in which the same relevant conditions exist, are treated differently. Was that discrimination “arbitrary or unjustifiable”? In the language of *Turtle Shrimp*, the assessment is a “cumulative” one.

First, the answer depends on the cause of the discrimination. Is it possible to reconcile the policy objective pursued by the controversial measure, on one hand, and the discrimination, on the other hand? Asked differently, as in

<sup>103</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.298.

<sup>104</sup> *Id.* ¶¶ 5.299-300.

<sup>105</sup> *Id.* ¶ 5.317.

*Turtle Shrimp* and *Brazil—Retreaded Tires*, is there a rational relationship between the two—does the rationale for the discrimination support, or undermine, that goal?<sup>106</sup> In *Fur Seals*, it was uncontested that the cause of the discrimination under the Article I:1 MFN obligation was the same as that under the Article XX *chapeau*—the Seal Regime, most notably the IC Exception.

Second, what is the rationale put forward to explain the discrimination? In both *Reformulated Gasoline* and *Turtle Shrimp*, the Appellate Body considered and rejected the United States' justifications for the discriminatory measure at stake:

5.304. In *U.S.—Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue. The first explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. While the Appellate Body accepted that the anticipated difficulties concerning verification and enforcement with respect to foreign refiners were “doubtless real to some degree,” it noted that the United States “had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate.” Second, the United States explained that imposing the statutory baseline requirement on domestic refiners was not an option either, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The Appellate Body observed that, while the United States counted the costs for its domestic refiners, there was “nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.

5.305. In *US—Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. These factors included the fact that the discrimination resulted from: (i) a “rigid and unbending requirement” that countries exporting shrimp into the United States must adopt a regulatory program that is essentially the same as the United States' program; (ii) the fact that the discrimination resulted from the failure to take into account different circumstances that may occur in the territories of other

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<sup>106</sup> *Id.* ¶ 5.306.

WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles; and (iii) the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members. As the Appellate Body stated in *Brazil—Retreaded Tires*, “[t]he assessment of these factors . . . was part of an analysis that was directed at the cause, or the rationale, of the discrimination.”<sup>107</sup>

Simply put, the respondent needs a cogent, sensible rationale to explain why the differential treatment exists among Members with similar conditions, a controversial measure in pursuit of its policy goal.

Applying this jurisprudence, the Appellate Body found the EU failed to prove that the IC Exception in the Seal Regime was not “arbitrary or justifiable” in the way it discriminated against WTO Members with similar relevant conditions:

*First*, we found that the European Union did *not* show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from “commercial” hunts can be *reconciled with the objective* of addressing EU public moral concerns regarding seal welfare. *Second*, we found *considerable ambiguity* in the “subsistence” and “partial use” criteria of the IC Exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as “commercial” hunts could potentially enter the EU market under the IC Exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. *Finally*, we were *not* persuaded that the European Union has made “*comparable efforts*” to *facilitate the access* of the Canadian Inuit to the IC Exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a “recognized body” that fulfills all the requirements of Article 6

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<sup>107</sup> *Id.* ¶¶ 5.304-05.

of the Implementing Regulation may entail significant burdens in some instances.<sup>108</sup>

As its summary indicates, the Appellate Body had provided three basic reasons for holding that the Seal Regime flunked step two of the two-step test.

The Appellate Body could not find what Canada and Norway dubbed a “rational relationship” between (1) the objective of the Seal Regime, and (2) the rules of the Seal Regime, particularly the IC Exception. Indeed, as Canada and Norway argued, there was a “rational disconnect.” The objective was to address European public moral concerns about seal welfare. But the rules—while banning importation of seal products from commercial hunts—allowed importation of those products if they satisfied criteria concerning the identity of the hunter, purpose of the hunt, and use of by-products from the hunt. There was no relationship between the objective and the criteria. Indeed, even the EU admitted there was no such relationship. The EU simply said the IC Exception to the import ban, whereby seal products from hunts conducted by the Inuit and other indigenous communities could be placed on the EU market, “*mitigate[d] the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to seal welfare.*”<sup>109</sup>

That was not good enough. It hardly amounted to a sufficient explanation as to reconciling the treatment of commercial versus IC hunting with the policy goal of addressing public morality concerns about seal welfare. Put directly, the IC Exception itself did not address those concerns so it was not rationally related to the overall objective. As the Appellate Body explained:

the different regulatory treatment of IC hunts, as compared to “commercial” hunts, takes the form of a significant carve-out of the former from the measure’s ban on seal products. The European Union has sought to explain why it decided not to impose the ban on the importation and placing on the market of seal products derived from IC hunts. Yet, the European Union has failed to demonstrate . . . how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to “commercial” hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. . . . [T]he European Union has not established, for example, why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts, given that “IC hunts can cause the

<sup>108</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.338 (emphasis added).

<sup>109</sup> *Id.* ¶ 5.319 (emphasis added).

very pain and suffering for seals that the EU public is concerned about.<sup>110</sup>

It is hard to fault the logic of the Appellate Body. If IC hunting causes the same pain and suffering to seals as does commercial hunting, and if the EU is sincere about its concern for seal welfare, then it should have banned seal products derived from both methodologies. Clearly, the import ban supported the objective, but how did the Exception advance the objective? As Canada and Norway suggested, the Exception actually undermined the objective.

Even still, the Appellate Body gave the EU another chance. The Appellate Body observed that the relationship between the discrimination caused by a controversial measure, and the objective of that measure, was not the sole test as to whether the discrimination was “arbitrary or unjustifiable.” The assessment was an overall one, a totality of circumstances, so additional factors should be checked. The Appellate Body asked whether the EU designed and applied the specific criteria of the IC Exception—that only subsistence hunting for Inuit and other indigenous communities could qualify—indicated the discrimination was neither arbitrary nor unjustifiable.

Yet the EU missed this chance. Article 3(1) of the Basic Regulation said that seal products could be placed on the market only if they came from hunting traditionally conducted by ICs and contributed to their subsistence. Article 3(1) of the Implementing Regulation elaborated on this IC Exception with the three criteria that defined whether a seal product originated from IC hunting: hunter identity, partial use, and subsistence. First, the identity of the hunter had to be Inuit or other IC living in the geographic region and community with a tradition of seal hunting. Second, the IC had to consume at least partly the byproducts from seal hunting according to its tradition. Third, seal hunting had to contribute to the subsistence of the IC.

However, by design, two of the three criteria in the Implementing Regulation contained ambiguities. “Partial use” was discernible with respect to a single hunt and single hunting was typical in Greenland. But what about multiple hunts? The Appellate Body wrote:

[There are] similar ambiguities with respect to the “partial use” criterion, pursuant to which seal products must be “at least partly used, consumed or processed within the communities according to their traditions.” The assessment of whether this criterion is fulfilled may be straightforward when it comes to the products of a single hunt, or where there are relatively stable patterns in the use of seal products, as appears to be the case in Greenland, where skins are the only parts of the seal that are currently traded on a significant scale. However, the ambiguity

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<sup>110</sup> *Id.* ¶ 5.320 (quoting Panel Report, *Fur Seals*, *supra* note 7, ¶ 7.275).

in the notion of “partial use” arises when it is applied on an aggregate basis. . . . [T]he European Union *could not confirm whether the “partial use” criterion is administered and enforced with respect to each individual seal, with respect to each seal hunt, or with respect to the catch of an entire season.* It is therefore *not clear with respect to what benchmark the requirement that seal products be at least partly used, consumed, or processed in the community, is to be understood.* . . . [W]here conformity with the “partial use” criterion is not assessed with respect to individual seals but rather with respect to individual hunters over an extended period of time (e.g., through licensing conditions), or with respect to all hunters active in a particular area or even all members of an Inuit community, *a substantial proportion of seal products that, when considered individually, might not conform to the “partial use” criterion* (either because the hunter has commercialized the entire seal or because the non-commercialized parts of the seal have been disposed of rather than used) *could potentially qualify for the IC Exception.* . . . [T]he ambiguity in the notion of “partial use” compounds the ambiguity of the “subsistence” criterion, with which it applies cumulatively, and thereby aggravates the overall vagueness of the IC requirements.<sup>111</sup>

Perhaps worse, the EU failed to define the scope or meaning of “subsistence.” Thus, there was a commercial dimension to IC hunting. Hence, the IC Exception overlapped with regular seal hunts:

The Panel had earlier found that “the subsistence purpose of IC hunts encompasses not only direct use and consumption of by-products of the hunted seals as part of their culture and tradition, but also a *commercial component*, to the extent that *Inuit or indigenous communities also exchange some by-products of the hunted seals for economic gain.*” The Panel further found this commercial aspect of IC hunts to be related more to the “need [of Inuit communities] to adjust to modern society rather than to continuing their cultural heritage of bartering.” For the Panel, *the commercial aspect of IC hunts “resembles the purpose of commercial hunts, which is to earn income (and make profits) by selling by-products of the hunted seals.”* The Panel thus identified a degree of *overlap between the purposes of “commercial” and IC hunts*, while at the same time maintaining that “[t]he commercial aspect of IC hunts is . . . not the same in

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<sup>111</sup> *Id.* ¶ 5.325 (emphasis added).

its extent as that associated with commercial hunts.” The European Union has not contested that IC hunts also have a commercial aspect. . . . [T]he lack of a precise definition of the subsistence criterion introduces a degree of ambiguity into the requirements for the IC exception under the EU Seal Regime.<sup>112</sup>

These “significant ambiguities” as the Appellate Body put it, meant the EU had “broad discretion” as to how to apply the IC Exception—even if it (or, more precisely, its “recognized bodies” where authority was delegated) was acting in good faith.<sup>113</sup> In brief, the design of the IC Exception criteria contained ambiguities that allowed for the possibility of discrimination in the application of the Exception against certain countries in which the same conditions prevailed could be arbitrary or unjustifiable.

Was the application itself discriminatory in an arbitrary or unjustifiable way? That is, was the manner in which the IC Exception affected Inuit and other indigenous communities in different countries arbitrarily or unjustifiably discriminatory? The Appellate Body said yes.

The Appellate Body agreed with the Panel, Canada, and Norway, in that the IC Exception “is available de facto exclusively to Greenland,” and this discrimination was directly attributable to the Seal Regime, not to the behavior of relevant operators (such as seal hunters) in Canada and Norway.<sup>114</sup> The EU argued any Inuit community in Canada, Norway, or any other WTO Member could meet the IC Exception criteria. The fact that only ICs in Greenland had done so was because of their decisions and actions about seal hunting, not because of the Regime. The Regime had no inherent flaw or permanent defect that kept ICs outside of Greenland from benefitting from the IC Exception. Indeed, the EU had reached out to ICs in Canada and Norway to help them navigate and satisfy the criteria, but they took no steps in response. In other words, the EU argument was that Canadian and Norwegian ICs were to blame—they were their own cause of failure to qualify for the Exception. For instance, in the Canadian context, the Inuit opted to focus on the development of their local market (in Nunavut), rather than export overseas.

The Appellate Body agreed that:

if the current de facto exclusivity of the IC Exception could be attributed entirely to private choice, there would be no “genuine relationship” between this exclusivity and the EU Seal Regime. . . . [T]he non-discrimination obligations in the covered agreements are only concerned with [in the words of the *Korea—Beef* Appellate Body Report] “governmental intervention that affects the conditions under which like goods,

<sup>112</sup> *Id.* ¶ 5.324 (emphasis added).

<sup>113</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.326.

<sup>114</sup> *Id.* ¶ 5.320 (quoting Panel Report, *Fur Seals*, *supra* note 7, ¶¶ 7.317-18).

domestic and imported, compete in the market within a Member's territory." [T]o the extent that the EU Seal Regime has an adverse effect on the Canadian Inuit by depressing the international market for seal products, this adverse effect would be experienced by the Greenlandic Inuit as well, and thus would not affect the conditions of competition between Canadian and Greenlandic Inuit.<sup>115</sup>

Canada and Norway successfully replied that the EU had both designed and applied the IC Exception "in such a way that only large-scale, commercially oriented seal hunting operations possess the wherewithal to do so."<sup>116</sup> In practice, seal hunts by Canadian and Norwegian Inuit were too small to give rise to market interest on an international scale, so—rationally—they saw "little point" in applying for the IC Exception.<sup>117</sup> Thus, the IC Exception was de facto available only to Greenland, and Greenland had been its only beneficiary. De facto exclusivity was attributable to the application, as well as design of the IC Exception, and that meant the discrimination against Canada and Norway was arbitrary or unjustifiable.

Citing its compliance decision in *Turtle Shrimp*, the Appellate Body faulted the EU for not making "comparable efforts" to help the Canadian (and, by extension, Norwegian) Inuit gain access to the IC Exception as the EU did for the Greenlandic Inuit.<sup>118</sup> The Appellate Body gave as an example the processing by Danish customs officials of certificates issued by Greenlandic authorities concerning eligibility of sealskin products for the IC Exception—even before the EU had formally accepted those authorities as "recognized bodies" under the Implementing Regulation to make such certifications. The EU had not sought cooperative arrangements with Canadian customs officials to facilitate access to the European market of Canadian Inuit products. Moreover, the EU had done nothing to reduce the burdens the Canadians (and Norwegians) faced in setting up "recognized bodies."

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<sup>115</sup> *Id.* ¶ 5.336. To this paragraph, the Appellate Body tacked on a final sentence. This sentence is one of many examples where the Appellate Body could have shortened its Report. The thought the sentence expresses is not fully explained. It is unconnected to the preceding sentences of the same paragraph, and fails to serve as a transition sentence to the subsequent paragraph.

<sup>116</sup> *Id.* ¶ 5.331.

<sup>117</sup> *Id.* The Appellate Body covers this point with respect to Canada, and recounts Norway's *sui generis* arguments in the next paragraph. However, the point seems equally pertinent to both.

<sup>118</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.337 (quoting Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21:5 of the DSU by Malaysia*, ¶ 122, WT/DS58/AB/RW (Oct. 22, 2001) (*adopted* Nov. 21, 2001)).



In sum, the Appellate Body said the EU failed to prove under the GATT Article XX *chapeau* that the IC Exception in the Seal Regime was not arbitrary or unjustifiable for three reasons:

In sum, we have identified several features of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC Exception. First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from “commercial” hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the “subsistence” and “partial use” criteria of the IC Exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as “commercial” hunts could potentially enter the EU market under the IC Exception. . . . Finally, we were not persuaded that the European Union has made “comparable efforts” to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a “recognized body” that fulfills all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.<sup>119</sup>

The Appellate Body would have done well to finish off with the point that the second step of the two-step test had matured fully into a “totality of factors,” but perhaps that was clear enough from its above-quoted list.

## 7. Commentary

### a. Too Long

Generally, “discrimination” is a dirty word in GATT-WTO law. The *Fur Seals* case teaches that what makes discrimination most pernicious is its arbitrariness or lack of justification. In legal terms, the MFN and national treatment principles in Articles I:1, III:1-2, and III:4 ban “discrimination.” But one of the exceptions in the ten-point list in Article XX allows it if it is

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<sup>119</sup> *Id.* ¶ 5.338.

“necessary” to protect “public morality,” and if it is not “arbitrary or unjustifiable.” “Public morality” includes animal welfare, and “necessity” essentially means there is no other reasonably available alternative to the trade-restrictive measure to promoting that welfare. If that measure is well-drafted, so that it advances its objective and eschews ambiguities, then the discrimination it causes is tolerated.

That is the case summary—that is it. Any well-trained second- or third-year law student in a respectable American J.D. program should be expected to “state the case” in this manner. From the leading multilateral adjudicatory body no less should be expected.

Yet, the Appellate Body Report consumes 194 pages (excluding an additional 14 pages of annexes) and 1,617 footnotes. Most of the pages and footnotes add at best moderate value to the resolution of the *Fur Seals* dispute, much less to the corpus of GATT-WTO jurisprudence.

How might the Appellate Body and the Secretariat improve decision-writing? Emailing passages of a report from different authors, collating them together, and rushing to get a document ready for translation into French and Spanish hardly makes for preserving the Queen’s English (which, it might be observed in an increasingly non-western age, still matters in India). What is needed is more careful, line-by-line editing: the question to be asked for every sentence—indeed, every word—is whether it adds substantive and/or stylistic value to the emerging body of common law of international trade? Consider this passage:

if the current *de facto* exclusivity of the IC Exception could be attributed entirely to private choice, there would be no “genuine relationship” between this exclusivity and the EU Seal Regime. . . . [T]he non-discrimination obligations in the covered agreements are only concerned with [in the words of the *Korea—Beef* Appellate Body Report] “governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member’s territory.” *We also recognize that, to the extent that the EU Seal Regime has an adverse effect on the Canadian Inuit by depressing the international market for seal products, this adverse effect would be experienced by the Greenlandic Inuit as well, and thus would not affect the conditions of competition between Canadian and Greenlandic Inuit.*<sup>120</sup>

Why is the final italicized sentence needed? Is it one of many examples where the Appellate Body could have shortened its Report. The thought the sentence expresses is not fully explained. The sentence is unconnected to the preceding

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<sup>120</sup> *Id.* ¶ 5.336 (emphasis added).

sentences of the same paragraph. The sentence fails to serve as a transition sentence to the subsequent paragraph. Why, then, is it there?

b. De Facto Stare Decisis Again and Mopping up a Spill over National Treatment

At first glance, the *Fur Seals* case seems innovative. It appears to deal with issues of first impression, especially animal rights and public morality. However, much of the Appellate Body Report is a routine application of precedent. That is most obvious for the question of whether the same legal standard in a non-discrimination claims under Article 2:1 of the TBT Agreement also applies to non-discrimination claims under Articles I:1 and III:4 of GATT.

The Appellate Body referred to a litany of its precedents. In this respect, the *Fur Seals* Report provides summaries that are useful in both pedagogy and practice as to how to mount a successful case under Article 2:1 vis-à-vis the GATT MFN and national treatment rules and what the essential elements are in those two rules. Quoted below is its MFN tutorial:

5.108. . . . [T]he Appellate Body, in *EC—Asbestos*, merely highlighted that the term “*treatment no less favorable*” in Article III:4 has a more *unfavorable* connotation than the drawing of distinctions between imported and domestic like products. WTO Members are free to impose different regulatory regimes on imported and domestic products, provided that the treatment accorded to imported products is *no less favorable* than that accorded to like domestic products. Thus, *Article III:4 does not require the identical treatment of imported and like domestic products, but rather the equality of competitive conditions between these like products*. In this regard, neither formally identical, nor formally different, treatment of imported and like domestic products necessarily ensures equality of competitive opportunities for imported and domestic like products. For this reason, the Appellate Body [in its 2001 *Korea—Beef* Report] has considered that:

A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated “less favourably” than like domestic products should be assessed instead by examining whether a measure *modifies the conditions of competition* in the relevant market to the detriment of imported products.

5.109. The proposition that distinctions may be drawn between imported and like domestic products without necessarily according less favorable treatment to the imported products implies only that the “treatment no less favorable” standard, under Article III:4, means something more than drawing regulatory distinctions between imported and like domestic products. There is, however, a point at which the differential treatment of imported and like domestic products amounts to “treatment no less favorable” within the meaning of Article III:4. The Appellate Body has demarcated where that point lies, in the following terms:

*the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favorably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is “less favorable” within the meaning of Article III:4.*

5.110. . . . [W]e do not agree with the European Union’s reading of the Appellate Body’s statement in *EC—Asbestos*. Specifically, *we do not consider that the Appellate Body’s statement that a Member may draw distinctions between imported and like domestic products without necessarily violating Article III:4 stands for the proposition that the detrimental impact of a measure on competitive opportunities for like imported products is not dispositive for the purposes of establishing a violation of Article III:4.*

. . . .

5.116. . . . [T]he term “treatment no less favorable” in Article III:4 requires effective equality of opportunities for imported products to compete with like domestic products. Thus, *Article III:4 permits regulatory distinctions to be drawn between products, provided that such distinctions do not modify the conditions of competition between imported and like domestic products.* Hence, a determination of whether imported products are treated less favorably than like domestic products involves an assessment of the implications of the contested measure for the *equality of competitive conditions* between imported and like domestic products. If the outcome of this assessment is that the measure has a *detrimental impact on the conditions of*

*competition* for like imported products, then such detrimental impact will amount to treatment that is “less favourable” within the meaning of Article III:4.

5.117. ... [T]he “treatment no less favourable” standard under Article III:4 of the GATT 1994 *prohibits WTO Members from modifying the conditions of competition* in the marketplace to the detriment of the group of imported products vis-à-vis the group of like domestic products. *We do not consider*, as argued by the European Union, *that for the purposes of an analysis under Article III:4, a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction*.<sup>121</sup>

In all events, the Appellate Body stressed the application of its familiar Vienna Convention approach to adjudication: namely, interpretations of TBT Agreement Article 2:1 and GATT Articles I:1 and III:4 were not the product of its own collective mind, but rather based on the text, the context of the text, and the object and purpose of the accords.<sup>122</sup>

As for the losing EU arguments, successful Canadian and Norwegian rebuttals, and Appellate Body findings concerning Article III:4, they were similar to those regarding Article I:1.<sup>123</sup> Briefly, the Panel held the legal standard for a non-discrimination claim under Article 2:1 of the TBT Agreement is not identical to the standard under GATT Article III:4. Under Article III:4, what matters is whether a disputed measure accords “treatment no less favorable” as to the competitive opportunities for imports vis-à-vis like domestic products. Objecting to this Panel finding, the EU repeated its argument from the MFN context and applied it to the national treatment context—just like proving a claim of non-discrimination under Article 2:1, it is necessary under Article III:4 to conduct an additional inquiry as to whether any detrimental impact of the measure on competitive opportunities for imported merchandise stems from a legitimate regulatory distinction.

Not so, Canada and Norway said, agreeing with the Panel; the legal standards are different. An Article III:4 claim never involves the question of whether a detrimental impact on imports stems exclusively from a legitimate regulatory distinction. Upholding the Panel, Appellate Body said the same:

The meaning of the term “treatment no less favorable” in Article III:4 has been considered by panels and the Appellate Body in

<sup>121</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶¶ 5.108-10, 5.116-17 (emphasis added).

<sup>122</sup> *Id.* ¶ 5.130.

<sup>123</sup> *Id.* ¶¶ 5.100-29. Discussion of the unsuccessful EU arguments about (1) possible divergent outcomes from the Panel holdings, and (2) GATT Article XX, is omitted.

prior disputes. As a result, the following propositions are well established. First, the term “treatment no less favorable” requires effective equality of opportunities for imported products to compete with like domestic products. Second, a formal difference in treatment between imported and domestic like products is neither necessary, nor sufficient, to establish that imported products are accorded less favorable treatment than that accorded to like domestic products. Third, because Article III:4 is concerned with ensuring effective equality of competitive opportunities for imported products, a determination of whether imported products are treated less favorably than like domestic products involves an assessment of the implications of the contested measure for the equality of competitive conditions between imported and like domestic products. If the outcome of this assessment is that the measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is “less favorable” within the meaning of Article III:4. Finally, for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a “genuine relationship” between the measure at issue and the adverse impact on competitive opportunities for imported products.

As it had with respect to its holding about the difference between the GATT MFN rule and Article 2:1 of the TBT Agreement, the Appellate Body in reaching this conclusion cited its own precedents—indeed, eight of them—plus a GATT Panel Report.<sup>124</sup>

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<sup>124</sup> The Appellate Body Reports were:

- (1) Appellate Body Report, *Japan—Alcoholic Beverages*, *supra* note 51, at 16;
- (2) Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶¶ 135-37, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) (*adopted* Jan. 10, 2001);
- (3) Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 19, WT/DS302/AB/R (Apr. 25, 2005) (*adopted* May 19, 2005);
- (4) Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 305, WT/DS363/AB/R (Dec. 21, 2009) (*adopted* Jan. 19, 2010);
- (5) Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶¶ 126, 128-29, 134, WT/DS371/AB/R (June 17, 2011) (*adopted* 15 July 2011);
- (6) Appellate Body Report, *Tuna Dolphin II*, *supra* note 55, at 87 n.457;

Succinctly put, there is no “legitimate regulation” exception to Article III:4, whereas there is for Article 2:1. Neither the text of Article III:4, nor the jurisprudence thereunder, extends beyond consideration of the detrimental effect of a measure on the competitive opportunities for imported articles to consideration of legitimate regulatory distinctions causing that effect. There is no additional inquiry under GATT, whereas there is under TBT Agreement under Article 2:1.

Arguably, the Appellate Body created the opportunity for the EU to make the argument it did, and thus may have sowed confusion for a few years. In the 2001 *Korea—Beef* and 2012 *COOL* cases, the Appellate Body said the test for determining whether the detrimental impact on competitive opportunities for imported products “is attributable to, or has a genuine relationship with,” the disputed measure, and the key question is whether a governmental measure affects the competitive conditions of imports with like domestic products. The EU read these precedents, along with the 2001 *Asbestos*, 2005 *Dominican Cigarettes*, and 2012 *Clove Cigarettes* cases, to mean that when deciding if a “genuine relationship” exists (i.e., whether the detrimental impact on competitive opportunities for imports is attributable to the disputed measure), it is permissible to ask if that impact stems exclusively from a legitimate regulatory distinction.<sup>125</sup> The EU interpretation was over-wrought. All that the Appellate Body meant by its “genuine relationship” point was causation: a claimant needs to show the disputed measures cause the differential competitive impact. The Appellate Body did not mean to create a “legitimate regulation” exception. With the 2014 *Fur Seals* Report, the Appellate Body mopped up the spill.

### c. Process Versus Product

What is the scope of application of the GATT-WTO regime regarding process and production methods (PPMs)? Theoretically, at one extreme is that GATT-WTO rules do not regulate PPMs, only products themselves. This extreme is supported by a narrow, textual approach that emphasizes the repeated use of the

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- (7) Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 176-79, WT/DS406/AB/R (Apr. 4, 2012) (adopted Apr. 24, 2012); and
  - (8) Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, ¶ 270, WT/DS384/AB/R, WT/DS386/AB/R (Oct. 20, 2014) (adopted July 23, 2012).

The GATT Panel Report was *United States Section 337 of the Tariff Act of 1930*, B.I.S.D. (36<sup>th</sup> Supp.) 345 at ¶ 5.10 (adopted Nov. 7, 1989). The Reports in 2001 *Korea—Beef*, 2005 *Dominican Cigarettes*, 2010 *China—Audiovisual Products*, 2011 *Thailand Cigarettes*, 2012 *Tuna Dolphin*, 2012 *Clove Cigarettes*, and 2012 *COOL*, are discussed in our *WTO Case Reviews* for 2001, 2005, 2010, 2011, and 2012, respectively.

<sup>125</sup> Appellate Body Report, *Fur Seals*, *supra* note 7, ¶ 5.105.

word “product,” or synonyms. The other extreme is that there is no choice but for the rules to cover PPMs. That is because of the substantive nature of those rules.

The rules raise important systemic issues (as the *Fur Seals* Appellate Body acknowledged), such as public morality (GATT Article XX(a)) and legitimate technical regulation (the TBT Agreement). If PPMs are not covered, then the force and effect of such GATT-WTO provisions could be undermined and WTO Members could be compelled to enact more trade restrictive measures than they otherwise would have. For instance, suppose it is lawful to ban imports of fur seal products if the seals are killed by two inhumane methods: gun shot or clubbing. Products derived from all other methods may be imported. Clearly, the ban is not on a product, but on two PPMs. Its object is to minimize inhumane killing and it is not as trade restrictive as a complete ban on all seal products. If a PPM-based ban is forbidden, then the only policy option left is the more trade restrictive one: a complete import prohibition.

A trade-restrictive measure based on a PPM is like a drone aimed at a particular target. While not always able to minimize civilian casualties, it is far less damaging than “carpet bombing” a district. The PPM-based measure can go far in advancing its objective, even if it has distasteful associations. In *Fur Seals*, the Appellate Body did not have the chance to resolve these sorts of systemic issues.<sup>126</sup>

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<sup>126</sup> See generally Fratini Vergano, *The WTO Appellate Body Issues Its Report in the EC – Seals Products Disputes*, TRADE PERSPECTIVES, May 30, 2014, available at <http://www.fratinivergano.eu/Trade%20perspectives%202014/14.05.30%20TP%20Issue%2011.pdf> (summarizing the *Fur Seals* Appellate Body findings and discussing the systemic PPM problem).



## **B. WTO Accession Commitments and GATT Obligations: 2014 *China Rare Earths Case***

### 1. Citation

Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 29, 2014) (*adopted* 29 August 2014).<sup>127</sup>

### 2. Background

This case concerned the validity of Chinese measures regarding export duties and export quotas on rare earth elements, tungsten, and molybdenum. Rare earths comprise seventeen elements on the Periodic Table, namely the fifteen chemical elements in the lanthanide group, scandium, and yttrium. Rare earth elements are often clumped together underground due to the nature of their weight, composition, and other properties, making them difficult to extract and separate. These elements are found throughout the world, but only a few countries have commercially viable reserves. China is the largest producer of rare earths in the world and in 2012 supplied approximately ninety-seven percent of rare earths, ninety-one percent of tungsten, and thirty-six percent of molybdenum.<sup>128</sup> In 2011, the U.S. Department of the Interior estimated China held half of the world's reserves,<sup>129</sup> but China has contended it has less than a

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<sup>127</sup> Hereinafter Appellate Body Report—*China Rare Earths*.

The Appellate Body issued, and the DSB adopted, the three Reports on the same day. For nearly all purposes, the Appellate Body treated the three disputes as one. It explained in a footnote on the first page of its Report that the cover page, preliminary pages, Sections 1-5, and Annexes were the same, but there were minor differences across the Reports in Section 6 (Findings). Essentially, those differences reflected the idiosyncrasies of the complaint and complainant, so unless otherwise noted herein, they are not pertinent to the discussion or analysis.

The Panel Reports in the case were *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014) (*adopted* Aug. 29, 2014) [hereinafter, Panel Report—*China Rare Earths*].

On appeal, the following WTO Members were third party participants: Argentina; Australia; Brazil; Canada; Colombia; European Union; Korea; Norway; Russia; Saudi Arabia; and Turkey. The presence of Russia is notable, as it acceded to the WTO just two years before the Appellate Body adopted this Report.

<sup>128</sup> See Daniel Pruzin, *WTO Director-General Appoints Panelists to Rule on China Rare Earths Complaints*, 29 INT'L TRADE REP. (BNA) 1584 (2012).

<sup>129</sup> See PUI-KWAN TSE, U.S. DEP'T OF THE INTERIOR, CHINA'S RARE EARTH INDUSTRY (2011), available at <http://pubs.usgs.gov/of/2011/1042/of2011-1042.pdf>.

quarter of global reserves and its most accessible reserves have been depleted.<sup>130</sup> Rare earths are used in a variety of everyday electronic products, including flat panel displays on smartphones and laptops and medical devices like x-ray machines. They are important inputs for “green technologies,” such as rechargeable batteries for hybrid and electric vehicles and generators for wind turbines and are also used in many military devices.

The three major issues before the Panel were (1) whether the use of export duties on rare earths, molybdenum, and tungsten by China violated Paragraph 11.3 of Part I of the Protocol on the Accession of the People’s Republic of China (Chinese Accession Protocol); (2) whether the use of export quotas on rare earths, molybdenum, and tungsten by China violated Article XI:1 of the GATT and Paragraph 1.2 of Part I of the Chinese Accession Protocol (which incorporates Paragraphs 162 and 165 of the Report of the Working Party on the Accession of China); and (3) whether the administration and allocation of export quotas on rare earths and molybdenum by China violated Paragraphs 5.1 and 1.2 of Part I of the Chinese Accession Protocol (which incorporates Paragraphs 82 and 83 of the Working Party on the Accession of China).<sup>131</sup> Ultimately, China lost all three issues.<sup>132</sup>

The measures at issue on appeal primarily concerned the Chinese export quotas. The Chinese Foreign Trade Law permits export quotas on products in certain circumstances, such as for the protection of the environment or human life or health.<sup>133</sup> The Ministry of Commerce of the People’s Republic of China (MOFCOM) regulates export quotas and must publicize annual quota amounts for the preceding year pursuant to the Regulations on the Administration of the Import and Export of Goods. Other relevant laws and regulations include the Export Quota Administration Measures and criminal and administrative penalties.<sup>134</sup> China accepted that its export quotas violated Article XI:1 of the GATT, and on appeal it sought to overturn Panel findings that led the Panel to determine China could not justify the measures under Article XX(g).

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<sup>130</sup> INFORMATION OFFICE OF THE STATE COUNCIL, SITUATION AND POLICIES OF CHINA’S RARE EARTH INDUSTRY (2012), *available at* [http://news.xinhuanet.com/english/business/2012-06/20/c\\_131665123.htm](http://news.xinhuanet.com/english/business/2012-06/20/c_131665123.htm).

<sup>131</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 1.4.

<sup>132</sup> *Id.* ¶ 6.

<sup>133</sup> *Id.* ¶ 4.6.

<sup>134</sup> *Id.* ¶¶ 4.6, 4.9.

### 3. Overview of Key Appellate Issues

China submitted three main issues on appeal.<sup>135</sup> The first issue concerned the relationship between the Chinese Accession Protocol and the Marrakesh Agreement Establishing the World Trade Organization (Marrakesh Agreement), including its Multilateral Trade Agreement annexes. In *China—Raw Materials*, the Appellate Body held Article XX of the GATT could not justify violations of Paragraph 11.3 of the Chinese Accession Protocol.<sup>136</sup> In the present case, China again faced a violation of Paragraph 11.3 of its Accession Protocol. Before the Panel, China accepted that its export duties violated its Accession Protocol, but sought to justify the violation under GATT Article XX and raised four new legal arguments for the Panel to consider. However, all four arguments were ultimately rejected.<sup>137</sup> The first appeal in *China—Rare Earths* concerns the second of the new legal arguments, namely, that the Chinese Accession Protocol is an integral part of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, and furthermore, the individual provisions of the Chinese Accession Protocol are “integral part[s] of one of the Multilateral Trade Agreements.”<sup>138</sup> Notably, this appeal did not seek to overturn the holding by the Panel that GATT Article XX exceptions cannot be used to justify violations under Paragraph 11.3 of the Chinese Accession Protocol.<sup>139</sup> The Appellate Body did not accept the interpretation set forth by China, and the appeal was lost.

The second and third Chinese appeals concerned the Panel findings that Chinese export quotas on rare earths, tungsten, and molybdenum do not meet the GATT Article XX(g) requirements “relating to” conservation and “made effective in conjunction with” domestic restrictions.<sup>140</sup> In other words, China failed step one of the two-step test under Article XX. Before the Appellate Body, China claimed the Panel did not correctly interpret or apply these two requirements. Specifically, China asserted that the Panel failed to recognize its export quotas act as “conservation-related signals” to foreign producers and consumers, indicating they should diversify their supply base and look for substitutes.<sup>141</sup> China also asserted that the Panel incorrectly added an “even-handedness” requirement that would require the burden of the domestic restriction and restriction on international trade to be balanced evenly between domestic producers and consumers and foreign producers and consumers.<sup>142</sup> Furthermore, China

<sup>135</sup> China also raised several appeals concerning Article 11 of the Dispute Settlement Understanding (DSU). See *id.* ¶¶ 5.176-258. China lost the DSU Article 11 appeals upon which the Appellate Body decided to rule. See *id.* ¶ 5.258.

<sup>136</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.4.

<sup>137</sup> *Id.* ¶ 5.5.

<sup>138</sup> *Id.* ¶ 5.8(a).

<sup>139</sup> *Id.* ¶ 5.2.

<sup>140</sup> *Id.* ¶ 3.1(c)(i)-(ii).

<sup>141</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.81.

<sup>142</sup> *Id.* ¶ 5.119.

requested a reversal of the Panel conclusion that GATT Article XX(g) cannot justify the Chinese export quotas if the Appellate Body found the Panel mistakes “tainted” that conclusion.<sup>143</sup> Although the Appellate Body agreed there is no additional “even-handedness” requirement, it found this error by the Panel inconsequential. China lost both of these appeals.

4. Issue 1: Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of Chinese Accession Protocol

The Panel found the Chinese Accession Protocol, in its entirety, is part of the Marrakesh Agreement, but its individual provisions are not integral parts of the annexed Multilateral Trade Agreements.<sup>144</sup> This intermediate finding by the Panel led to its ultimate holding that GATT Article XX exceptions do not apply to violations of Paragraph 11.3 of the Chinese Accession Protocol. On appeal, China asserted that the Panel misinterpreted Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of the Chinese Accession Protocol, arguing that instead the Panel should have conducted a more “holistic” reading of these provisions.<sup>145</sup> The Chinese also offered an “intrinsic relationship” test, whereby a panel or an Appellate Body confronted with a possible violation of an Accession Protocol would first determine which Multilateral Trade Agreement the provision relates to “intrinsically” and, second, must treat “that provision . . . as an integral part of the related covered agreement.”<sup>146</sup>

Article XII:1 of the Marrakesh Agreements states, with emphasis added:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. *Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.*

Paragraph 1.2 of the Chinese Accession Protocol states, with emphasis added:

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<sup>143</sup> *Id.* ¶ 5.75.

<sup>144</sup> One panelist issued a separate opinion, stating the “close relationship” between Paragraph 11.3 of the Chinese Accession Protocol and GATT Articles II and IX:1 established Paragraph 11.3 as an “integral part” of the GATT, and thus the right to invoke GATT Article XX exceptions applies to violations under Paragraph 11.3 unless China gave up that right, which it did not.

<sup>145</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶¶ 5.8(a), 5.13.

<sup>146</sup> *Id.* ¶ 5.13.

The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. *This Protocol*, which shall include the commitments referred to in paragraph 342 of the Working Party Report, *shall be an integral part of the WTO Agreement*.

The Appellate Body upheld the finding by the Panel.<sup>147</sup> Contrary to the Chinese argument, the Appellate Body found neither Article XII:1 of the Marrakesh Agreement nor Paragraph 1:2 of the Chinese Accession Protocol could definitively answer the issue on appeal.<sup>148</sup> The Appellate Body determined that Article XII:1 “provides the general rule” for WTO accession and Paragraph 1.2 makes the “Accession Protocol, in its entirety, an integral part” of a single WTO package.<sup>149</sup> The Appellate Body focused on the phrase “integral part,” in Paragraph 1.2 of the Chinese Accession Protocol and determined that this phrase “serves to build a bridge between the package of Protocol provisions and the existing package of WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements,”<sup>150</sup> but “neither obligations nor rights may be automatically transposed from one part of this legal framework to another.”<sup>151</sup>

The Appellate Body also rejected the “intrinsic relationship” test proposed by the Chinese, and instead the Appellate Body considered whether an Accession Protocol provision is linked to a Multilateral Trade Agreement annexed to the Marrakesh Agreement requires the type of careful analysis undertaken by the Appellate Body in *China—Raw Materials* and *China—Publications and Audiovisual Products*.<sup>152</sup> Specifically, the Appellate Body found the analysis must be based on “customary rules of treaty interpretation and the circumstances of the dispute.”<sup>153</sup> The “analysis must start with the text of the relevant provision in [the Chinese] Accession Protocol and take into account its context,” including all relevant provisions in the Accession Working Party Report and WTO Agreements, and consider “the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretive elements.”<sup>154</sup> The Appellate Body emphasized that the analysis “must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.”<sup>155</sup>

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<sup>147</sup> *Id.* ¶ 5.73.

<sup>148</sup> *Id.* ¶¶ 5.34, 5.51.

<sup>149</sup> *Id.* ¶¶ 5.34, 5.72.

<sup>150</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.50.

<sup>151</sup> *Id.* ¶ 5.74.

<sup>152</sup> *See id.* ¶ 5.63.

<sup>153</sup> *Id.* ¶ 5.74.

<sup>154</sup> *See id.*

<sup>155</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.74.

### 5. Issue 2: GATT Article XX(g) “Relating To” Conservation

The second Chinese appeal concerned the determination by the Panel that the Chinese export quotas on rare earths, tungsten, and molybdenum do not meet the “relating to” conservation requirement of GATT Article XX(g), and thus cannot be justified.<sup>156</sup> Article XX(g) of the GATT (and its *chapeau*) states, with emphasis added:

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

...

- (g) *relating to* the conservation of exhaustible natural resources if such measures are *made effective in conjunction with restrictions on domestic production or consumption*. . . .

Before addressing the claims raised by China on appeal, the Appellate Body began its analysis by reviewing explanations of Article XX(g) in previous Appellate Body Reports.<sup>157</sup> This Appellate Body found:

In sum, Article XX(g) permits the adoption or enforcement of trade measures that have “a close and genuine relationship of ends and means” to the conservation of exhaustible natural resources, when such trade measures are brought into operation, adopted or applied and “work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.” In order to justify a measure pursuant to Article XX(g), a WTO Member must show that it satisfies all the requirements set out in that provision. Indeed, the text of Article XX(g), particularly its use of the conjunctive “if,” suggests a holistic assessment of its component elements. . . .<sup>158</sup>

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<sup>156</sup> See *id.* ¶¶ 5.102, 5.142.

<sup>157</sup> See *id.* ¶¶ 5.84-101.

<sup>158</sup> *Id.* ¶ 5.94 (quoting Appellate Body Report, *U.S.—Shrimp*, *supra* note 80, ¶ 136; Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 356, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) (*adopted* Feb. 22, 2012)).

In addition, the Appellate Body emphasized:

Assessing a measure based on its design and structure is an objective methodology that also helps determine whether or not a measure does what it purports to do. . . . The analysis of a measure's design and structure allows a panel or the Appellate Body to go beyond the text of the measure and either confirm that the measure is indeed related to conservation, or determine that, despite the text of the measure, its design and structure reveals that it is not genuinely related to conservation.<sup>159</sup>

The Appellate Body noted the importance of also considering the market conditions that typically influence the way in which a Member designs and structures its measures.<sup>160</sup> It also pointed out *US—Gasoline* established that an “empirical effects test” is not a necessary part of the analysis under Article XX(g).<sup>161</sup>

#### a. Interpretation of “Relating to” Conservation

Before the Panel, China acknowledged its export quotas on rare earths, molybdenum, and tungsten violated Article XI:1 of the GATT, but it sought to justify them under the Article XX(g) exception. On appeal, China sought to overturn an unfavorable Panel finding concerning the Chinese argument that its export quotas on rare earths and tungsten “relate to” conservation because they signal to producers and consumers that they should find alternate supply sources and seek substitutes.<sup>162</sup>

According to China, the Panel mistakenly interpreted the “relating to” conservation requirement to mean that a panel can only assess whether the design and structure of the challenged measure is closely and genuinely related to its purported objective,<sup>163</sup> and the Panel erroneously focused on the design and structure of the measure to the detriment of other factors, such as market effects.<sup>164</sup> China argued that, if a panel could not find a measure is “related to” conservation based on its text, design, and structure, then it should look at how the measure at issue operates in practice unless there is insufficient data. China also asserted that the “contribution test” of GATT Article XX(a), (b), and (d) may be

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<sup>159</sup> *Id.* ¶ 5.96.

<sup>160</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.97.

<sup>161</sup> *Id.* ¶ 5.98 (citing Appellate Body Report, *U.S.—Gasoline*, *supra* note 80).

<sup>162</sup> *Id.* ¶ 5.81.

<sup>163</sup> *Id.* ¶¶ 5.105, 5.107.

<sup>164</sup> *Id.*

used to determine “whether there is a close and genuine relationship of ends and means between the measure at issue and the conservation objective.”<sup>165</sup>

The Appellate Body found that the Panel did not err in its interpretation of the “relating to” conservation requirement. It quickly determined that China mischaracterized the interpretation by the Panel and stated that in fact the Panel stressed that the “relating to” conservation requirement requires a case-by-case determination that includes a “holistic” examination of the challenged measure including the “factual and legal context.”<sup>166</sup> Furthermore, the Appellate Body said, at no point did the Panel state that it was precluded from assessing the market effects of the challenged measure.<sup>167</sup>

The Appellate Body, referencing its findings concerning Article XX(g) (summarized above), also determined that the Panel’s emphasis on the design and structure of the challenged measure was not wrong, stating that the Panel was not required to assess the effects of the measure, although it was also not precluded from doing so.<sup>168</sup> Additionally, the Appellate Body addressed the conflation of the “necessity” test linked to Article XX(b)<sup>169</sup> and pointed to previous findings that the distinctions between the connecting words “necessary” and “relating to” require different tests, and “mixing of the different tests under Article XX(b) and Article XX(g), absent of context, would result in an approach that ignores the important distinctions between the various subparagraphs of Article XX.”<sup>170</sup> The Appellate Body stated that it is conceivable in some cases that the addition of the Article XX(b) “contribution” test could help in determining whether a “close and genuine relationship” exists between the challenged measure and its purported conservation objective for the purposes of the Article XX(g) “relating to” test.<sup>171</sup>

#### b. Application of “Relating To” Conservation Requirement

The Chinese argument on appeal concerning the application of the “relating to” conservation requirement focused on the “signaling function” of the export quotas. The Panel found that, although the export quotas may “signal to the world its limited resources and conservation policy,” they could also send a “perverse” signal to increase domestic consumption that could not be offset by Chinese measures concerning domestic production caps or its conservation policy.<sup>172</sup> On

<sup>165</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.105.

<sup>166</sup> *Id.* ¶ 5.108 (quoting Panel Report—*China Rare Earths*, *supra* note 127, ¶¶ 7.292, 7.363).

<sup>167</sup> *Id.* ¶ 5.109.

<sup>168</sup> *See id.* ¶ 5.114.

<sup>169</sup> *See id.* ¶ 5.116 (noting that article XX(b) concerns measures “‘necessary’ to protect human, animal or plant life or health” (emphasis added)).

<sup>170</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶¶ 5.115-16.

<sup>171</sup> *Id.* ¶ 5.116-17.

<sup>172</sup> *Id.* ¶¶ 5.143, 5.149.



appeal, China argued that the Panel failed to “go beyond an examination of the design and structure of [the Chinese] export quotas on rare earths and tungsten” and that the Panel should have determined whether the perverse signals actually existed or if the risk of perverse signals was real.<sup>173</sup> China asserted that even if the perverse signals do exist, the Panel failed to consider “evidence on how [the Chinese] measures work as part of [the Chinese] comprehensive conservation policy,” specifically the Chinese domestic production caps and their effects.<sup>174</sup> The Appellate Body noted the narrow scope of the appeal in that it “takes issues with only limited aspects of the reasoning underlying these findings” and that even if the Chinese appeal were successful, it would not, as acknowledged by China, “affect the ultimate conclusion of the Panel under Article XX(g).”<sup>175</sup> The Appellate Body clarified that the “main concern [of China] in challenging these Panel findings is that they suggest that export quotas are per se incapable of justification under Article XX of the GATT 1994.”<sup>176</sup>

The Appellate Body quickly determined that the focus by the Panel on the design and structure of the challenged measures did not constitute an error in its application of the “relating to” conservation requirement of Article XX(g).<sup>177</sup> Furthermore, the Appellate Body noted that the Panel generally found export quotas could send conservation signals to foreign producers and consumers, but “the Panel did not find that [the Chinese] export quotas do send such signals, much less that such signals are “effective.”<sup>178</sup> In addition, the Appellate Body noted that the Panel actually did consider the Chinese evidence in question. According to the Appellate Body, the Panel reasonably found, “as a matter of design and structure,” that the domestic production caps on rare earths and tungsten are not “capable of mitigating” the perverse signals generally sent out by export quotas to domestic consumers.<sup>179</sup>

#### 6. Issue 3: GATT Article XX(g) “Made Effective in Conjunction With” Domestic Restrictions

The third claim raised by China on appeal concerned the interpretation and application of the GATT Article XX(g) requirement “made effective in conjunction with” domestic restrictions.<sup>180</sup>

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<sup>173</sup> *Id.* ¶5.151.

<sup>174</sup> *Id.*

<sup>175</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.146.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* ¶ 5.152.

<sup>178</sup> *Id.* ¶ 5.156.

<sup>179</sup> *Id.* ¶¶ 5.157-59.

<sup>180</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.163.

a. Interpretation of the Phrase “‘Made Effective in Conjunction with’ Domestic Restrictions”

On appeal, China claimed that the Panel misinterpreted the phrase “made effective in conjunction with domestic restrictions” by (1) imposing an extra “even-handedness” requirement that requires “the burden of conservation-related measure be distributed in a balanced way between domestic and foreign consumers or producers,” and (2) limiting the assessment to the design and structure of the export quotas at issue and neglecting evidence regarding the effect of the measures.<sup>181</sup> According to China, “even-handedness,” as it relates to GATT Article XX(g), merely “refer[s] to the fact that the restrictions on imports or exports must work ‘in conjunction with’ domestic restrictions.”<sup>182</sup> China also asserted that the Panel precluded itself from engaging in an assessment beyond the design and structure of the challenged measures.<sup>183</sup>

The Appellate Body first looked at the issue of the “even-handedness” requirement. In accordance with *US—Gasoline*, the Appellate Body stated that “evenhandedness” in the context of Article XX(g) is not an additional obligation, but simply requires that the challenged measures apply to both to international trade and domestic production and consumption.<sup>184</sup> The Appellate Body also stated that “made effective in conjunction with restrictions on domestic production or consumption” requires that the challenged measures be imposed on domestic producers and consumers in a “real” way—as opposed to “existing merely ‘on the books,’”—and that the domestic restrictions “reinforce and complement the restriction on international trade.”<sup>185</sup> The Appellate Body also noted that, nevertheless, “it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g).”<sup>186</sup> The Panel Report proved to be unclear and inconsistent regarding an even-handedness requirement, so the Appellate Body determined the Panel erred to the extent that it found (1) a separate “even-handedness” requirement<sup>187</sup> and (2) that the burden of conservation must be evenly distributed between domestic producers and consumers and foreign consumers.<sup>188</sup> However, the Appellate Body noted that these two interpretative errors clearly did not “taint” the other elements of the phrase “made in conjunction with” domestic restrictions, which were correctly interpreted by the panel.<sup>189</sup>

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<sup>181</sup> *Id.* ¶¶ 5.119-20.

<sup>182</sup> *Id.* ¶ 5.120.

<sup>183</sup> *See id.* ¶ 5.140.

<sup>184</sup> *Id.* ¶ 5.124.

<sup>185</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.136.

<sup>186</sup> *Id.* ¶ 5.134.

<sup>187</sup> *Id.* ¶¶ 5.127, 5.141.

<sup>188</sup> *See id.* ¶¶ 5.136, 5.141.

<sup>189</sup> *Id.* ¶ 5.141.

Finally, the Appellate Body determined that the Panel did not err in focusing its assessment on the design and structure of the challenged measure. The Appellate Body referred to its earlier assessment of Article XX(g), which allows for an emphasis on the design and structure of a measure at issue and does not require a panel to look at the actual or predicted effects of the challenged measure.<sup>190</sup> Thus, the Appellate Body found that the Panel did not error in focusing on the design and structure of the challenged measure or in noting an “effects test” was not required.<sup>191</sup>

b. Application of “Made Effective in Conjunction with” Requirement

China claimed that the Panel misapplied the GATT Article XX(g) requirement “made effective in conjunction with” domestic restrictions and erred in applying an additional “even-handedness” obligation that requires the burden of conservation to be evenly distributed between domestic and foreign users.<sup>192</sup> The Appellate Body determined that the Panel did not actually assess whether the burden of conservation measures was evenly distributed between domestic producers and consumers and foreign consumers.<sup>193</sup> Instead, the Panel discovered that the challenged measures simply “had no domestic counterpart,” and therefore that it had no need to assess whether the burden of the measures was evenly distributed.<sup>194</sup> Thus, the Panel grounded its findings in the “absence of restrictions imposed on domestic producers or consumers.”<sup>195</sup> In addition, the Appellate Body found that, “with respect to each product, the Panel correctly referred to the requirement that the export quota must ‘work together’ with domestic restrictions.”<sup>196</sup> Consequently, the Appellate Body determined that, “despite certain flaws” in the interpretation of the phrase “made in conjunction with” domestic restrictions, the Panel did not misapply the requirement and the Panel findings related to the application of Article XX(g) would remain in place.<sup>197</sup>

In January 2015, China reported that it would maintain its export license requirements on rare earths, but it dropped the export restrictions deemed to violate its obligations under the WTO. At the same time, “Chinese officials have expressed hope foreign manufacturers that use rare earths will shift production to

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<sup>190</sup> See Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.138.

<sup>191</sup> See *id.* ¶ 5.139.

<sup>192</sup> See *id.* ¶ 5.163.

<sup>193</sup> See *id.* ¶ 5.167.

<sup>194</sup> *Id.* ¶¶ 5.167-68.

<sup>195</sup> Appellate Body Report—*China Rare Earths*, *supra* note 127, ¶ 5.167.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* ¶ 5.169.

China and give technology to local partners.”<sup>198</sup> This request reflects a long-term policy goal of China to further develop its supply chains and move more into downstream commercial activities.<sup>199</sup>

## 7. Commentary

### a. National Security Implications

Rare earth elements are critical inputs for the strongest permanent magnets currently available, which are used in military devices such as missile guidance systems, satellites, and anti-missile defense.<sup>200</sup> From 2006 until 2009, the United States was completely dependent upon imports for rare earth elements, with ninety-two percent of its supply from China.<sup>201</sup> Due to the importance of rare earths in military devices, many countries and producers have expressed concerns about Chinese influence over the rare earths market from a national security standpoint. In 2010, China stopped exports of rare earths to Japan after Japan arrested Chinese fishermen near islands involved in a Sino-Japanese territorial dispute. This embargo increased the international price for rare earths because Japan was “the largest importer of rare earths in the world, and obtain[ed] 82 percent of its rare earths from China.”<sup>202</sup> Additionally, in the mid-to-late 2000s, China tightened its export controls on rare earths as its domestic demand increased, which caused the world price of rare earths to jump.<sup>203</sup> In response, producers of rare earth products, like Japanese automobile companies, have begun to seek ways to diversify their supply chains away from China.<sup>204</sup> Due to the importance of rare earths for military devices, the Chinese control over the global

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<sup>198</sup> *China Scraps Quotas on Rare Earths After WTO Complaint*, GUARDIAN (Jan. 5, 2015, 3:10 PM), <http://www.theguardian.com/world/2015/jan/05/china-scraps-quotas-rare-earth-wto-complaint>.

<sup>199</sup> See N.V., *The Difference Engine: More Precious than Gold*, ECONOMIST (Sep. 17, 2010, 6:22 PM), [http://www.economist.com/blogs/babbage/2010/09/rare-earth\\_metals](http://www.economist.com/blogs/babbage/2010/09/rare-earth_metals).

<sup>200</sup> See MARC HUMPHRIES, CONG. RESEARCH SERV., R41347, RARE EARTH ELEMENTS: THE GLOBAL SUPPLY CHAIN 7 (2013), available at <https://www.fas.org/sgp/crs/natsec/R41347.pdf>.

<sup>201</sup> See Sarah Simpson, *Afghanistan's Buried Riches*, SCI. AM., Oct. 2011, at 58, available at [http://afghanistan.cr.usgs.gov/downloadfile.php?file=AfghanistansBuriedRiches\\_09-29-11.pdf](http://afghanistan.cr.usgs.gov/downloadfile.php?file=AfghanistansBuriedRiches_09-29-11.pdf).

<sup>202</sup> Shannon B. Keating & Raj Bhala, *When Are Rare Earths Raw Materials? Emerging GATT-WTO Jurisprudence on Export Restraints*, 19 INT'L TRADE L. & REG. 1, 6 (2013).

<sup>203</sup> See *China Scraps Quotas on Rare Earths After WTO Complaint*, *supra* note 198.

<sup>204</sup> See Steve Gorman, *As Hybrid Cars Gobble Rare Metals, Shortage Looms*, REUTERS (Aug. 31, 2009), <http://www.reuters.com/article/2009/08/31/us-mining-toyota-idUSTRE57U02B20090831>.

supply of rare earth elements also has led many countries, including the United States, to push for the discovery of new and alternative reserves.

#### b. Economic Adjustment Through New Supply Sources

Demand for rare earths is only expected to increase, and fears of shortages from China, whether man-made or natural, have led some countries to stockpile rare earths and, as mentioned, look for alternate supply bases.<sup>205</sup> These efforts to diversify supply sources are seemingly starting to make an impact. In 2013, China supplied approximately eighty-five percent of rare earths, down from ninety-five percent in 2012.<sup>206</sup>

Producers have been re-examining closed rare earths mines and looking into areas with newly confirmed rare earth reserves, including the Taliban-controlled southern region of Afghanistan. Rare earth mining in Afghanistan poses both a challenge and opportunity in a country of strategic national interest to the United States.<sup>207</sup> The United States is hopeful that ongoing, successful mining operations of rare earths in the northern region will divert commercial activity away from opium and help stimulate foreign investment in rare earths mines, including in the South. While mining potentially could contribute to the economic development of Afghanistan, many challenges remain, from overcoming high barriers to entry to inadequate rule of law and large infrastructure gaps (both hard and soft). Furthermore, although some estimates predict one “large mine could provide jobs for tens of thousands of Afghans,” rare earths mines also are often linked with grave human health issues and significant environmental damage and serious concerns about the “resource curse” loom.<sup>208</sup>

In the future, recycled rare earths could be a significant supply source, which is extremely welcome news for those concerned about the detrimental impact of rare earths extraction on the environment and human and animal health. New advances in recycling technology at the University of Leuven in Belgium have led the researchers to estimate “roughly 20 percent of global demand” could be met through recycling in the future.<sup>209</sup> Until then, previously closed mines in California and a number of countries, including Australia, Brazil, and South

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<sup>205</sup> See *EU Stockpiles Rare Earths as Tensions with China Rise*, FIN. POST (Sept. 6, 2011), <http://business.financialpost.com/2011/09/06/eu-stockpiles-rare-earths-as-tensions-with-china-rise/>.

<sup>206</sup> See Anna-Katarina Gravgaard, *Greenland's Rare Earths Gold Rush*, FOREIGN AFF. (Oct. 28, 2013), <http://www.foreignaffairs.com/features/letters-from/greenlands-rare-earths-gold-rush>.

<sup>207</sup> See Simpson, *supra* note 201, at 58, 60, 64.

<sup>208</sup> *Id.*

<sup>209</sup> *New Liquid Extraction Frontier for Rare Earths?*, RECYCLING INT'L (Mar. 26, 2013), <http://www.recyclinginternational.com/recycling-news/6976/research-and-legislation/belgium/new-liquid-extraction-frontier-rare-earths>.

Africa, are restarting their operations to bring additional sources of rare earths online. Some governments hope to attract foreign investment to start new mines, like in Greenland<sup>210</sup> and Tanzania. In addition to opening up underground mines, producers are also exploring undersea mining opportunities. Japan seeks to exploit undersea mud beds containing large deposits of rare earths where Japanese geologists estimate that “[o]ne square patch of metal-rich mud 2.3 kilometers wide might contain enough rare earths to meet most of the global demand for a year.”<sup>211</sup> This discovery and others like it also will raise important questions regarding the adequacy of current laws and regulations on undersea mining operations as well as the impact of undersea mining on other marine commercial activities and the environment.

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<sup>210</sup> See Gravgaard, *supra* note 206; see also Carol Matlack, *Chinese Workers – In Greenland?*, BLOOMBERGBUSINESS (Feb. 10, 2013), <http://www.bloomberg.com/bw/articles/2013-02-10/chinese-workers-in-greenland>.

<sup>211</sup> Devin Powell, *Rare Earth Elements Plentiful in Ocean Sediments*, SCI. NEWS (Jul. 3, 2011), <https://www.sciencenews.org/article/rare-earth-elements-plentiful-ocean-sediments>.

**C. Trade Remedies—Antidumping and Countervailing Duties: 2014 China AD-CVD Case**

1. Citation

Appellate Body Report, *United States—Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/AB/R (July 7, 2014) (*adopted* July 22, 2014).<sup>212</sup>

2. Facts

The scope of the dispute encompasses a complaint by China with respect to measures taken by the United States, where the United States applied countervailing duties (CVDs) to imports from non-market economy (NME) countries (including China), and the failure by the United States to investigate and avoid double remedies in certain CVD and anti-dumping (AD) duty investigations.<sup>213</sup>

The U.S. statute challenged by China was Section 1 of U.S. Public Law No. 112-99, which introduced Section 701(f) of the United States Tariff Act of 1930 (U.S. Tariff Act).<sup>214</sup> At the panel stage, China also challenged the failure of U.S. authorities to investigate and avoid double remedies in twenty-six CVD investigations and reviews initiated between November 20, 2006 and March 13, 2012.<sup>215</sup> As established under Section 1 of U.S. Public Law No. 112-99 and as described by the Appellate Body:

Section 701(f) of the U.S. Tariff Act, which is established by [Section 1 of U.S. Public Law No. 112-99], applies the [CVD] provisions of the U.S. Tariff Act to NME countries, except in cases where “the administering authority is unable to identify and measure subsidies provided by the government of the [NME] country or a public entity within the territory of the

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<sup>212</sup> Hereinafter Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*. The Panel Report in the case was Panel Report, *United States—Countervailing and Anti-dumping Measures on Certain Products from China*, WT/DS449/R (Mar. 27, 2014) (*adopted* July 22, 2014) [hereinafter Panel Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*].

On appeal and at the Panel stage the following WTO Members were third party participants in the dispute: Australia; Canada; the European Union; Japan; Turkey; Viet Nam; India; and the Russian Federation.

<sup>213</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 1.1.

<sup>214</sup> Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, 126 Stat. 265 (2012).

<sup>215</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 1.2.

[NME] country because the economy of that country is essentially comprised of a single entity.<sup>216</sup>

In relevant part, and with respect to China's claims under Article X of the WTO General Agreement on Tariffs and Trade 1994 (GATT) concerning Section 1 of U.S. Public Law No. 112-99, the Panel found that:

- (a) The United States did not act inconsistently with Article X:1 of the GATT because Section 1 was "made effective" and published by the United States on March 13, 2012;
- (b) although, through Section 1(b) and relevant determinations or actions made or taken by the United States between November 20, 2006 and March 13, 2012, in respect of imports from China, the United States enforced Section 1 before it had been officially published, the United States did not act inconsistently with Article X:2 of the GATT because Section 1 does not "effect an advance in a rate of duty or other charge on imports under an established and uniform practice, or impos[e] a new or more burdensome requirement, restriction, or prohibition on imports;" and
- (c) the United States did not act inconsistently with Article X:3(b) of the GATT, because said provision does not prohibit a WTO Member from taking legislative action in the nature of Section 1 of U.S. Public Law No. 112-99.<sup>217</sup>

### 3. Overview of the Key Appellate Issue

The scope of the complaints encompasses three WTO agreements, including the GATT, the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). However, on appeal, the main substantive issues that emerged fell only within the scope of the GATT.<sup>218</sup>

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<sup>216</sup> *Id.* ¶ 1.3.

<sup>217</sup> *Id.* ¶ 1.7.

<sup>218</sup> On appeal, China also challenged procedural aspects of the Panel Report under Articles 6.2 and 11 of the DSU. During the panel stage of the dispute, the United States undertook a procedural challenge against the claims made by China and those contained in its request for the establishment of a panel. In particular, the United State argued that Parts C and D of China's panel request failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" under Article 6.2 of the DSU because the request merely listed articles of the SCM Agreement, the WTO Agreement on Antidumping, and the GATT relevant to over sixty American CVD and AD cases. Preliminary Ruling by the Panel, *United States—Countervailing and Anti-dumping Measures on Certain Products from China*, ¶¶ 1.1-1.2, 7.1 WT/DS449/4 (May 7, 2013). The Appellate Body spent approximately fourteen pages addressing this issue, which may



In particular, the main issue addressed on appeal dealt with whether the Panel erred in finding that the United States did not act inconsistently with Article X:2 of the GATT. The Appellate Body specifically addressed whether the Panel erred in the interpretation and application of Article X:2 of the GATT in three parts. First, it examined the baseline of comparison for measures of general application “effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports.” Second, it addressed the findings of the Panel that China failed to establish that Section 1 of U.S. Public Law No. 112-99 is a provision “effecting an advance in a rate of duty or other charge on imports under an established and uniform practice” and that it is a provision “imposing a new or more burdensome requirement, restriction or prohibition on imports.” Third, it considered, if the Panel’s findings were reversed, whether the Appellate Body would be able to complete the analysis regarding whether Section 1 of U.S. Public Law No. 112-99 effected an “advance in a rate of duty or other charge on imports under an established and uniform practice” or imposed “a new or more burdensome requirement, restriction or prohibition on imports.”

#### 4. Background for the Key Appellate Issue

Article X:2 of the GATT prohibits WTO Members from enforcing measures of general application before they have been officially published if said measures increase a duty or other charge on imports under an established and uniform practice or impose a new or more burdensome requirement, restriction, or prohibition on imports (or on the transfer of relevant payments). The text of Article X:2 states that:

No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or

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provide a useful resource should this issue occur again in the future. But, in practice, complaining parties should be able to avoid this type of procedural challenge. Given the significant attention given to such a small, but potentially impactful procedural aspect of the dispute, litigants may be motivated to adjust their practice of citing minimal articles in their request for the establishment of a panel. The Panel and the Appellate Body ultimately confirmed that the obligations of Article 6.2 of the DSU are broad and that China’s claims fell within the terms of reference of the Panel.

With respect to the claims by China under Article 11 of the *DSU*, the Appellate Body did not consider it necessary to make a ruling, given that it had already reversed the Panel’s interpretation and application of Article X:2 of the GATT. Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 5.1.

prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

In the dispute at hand, the measure at issue was Section 1 of U.S. Public Law No. 112-99. The Panel found that the United States applied or enforced Section 1 as of the date of publication, but only did so with respect to events and circumstances that took place as early as November 20, 2006.<sup>219</sup> However, “[n]either China nor the U.S. appealed this finding by the Panel.”<sup>220</sup> Accordingly, the more significant issues were whether Section 1 was a “measure of general application” and whether the measure effected “an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction, or prohibition on imports, or on the transfer of payments therefore,” under Article X:2 of the GATT.

Before the Panel, the United States argued that Section 1 was not a measure of general application within the meaning of Articles X:1 and X:2 of the GATT because the measure applied only to a limited set of imports and proceedings over a six-year period.<sup>221</sup> The Panel disagreed with the United States, stating that the narrow regulatory scope of the measure failed to establish that said measure was particularly rather than generally applicable. The Panel found that Section 1 of U.S. Public Law No. 112-99 applied to a class or category of people, entities, situations, or cases, and that to be of “particular application,” rather than “general application,” a measure’s scope would have to be limited to specifically identified persons, entities, situations, or cases.<sup>222</sup>

Next, the Panel embarked on a textual analysis of the language in Article X:2 of the GATT. First, it addressed the meaning of “effecting an advance in a rate of duty or other charge on imports” in Article X:2. The Panel relied on the interpretation by a previous panel in *EC—IT Products*, which found that the phrase in question equated the meaning of the terms “advance” and “increase.”<sup>223</sup> Additionally, as agreed by both panels, the phrase “under an established and uniform practice” is a dependent clause that applies to both the “rate of duty” and “other charge.”<sup>224</sup> The Panel also recognized that, logically, the application of a potential “advance in rate” requires a comparison between the rates of duty or

<sup>219</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.56.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* ¶ 4.57 (citing Panel Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶¶ 7.133, 7.23).

<sup>222</sup> *Id.* (citing Panel Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 7.35).

<sup>223</sup> *Id.* ¶ 4.59 (citing Panel Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 7.154).

<sup>224</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.59 (citing Panel Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 7.154).

charge prior to the measure at issue and after the enforcement or application of the measure at issue.<sup>225</sup> Moreover, the Panel found that the phrase “under an established and uniform practice” refers to the rate of duty or charge prior to the measure at issue being enforced or applied.<sup>226</sup>

When the Panel applied these standards, it found that prior to the effective date of Section 1 of U.S. Public Law No. 112-99 (March 2012), there was an established and uniform practice by the U.S. Department of Commerce (USDOC) with respect to “rates of duty” applicable to imports from China as a NME country.<sup>227</sup> Accordingly, the Panel found that an “advance of rates” was not present because the established and uniform practice of the USDOC did not change under Section 1 of U.S. Public Law No. 112-99.<sup>228</sup> China’s challenge on appeal includes claims that the Panel erred in the interpretation and application of Article X:2 of the GATT with respect to the phrases discussed above.

## 5. Holdings and Rationales

### a. Key claims under the GATT

The substantive issues addressed by the Appellate Body dealt with Article X:2 of the GATT. China took issue with how the Panel interpreted Article X:2 of the GATT with respect to the baseline of comparison for measures of general application effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, and for measures of general application imposing a new or more burdensome requirement, restriction, or prohibition on imports.<sup>229</sup> China also challenged the subsequent application of Article X:2 of the GATT by the Panel to Section 1 of U.S. Public Law No. 112-99.<sup>230</sup> As discussed above, the Panel had ruled that China failed to establish that Section 1 of the law violated either factor set out in Article X:2 of the GATT.<sup>231</sup>

The Appellate Body first addressed China’s appeal of the interpretation by the Panel with respect to the relevant baseline of comparison for measures of general application in Article X:2 of the GATT. The Appellate Body organized the scope of Article X:2 by way of two categories of measures of general application: (1) measures “effecting an advance in a rate of duty or other charge

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<sup>225</sup> *Id.* ¶ 4.60.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* ¶ 4.61.

<sup>228</sup> *Id.*

<sup>229</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.54.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

on imports,” and (2) measures “imposing a new or more burdensome requirement, restriction or prohibition on imports.”<sup>232</sup>

i. Measures “Effecting an Advance in a Rate of Duty or Other Charge on Imports”

With respect to the first category, China’s appeal focused on the relationship of the phrase “under an established and uniform practice” with the surrounding language in Article X:2 of the GATT. China claimed that the Panel erred when it found that the phrase “under an established and uniform practice” defined the basis of comparison for determining whether the measure at issue effects an “advance in a rate.”<sup>233</sup> China instead argued that the phrase “under an established and uniform practice” qualifies the immediately preceding reference to a “measure of general application.”<sup>234</sup> In effect, China interpreted the phrase “under an established and uniform practice” as a characteristic of the measure at issue rather than the baseline of comparison prior to the enforcement or application of the measure at issue.

The Appellate Body agreed in general with the Panel that a baseline of comparison must be used to establish an “advance in the rate” is present, but it considered that there was insufficient evidence to conclude that the phrase “under an established and uniform practice” related directly to such a baseline of comparison.<sup>235</sup> The Appellate Body came to this conclusion after three-prong textual analysis of the relevant provision.

First, the main determinative factors in the analysis by Appellate Body were the official French and Spanish translations of the GATT, and their use of the terms “*en virtud de*” and “*en vertu de*,” respectively, as translations for “under.”<sup>236</sup> The Spanish and French terms “*en virtud de*” and “*en vertu de*” translate to “by virtue of” in English.<sup>237</sup> In an exercise to assist its understanding of the provision, the Appellate Body replaced “under an established and uniform practice” with “by virtue of an established and uniform practice,” and determined that such a reading did not support the Panel interpretation of the provision.<sup>238</sup> As a result, the Appellate Body agreed with China and found the phrase “under an established and uniform practice” to be a characteristic of the measure at issue rather than the baseline of comparison prior to the enforcement or application of the measure at issue.

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<sup>232</sup> *Id.* ¶ 4.68.

<sup>233</sup> *Id.* ¶ 4.70.

<sup>234</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.70.

<sup>235</sup> *Id.* ¶ 4.72.

<sup>236</sup> *See generally id.* ¶¶ 4.74–78.

<sup>237</sup> *Id.* ¶ 2.5.

<sup>238</sup> *Id.* ¶ 4.76.

Second, the Appellate Body addressed the counterargument by the United States that if the phrase “under an established and uniform practice” was interpreted as applying to the measure at issue, rather than the baseline of comparison, then said phrase is rendered redundant.<sup>239</sup> That is to say there would be no need for Article X:1 of the GATT to use the phrases “of general application” and “established and uniform” if both referred to the measure at issue. Additionally, such a reading, according to the United States, would limit the ability for complainants to challenge a measure under Article X:2 of the GATT because said potential complainants, such as China in this dispute, would have to wait until a measure was being enforced before they could initiate a dispute.<sup>240</sup> However, the Appellate Body disagreed with the American argument. In its view, as addressed by the panel in *EC—IT Products*:

under Article X:2 [of the GATT], measures must be of a type that effect an advance in a rate of duty under an established and uniform practice, which means that the advance in a rate of duty must be applied (“practice”) in the whole customs territory (“uniform”) and its application should be on a secure basis (“established”).<sup>241</sup>

In effect, the relevant terms that the United States argued would be redundant and can be distinguished in their definition and use, particularly as they apply to Article X:2 of the GATT.

Third, and finally, the Appellate Body found its reading of the two categories of measures addressed by Article X:2 of the GATT to support its finding that the phrase “under an established and uniform practice” describes a characteristic of the measure at issue rather than the baseline of comparison prior to the enforcement or application of the measure at issue.<sup>242</sup> As discussed above, in the view of the Appellate Body, the two categories of measures relevant to Article X:2 are measures “effecting an advance in a rate of duty or other charge on imports” and measures “imposing a new or more burdensome requirement, restriction or prohibition on imports.” However, the phrase “under an established and uniform practice” is only used to qualify the phrase “effecting an advance in a rate of duty or other charge.” In the view of the Appellate Body, if the drafters of the GATT intended the phrase “under an established and uniform practice” to apply to the baseline of comparison, then they would have made it clear that the phrase qualified both categories of measures.<sup>243</sup>

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<sup>239</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.79.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at ¶ 4.80.

<sup>242</sup> *Id.* at ¶ 4.84.

<sup>243</sup> *Id.*

The interpretation of Article X:2 of the GATT by the Appellate Body, especially as it relates to “under an established and uniform practice,” is important because, by attaching the phrase to the measure at issue rather than a potential baseline of comparison for the “advance in the rate,” respondents in future cases will have trouble arguing that a measure at issue simply codified an existing “established and uniform practice” and thus did not create any “advance in the rate” of duty or charge on traders.

ii. Measures “Imposing a New or More Burdensome Requirement, Restriction or Prohibition on Imports”

With respect to the second category of measures of general application—measures “imposing a new or more burdensome requirement, restriction or prohibition on imports”—the Appellate Body again found that the Panel did not provide sufficient support for its findings. In the view of the Appellate Body, the Panel erred when it found that a comparison of the baseline should be conducted with the requirement, restriction, or prohibition that resulted from the practice of the administrative agency.<sup>244</sup> The Appellate Body emphasized that the starting point of the analysis of municipal law should normally be the published measure of general application rather than the practice.<sup>245</sup> As a result, the Appellate Body reversed the Panel’s interpretation of Article X:2 of the GATT concerning the baseline comparison for measures of general application “effecting an advance in a rate of duty or other charge on imports under an established and uniform practice” and, with respect of measures of general application “imposing a new or more burdensome requirement, restriction or prohibition on imports.”<sup>246</sup>

iii. Determination of the Meaning of Municipal Law for Purposes of Article X:2 of the GATT

As discussed above, the Appellate Body did recognize that, although Article X:2 of the GATT does not explicitly call for a baseline of comparison for either type of measure of general application referenced in the provision, a comparison is nonetheless logically necessary. As the Appellate Body explained, this is because an analysis of whether a measure “advances,” is “new,” or is “more burdensome” can only be completed when the measure at issue is considered in relation to another measure or in the absence of any measure.<sup>247</sup> To do so, a panel must ascertain the meaning of the measure at issue in order to later determine

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<sup>244</sup> See Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶¶ 4.88–90.

<sup>245</sup> *Id.* ¶ 4.91.

<sup>246</sup> *Id.* ¶ 4.94.

<sup>247</sup> *Id.* ¶ 4.96.

whether said measure advances a rate of duty or imposes a new or more burdensome requirement within the meaning of Article X:2 of the GATT.<sup>248</sup>

The Appellate Body went on to criticize the Panel for its view that the practice of the administering agency in applying the relevant law of the United States was in itself the baseline of comparison.<sup>249</sup> Instead, the Appellate Body stated that “in identifying the baseline of comparison under Article X:2 [of the GATT], the Panel should have ascertained the meaning of the U.S. CVD law prior to [Section 1 of U.S. Public Law No. 112-99] directly through its objective assessment, and not only through the lens of the agency practice.”<sup>250</sup> As elaborated upon by the Appellate Body:

the identification of the baseline of comparison under Article X:2 [of the GATT] for both (i) measures effecting an advance in a rate of duty and (ii) measures imposing a new or more burdensome requirement should start with the text of the published measure of general application that existed prior to the measure allegedly effecting an advance in a rate of duty or imposing a new or more burdensome requirement that replaced it or modified it. As discussed above, we consider that Article X:2 reflects the principles of transparency and due process and notice. The relevant baseline of comparison for purposes of Article X:2 should be reflected in norms that traders can rely upon and that accordingly create expectations among them. Published measures create expectations among traders, and changes to such measures trigger the due process and notice obligations of Article X:2, which, for this reason, preclude the enforcement of those changes before publication.<sup>251</sup>

Nonetheless, there may be circumstances where the prior measure of general application was neither published nor existent. In such situations, other available evidence would need to be ascertained and examined in order to determine the baseline of comparison.<sup>252</sup>

When applied to the dispute at hand, this prioritization of the prior published measures of general application is important. The Panel used a baseline of comparison that included the practice of the USDOC of applying CVDs to imports from China as an NME country between 2006 and 2012, and it thus determined that Section 1 of U.S. Public Law No. 112-99 was not a new measure of general application. As apparently identified by the Appellate Body, such an

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<sup>248</sup> *Id.* ¶ 4.97.

<sup>249</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.103.

<sup>250</sup> *Id.* ¶ 4.104.

<sup>251</sup> *Id.* ¶ 4.105.

<sup>252</sup> *Id.* ¶ 4.106.

interpretation and application of Article X:2 of the GATT may diminish, if not render inutile, the transparency obligations in the provision. In light of the above, the Appellate Body reversed the relevant findings by the Panel.<sup>253</sup> The Appellate Body also declared moot and of no legal effect the finding of the Panel with respect to the lawfulness of Section 1 of U.S. Public Law No. 112-99.<sup>254</sup>

#### iv. Completion of the Analysis Under Article X:2 of the GATT

Having reversed the Panel's interpretation and application of Article X:2 of the GATT, the Appellate Body turned to the question of whether it was in a position to complete the analysis in order to determine whether Section 1 of U.S. Public Law No. 112-99 effected "an advance in a rate of duty or other charge on imports" or imposed "a new or more burdensome requirement [or] restriction" within the meaning of the provision.<sup>255</sup> The relevant portion of the Appellate Body Report spans twenty pages, with the eventual conclusion by the Appellate Body that it was unable to complete the analysis.<sup>256</sup>

In reaching this conclusion, the Appellate Body acted pursuant to its own findings in *U.S.—Carbon Steel*.<sup>257</sup> This is to say the Appellate Body undertook an examination of "the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."<sup>258</sup>

In this regard, the Appellate Body considered that the relevant baseline under Article X:2 of the GATT was the prior published measure of general application (i.e., Section 701(a) of the U.S. Tariff Act, as interpreted by the United States and interpreted and applied by the USDOC). The examination by the Appellate Body also considered additional relevant evidence. In full, the analysis by the Appellate Body continued as follows:

- (i) Examination of the text of Section 1 of U.S. Public Law No. 112-99;
- (ii) Examination of the text of Section 701(a) of the U.S. Tariff Act;
- (iii) Assessment of other elements of U.S. CVD law relevant to the present dispute, including judicial decisions by U.S. courts and the

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<sup>253</sup> *Id.* ¶ 4.119.

<sup>254</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.120.

<sup>255</sup> *Id.* ¶ 4.123.

<sup>256</sup> *Id.* ¶ 4.183.

<sup>257</sup> *Id.* ¶ 4.123 (citing Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 157, WT/DS213/AB/R (Nov. 28, 2002)).

<sup>258</sup> *Id.*



- practice of the USDOC in applying CVDs to imports from NME countries; and
- (iv) Assessment of whether it is able to reach a conclusion on whether Section 1 of U.S. Public Law No. 112-99 effected an “advance in a rate” of duty or imposed a “new or more burdensome requirement or restriction” within the meaning of Article X:2 of the GATT, as compared to the U.S. CVD law applicable prior to Section 1 of U.S. Public Law No. 112-99.

In addition to the statutory law analyzed by the Appellate Body (i.e., Section 1 of U.S. Public Law No. 112-99 and Section 701(a) of the U.S. Tariff Act), the circumstantial evidence relied upon by the Appellate Body included, in part, the *GPX International Tire Corporation* case before the U.S. Court of Appeals for the Federal Circuit (*GPX V*). According to the United States, the *GPX V* case prompted passage of Section 1 of U.S. Public Law No. 112-99 because of the uncertainty and ambiguity of US CVD law created by the 2011 decision.<sup>259</sup> This uncertainty is in part due to the relevant jurisprudence leading up to *GPX V*, namely, *Georgetown Steel Corporation v. United States*, which upheld a USDOC decision not to apply CVD measures to NME countries, its potential scope of application, and other cases related to *GPX V* (i.e., *GPX I*, *GPX II*, and *GPX VI*).<sup>260</sup> The Appellate Body examined the relevant jurisprudence in detail, but a recapitulation would be uninteresting, as the Appellate Body concluded that both the relevant statutory law and legal jurisprudence were “amenable to different readings” and thus required factual findings by the Panel. Given that the Panel’s factual findings did not exist, the Appellate Body was unable to complete the analysis.<sup>261</sup>

Accordingly, the practical effect of the decision appears that the United States acted inconsistently with Articles 19.3, 10, and 32.1 of the SCM Agreement (as found by the Panel and allowed in a procedural sense by the Appellate Body), but that China was not able to secure a full victory with respect to its claims under Article X:2 of the GATT.

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<sup>259</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 4.138.

<sup>260</sup> Full citations of the relevant jurisprudence are provided in a table in the Appellate Body Report. *See id.*, at 10. They are as follows: *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (*Georgetown Steel*); *GPX Int’l Tire Corp. v. United States*, 587 F. Supp. 2d 1278 (Ct. Int’l Trade 2008) (*GPX I*); *GPX Int’l Tire Corp. v. United States*, 645 F. Supp. 2d 1231 (Ct. Int’l Trade 2009) (*GPX II*); *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011) (*GPX V*); and *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308 (Fed. Cir. 2012) (*GPX VI*).

<sup>261</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶¶ 4.182-83.

## 6. Commentary

### a. Effectiveness of the DSB?

The inability for the Appellate Body to complete its analysis in this dispute continues the trend of similar outcomes in recent WTO disputes. Relative to other disputes in recent years, *U.S.—Countervailing and Anti-Dumping Measures (China)* was not particularly complex. The Appellate Body Report was comparatively short (100 pages) and the main substantive issues were contained within the scope of one paragraph of the GATT. Nonetheless, given the failure by the Panel to adequately address disputes of fact, the Appellate Body had no choice but to conclude that the analysis could not be completed.

Thus, this dispute serves as another example of the less-than-full effectiveness of the WTO dispute settlement mechanism resulting in this instance from the inability of the Appellate Body to remand cases to the panel for further findings of fact and augmentation of the record. WTO Members continue to find it difficult to agree to reforms of the DSU (or, for that matter, anything else within the WTO system). While potential solutions to consider include urging panels to make more complete factual findings from the outset, the obvious remedy is to include the possibility of remand by the Appellate Body in a revised DSU. In the dispute at hand, remand to the panel for further factual determinations regarding the interpretations of the relevant U.S. statutory law and the effect of relevant jurisprudence could have provided a much more satisfactory result to this dispute.

### b. The Importance of Transparency in International Trade Law

The dispute at hand also serves as a reminder of the increasing importance of transparency in the context of international trade law. In this regard, the Appellate Body even felt that it was worthwhile to allocate a page of its Report to an explanation of the function and importance of Article X:2 of the GATT. It went so far as to quote itself in *U.S.—Underwear*, stating:

We recall that the Appellate Body observed in *U.S.—Underwear* that Article X:2 [of the GATT] embodies the principle of transparency, which has due process dimensions. The Appellate Body considered that the essential implication of this principle of transparency is that “Members and other persons affected . . . by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures

and accordingly to protect and adjust their activities or alternatively to seek modification of such measures.”<sup>262</sup>

As the focus of increasing market access has shifted from tariff measures to non-tariff measures (and in particular, non-tariff barriers), Members may face increased challenges under Article X of the GATT, or comparable provisions in regional or bilateral trade agreements, as foreign governments either voluntarily publish relevant measures of general applicability or are forced to do so by favorable rulings (such as China in the dispute at hand) issued by panels or the Appellate Body.

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<sup>262</sup> *Id.* ¶ 4.66.

**D. Trade Remedies: 2014 US—Carbon Steel (India) Case**

SCM Agreement

General Agreement on Tariffs and Trade

WTO Agreement

1. Citation

Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, (Dec. 8, 2014) (adopted Dec. 19, 2014). (Appellant/Appellee: India; Other Appellant/Appellee: United States; Third participants: Australia, Canada, China, EU, Saudi Arabia and Turkey.)<sup>263</sup>

2. Facts

This appeal constituted a broad challenge to U.S. countervailing duty law “as such” (as written) and U.S. agency practices under it, “as applied,” in the original CVD investigation, five administrative reviews, and two sunset reviews. India challenged as inconsistent with the relevant WTO Agreements both the multiple U.S. statutes and regulations relating to both the calculation of subsidies by the Commerce Department and the determination of material injury by the U.S. International Trade Commission (USITC), as well as the manner in which those legislative provisions were interpreted and applied by the USDOC and USITC in the course of these administrative proceedings.<sup>264</sup> India alleged numerous violations (more than twenty by our count) of the relevant covered agreements both before the Panel and on appeal. Both Parties sparred over several procedural issues. The United States, on cross-appeal, also challenged several of the Panel’s rulings. Despite its length (268 pages) and complexity—one of the longest and most complicated in Appellate Body history—the Appellate Body was able to complete the appeal more or less promptly; the notice of appeal was filed on August 8, 2014, and the Appellate Body’s ruling was issued exactly four months later, only one month beyond the time limits specified in Article 17.5 of the DSU, despite a week’s extension granted to the Parties for their principal submissions.<sup>265</sup>

India is the world’s fourth largest producer of steel, followed only by China, Japan, and the United States.<sup>266</sup> India is also a major exporter of steel. Steel is an important export industry and its viability is supported by various agencies of the Indian Government (GOI). This support has been provided in the

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<sup>263</sup> Hereinafter Appellate Body Report, *US—Carbon Steel (India)*.

<sup>264</sup> *Id.* ¶ 1.2.

<sup>265</sup> *Id.* ¶¶ 1.12-13.

<sup>266</sup> *World Steel in Figures 2014*, WORLD STEEL ASS’N (May 28, 2014), <http://www.worldsteel.org/media-centre/press-releases/2014/World-Steel-in-Figures-2014-is-available-online.html>.

form of iron ore and mining rights supplied by the National Minerals Development Corporation (NMDC), a mining company whose stock is held ninety-eight percent by India's Ministry of Steel,<sup>267</sup> and through loans extended to steel producers by India's Steel Development Fund (SDF).

Reactions in December 2014 to the decision predictably varied, as it was not a clear victory for India or the United States. The Indian Ministry of Commerce welcomed the news of the decision, asserting that "India has achieved a significant victory at the WTO," which would be helpful to domestic producers of steel and nine other commodities, which the Ministry said had been suffering due to inconsistent U.S. practices.<sup>268</sup> The American Iron and Steel Institute (AISI) denounced the decision, asserting that it "significantly weakens the effectiveness of U.S. trade laws." AISI said the ruling "will make it very difficult for domestic industries to obtain an effective remedy when facing both dumped and subsidized imports at the same time."<sup>269</sup> A spokesman for the Office of the U.S. Trade Representative (USTR) took a more optimistic stance, noting that the Appellate Body had rejected challenges relating to several important methodological practices, including inter alia "the use of facts available" where companies fail to cooperate with the USDOC investigations; "benchmark calculations" to determine if the subsidy has conferred a benefit; determination of whether a subsidy is "specific" and therefore actionable under the countervailing duty laws; and the inclusion of new subsidy program when USDOC administratively reviews existing CVD determinations.<sup>270</sup>

### 3. Overview of Key Appellate Issues<sup>271</sup>

- (1) Did the Panel err with respect to India's NMDC in its interpretation and application of the term "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement?
- (2) Did the Panel err with regard to its findings of a financial contribution in conflict with Article 1.1(a)(1)(iii) of the SCM Agreement with regard to India's provisional grant of mining rights to iron ore and coal, and a direct transfer of funds by the SDF Management Committee under Article 1.1(a)(1)(i)?

<sup>267</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.3.

<sup>268</sup> Int'l Centre for Trade and Sustainable Dev., *WTO Appellate Body Grants India Victory in US Steel Duties Case*, BRIDGES, Dec. 11, 2014, at 18, 19, available at <http://www.ictsd.org/sites/default/files/review/bridgesweekly18-42.pdf>.

<sup>269</sup> See Bryce Baschuk, *WTO Appeal Panel Issues Mixed Ruling in U.S., India Steel Dispute*, INT'L TRADE DAILY (BNA), Dec. 9, 2014 (quoting AISI President and Chief Executive Officer Thomas Gibson).

<sup>270</sup> *Id.*

<sup>271</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 3.1.

- (3) Did the Panel err when it determined, in rejecting India's "as such" claims under Article 14 of the SCM Agreement, that the United States' benchmarking mechanism fails to assess the adequacy of remuneration from the government provider's prospective before determining whether a benefit has been provided to the recipient; that is, it excludes the use of government prices in determining benchmarks, uses world market prices for the "Tier II" benchmarks, and uses "as delivered" prices under the benchmarking mechanism?
- (4) Did the Panel err with regards to its "as applied" findings under SCM Agreement Article 14 when it issued alternative findings on *ex post* rationales put forward by the United States to justify USDOC's failure to consider certain domestic pricing information in assessing whether NMDC provided iron ore for less than adequate remuneration; when it rejected India's claim that the USDOC's exclusion of NMDC's export prices in determining a Tier II benchmark was inconsistent with Article 14; when the USDOC used "as delivered" prices from Australia and Brazil in assessing NMDC's adequacy of remuneration; when USOC constructed government prices of iron and coal; and when USDOC determined that loans provided under conferred a benefit within the meaning of Articles 1.1(b) and 14(b) of the SCM Agreement?
- (5) In terms of specificity under Article 2.1(c) of the SCM Agreement, did the Panel err in finding that the USDOC had no obligation to establish that only a limited number of "certain enterprises" used the subsidy program; that specificity did not have to be established on the basis of discrimination in favor of "certain enterprises;" and that the inherent characteristics of a subsidized good limits the possible use of the good to a certain industry?
- (6) With regard to the Panel's finding on the use of "facts available" under Article 12.7 of the SCM Agreement, did the Panel err in not requiring the investigating authority to engage in a comparative evaluation in order be able to select the best information; in not finding that the U.S. law and regulations on the facts available is inconsistent with the Agreement; and in rejecting the sufficiency of India's evidence of an alleged "rule" under which USDOC selected the highest non-*de minimis* subsidy rates for facts available?
- (7) Did the Panel err in concluding that the USDOC's consideration of new subsidy allegations was inconsistent with Articles 11.1, 13.1, 21.1, 21.2, and 22.2 of the SCM Agreement?
- (8) Did the Panel err in finding that Articles 15.1, 15.2, 15.4, and 14.5 of the SCM Agreement do not permit "cross-cumulation" of imports that are not subject to simultaneous countervailing duty investigations (e.g., allegedly dumped imports) with those that are subject to such countervailing duty investigations?

Other minor issues have been omitted.

#### 4. Summary of the Appellate Body's Findings<sup>272</sup>

In this report, the Appellate Body:

- (1) Reversed the Panel by holding that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement;
- (2) upheld the Panel and USDOC's determinations that the GOI's provision of goods through the grant of mining rights for iron and coal constitutes a subsidy under Article 1.1(a)(1)(iii) of the SCM Agreement and that the direct transfer of funds by the SDF Management Committee is a subsidy under Article 1.1(a)(1)(i);
- (3) with regard to "as such" claims, upheld, in most respects, as consistent with Article 14(b) of the SCM Agreement, the USDOC's practices following U.S. law and regulations with regard to benchmarking, including the assessment of adequacy of remuneration from the point of view of the beneficiary rather than the provider; excluding the use of government prices as benchmarks; using world market prices for Tier II benchmarks; and using mandatory "as delivered" benchmarks (rather than *ex works* prices);
- (4) with regard to "as applied" claims, declared moot the *ex post* rationales put forward by the United States to justify USDOC's failure to consider certain domestic pricing information in assessing whether NMDC provided iron ore for less than adequate remuneration; accepted India's claim that USDOC's exclusion of NMDC's export prices in determining a Tier II benchmark was inconsistent with Article 14(d) and the *chapeau* of Article 14 of the SCM Agreement; accepted India's claim that USDOC's use of "as delivered" iron ore prices from Australia and Brazil was inconsistent with Article 14(b); rejected India's claim that the USDOC's construction of government prices for iron ore and coal is inconsistent with Articles 1.1(b) and 14(d); and accepted India's claim that USDOC's determination that SDF loans conferred a benefit was inconsistent with Articles 1.1(b) and 14(b) (but was unable to complete the analysis);
- (5) with regard to specificity, upheld the Panel finding (and rejected India's challenge) that USDOC was not obligated to establish that only a "limited number" within the set of "certain enterprises" actually used the subsidy program; upheld the Panel's finding rejecting India's argument that specificity must be established on the

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<sup>272</sup> *Id.* ¶ 5.1.

basis of discrimination in favor of “certain enterprises” against a broader category of other similarly situated enterprises; and upheld the Panel’s finding rejecting India’s argument that if the inherent characteristics of the subsidized good (i.e., iron ore) limit the possible use of the subsidy to a certain industry (i.e., steel producers), the subsidy will not be specific unless access is further limited to a subset of the industry;

- (6) regarding the use of “facts available” under Article 12.7 of the SCM Agreement, modified the Panel Report and found that Article 12.7 requires the investigating authority to use facts available that reasonably replace the missing necessary information in arriving at an accurate determination that also includes and evaluation of available evidence; upheld India’s claim that it established a prima facie case by completing the legal analysis found that the U.S. statute and regulations<sup>273</sup> were not demonstrated by India to be inconsistent “as such” with Article 12.7 of the SCM Agreement; and upheld the Panel’s finding that India failed to establish a prima facie case of inconsistency with Article 12.7.
- (7) With respect to USDOC’s examination of new subsidy allegations in administrative reviews, upheld the Panel’s rejection of India’s claim that the USDOC’s examination of new subsidy allegations in administrative reviews is inconsistent with Articles 11.1, 13.1, 21.1, and 21.2 of the SCM Agreement; and accepted India’s claims that the USDOC’s examination of new subsidy allegations in administrative reviews relating to the steel imports at issue is inconsistent with Articles 22.1 and 22.2; however they were unable to complete the legal analysis.
- (8) With regard to the Panel’s findings of cross-cumulation<sup>274</sup> of subsidized imports and unsubsidized, dumped imports under Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, upheld the Panel finding against the United States that Articles 15.3, 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement do not authorize the investigating authority to cumulatively assess the effects of imports that are not subject to simultaneous countervailing duty investigations (e.g., non-subsidized dumped imports) with the effects of imports subject to countervailing duty investigations; and reversed the Panel’s finding that the U.S. statute is inconsistent “as such” with these articles of the SCM Agreement, but, after completing the analysis, still found

<sup>273</sup> 19 U.S.C. § 1677e(b) (2012); 19 C.F.R. §§ 351.308(a)-(c) (2015).

<sup>274</sup> Cross-cumulation occurs when subsidized and dumped imports are aggregated in order to demonstrate that the unfairly traded imports are causing material injury to the United States. With cumulation, it may be that in some cases there are insufficient subsidized imports alone to demonstrate injury.



that the statute is inconsistent “as such” with the relevant articles of the SCM Agreement.

## 5. The Appellate Body’s Rationale

### a. NMDC as a “Public Body”

Article 1.1(a)(1) of the SCM Agreement provides that “[f]or the purpose of this Agreement, a subsidy shall be deemed to exist if . . . there is a *financial contribution by a government or any public body* within the territory of a Member (referred to in this Agreement as “government”). . . .”<sup>275</sup> Thus, if the subsidy is not provided by the government directly, or by a public body, no actionable subsidy is considered to exist under Article 1.1(a)(1). The USDOC, in determining that the NMDC was a public body, looked to the evidence of control as well as ownership.<sup>276</sup> The Panel concluded that the determination by the USDOC that the NMDC, based on record evidence, effectively amounted to a finding that the NMDC was under the meaningful control of the Indian government.<sup>277</sup> The Appellate Body had opined in *US—Antidumping and Countervailing Duties (China)* that “being vested with governmental authority is the key feature of a public body,” so in order to meet the requirements of the SCM Agreement a public body “must be an entity that possesses, exercises or is vested with governmental authority.”<sup>278</sup>

However, according to the Appellate Body, an entity does not necessarily have to possess the power to regulate in order to be a public body or to entrust or direct private bodies to carry out the functions identified in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement.<sup>279</sup> For the Appellate Body, neither a broad nor a narrow interpretation of the term “public body” is warranted.<sup>280</sup> It was further noted that even an entity that is not a public body under in Article 1.1(a)(1)(i)-(iii) may be a private body entrusted or directed by the government under Article 1.1(a)(1)(iv). Whether the conduct of an entity is that of a public body “must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country where the investigated entity operates.”<sup>281</sup>

<sup>275</sup> Emphasis added.

<sup>276</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.3.

<sup>277</sup> *Id.* ¶ 4.4.

<sup>278</sup> Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 317.

<sup>279</sup> Appellate Body Report, *US—Carbon Steel (India)*, ¶¶ 4.17-18.

<sup>280</sup> *Id.* ¶ 4.28 (citing Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 303).

<sup>281</sup> *Id.* ¶ 4.29.

In its proceedings, the USDOC had applied a “simple control” test and an analysis of the evidence of the nature of the relationship between the Indian Government and the NMDC, which suggested that the government controlled the NMDC and could use its resources as its own.<sup>282</sup> The Panel had likewise viewed the relationship between the government and the NMDC as “very different from the relationship that would normally prevail between a private body and the government.”<sup>283</sup> But the Appellate Body felt that the Panel gave insufficient consideration to India’s assertion that evidence before the USDOC showed that the NMDC as a *Miniratna* or *Navratna* enterprise lacked governmental control and that “government directions or policies have not influenced the transactions or pricing of the products sold by” the NMDC.<sup>284</sup>

The Appellate Body, again emphasizing that an analysis was required in each instance, suggested that the Panel had failed to evaluate whether the USDOC “had properly considered the relationship between the NMDC and the GOI within the Indian legal order, the GOI in fact ‘exercised’ meaning control over the NMDC as an entity and over its conduct.”<sup>285</sup> Nor did USDOC explain certain evidence in its record that was cited by the United States before the Panel.<sup>286</sup> Accordingly, the Panel erred in rejecting India’s claim that the USDOC’s public body determination was inconsistent with Article 1.1(a)(1) of the SCM Agreement.<sup>287</sup>

After this determination, the Appellate Body examined whether it could complete the legal analysis of whether the NMDC is a public body. The Appellate Body noted that the USDOC had failed to provide “a reasoned and adequate explanation of the basis for its determination that the NMDC is a public body.”<sup>288</sup> Rather, it had simply determined that the “NMDC is a mining company governed by the GOI’s Ministry of Steel and that the GOI holds 98 percent of its shares.”<sup>289</sup> There was no evaluation of the core features of the entity and its relationship with the government, or within the Indian legal order, or the extent to which the GOI exercised “meaningful control” over the NMDC and over its conduct.<sup>290</sup> Nor were any factors considered beyond government shareholding and the power to appoint directors. Rather, the inquiry focused on “formal indicia of control. . . . These factors are certainly relevant but do not provide a sufficient basis for a determination that an entity is a public body that possesses, exercises or

<sup>282</sup> *Id.* ¶ 4.38 (quoting U.S. response to Panel question no. 42(b), ¶ 10).

<sup>283</sup> Panel Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 7.87, WT/DS436/R (July 14, 2014) [hereinafter Panel Report, *US—Carbon Steel (India)*].

<sup>284</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.40.

<sup>285</sup> *Id.* ¶ 4.43.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* ¶ 4.47.

<sup>288</sup> *Id.* ¶ 4.51.

<sup>289</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.52.

<sup>290</sup> *Id.*

is vested with governmental authority.”<sup>291</sup> For all these reasons, the Appellate Body found that USDOC’s public body determination was inconsistent with Article 1.1(a)(1) of the SCM Agreement.<sup>292</sup>

#### b. Financial Contributions

The Government of India supported the steel industry in part by granting producers mining rights for iron ore and coal. The program brings to mind the practices in *US—Softwood Lumber IV*,<sup>293</sup> where Canada provided lumber producers not with the lumber per se but with rights to the lumber, known as stumpage. India asserted before the Panel, as Canada had earlier in *Softwood Lumber*, that a grant of mining rights was not a provision of goods under Article 1.1(a)(1)(iii), because “intervening acts of non-government entities” (e.g., private companies that extracted the minerals) resulted in a connection that was too remote to meet the “reasonably proximate relationship” standard of *US—Softwood Lumber IV*.<sup>294</sup> The Panel followed *US—Softwood Lumber IV*’s rationale, noting that “a government may provide goods constituting a final contribution ‘by making them available through the grant of extraction rights.’”<sup>295</sup> The Panel also concluded that “given the GOI’s direct control over the availability of the relevant minerals, the GOI’s grant of rights to mine them essentially made those minerals available to, and placed them at the disposal of, the beneficiaries of those rights,” making them “reasonably proximate” to the use and enjoyment of the minerals such as to be a provision of a good under Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>296</sup>

India had also contended that the Article did not apply to grants that required the beneficiaries, such as the steel producers, to engage in significant intervening acts. This distinguished the facts from *US—Softwood Lumber IV* since the stumpage rights were not severable from standing timber.<sup>297</sup> The United States of course disagreed, suggesting that it made no difference whether the ore was mined directly by the GOI or the mining rights were sold so that someone else may extract the minerals: “[w]hen a government gives a company the right to take a government-owned good, such as iron ore and coal from government lands,

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<sup>291</sup> *Id.* ¶¶ 4.53-54.

<sup>292</sup> *Id.* ¶ 4.55.

<sup>293</sup> Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW (Dec. 5, 2005) [hereinafter Appellate Body Report, *US—Softwood Lumber IV*].

<sup>294</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.6.1.

<sup>295</sup> Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.235.

<sup>296</sup> *Id.* ¶ 7.238.

<sup>297</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.66.

the government is ‘providing’ the goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.”<sup>298</sup>

While the Appellate Body questioned certain aspects of the Panel’s reasoning, particularly the rejection of the GOI’s approach dealing with the alleged remoteness of the relationship between the grant of rights and the steel enterprises because it “lacked legal certainty,” it nevertheless concluded that the fact that the enterprises paid royalties tied to the amount of mineral extracted substantiated the Panel’s conclusion that there was “a reasonably proximate relationship between the GOI’s grant of mining rights and the final goods consisting of extracted iron ore and steel.”<sup>299</sup> Further:

rights over extracted iron ore and coal follow as a natural and inevitable consequence of the steel companies’ exercise of their mining rights, which suggests that making available iron ore and coal is the *raison d’être* of the mining rights. This, in our view, supports the Panel’s conclusion that the government’s grant of mining rights is reasonably proximate to the use or enjoyment of the minerals by the beneficiaries of those rights.<sup>300</sup>

The Appellate Body also rejected India’s contention that the Panel’s treatment of the evidence, in reaching its conclusions regarding the “proximate relationship,” was inconsistent with the “objective assessment” requirements of Article 11 of the DSU. The fact that India did not agree with the conclusion that the Panel reached by evaluating the evidence “does not mean that the Panel committed an error amounting to a violation of Article 11 of the DSU.”<sup>301</sup>

India also appealed the Panel’s conclusion that the USDOC’s determination that the SDF had provided direct transfer of funds was not inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement. India argued that the SDF loans were not provided to borrowers by the SDF’s management Committee (which the USDOC found to be a public body) but by the Joint Planning Committee (JPC), which the USDOC had not found was a public body. Thus, the loans could not have been properly considered “direct transfers of funds” under Article 1.1(a)(1)(i) of the SCM Agreement.<sup>302</sup> The Panel noted that the Management Committee “handles all decisions regarding the issuance, terms, and waivers of SDF loans,” that it considers and grants the ultimate approval on loan proposals put forth by the JPC, and that the JPC handles the day-to-day affairs; it also conceded that the Management Committee was the decision-maker

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<sup>298</sup> *Id.* ¶ 4.67 (quoting United States’ appellee’s submission, ¶ 371).

<sup>299</sup> *Id.* ¶¶ 4.72-73.

<sup>300</sup> *Id.* ¶ 4.74.

<sup>301</sup> *Id.* ¶¶ 4.78-80.

<sup>302</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.83.

with regard to issuance, terms and, waivers of the SDF loans.<sup>303</sup> Despite the role of the JPC, the Panel considered that it was reasonable for the USDOC to have determined that the SDF Management Committee was directly involved in the issuance of the loans and made the decisions as to whether the loans would be issued and on what terms.<sup>304</sup> The Appellate Body observed that the “[p]anel reasoned that, even though the SDF Managing Committee may not have taken title over the funds . . . the SDF Managing Committee was instrumental due to its role as decision-maker regarding the issuance, terms, and waivers of SDF loans.” The Panel further concluded that the Management Committee had “made available” the funds once the loan authorizations were provided.<sup>305</sup>

On appeal, India argued that a direct transfer means there also must be an immediate link without involving any intermediary or intervening agency. Also, because the JPC formally administered the funds, it is the JPC, not the SDF Management Committee, that transfers the funds. Under such circumstances the SDF funds should not be considered government funds.<sup>306</sup> The United States contended that the Panel, “by looking to the design, operation, and effects of the SDF loan programme,” correctly interpreted Article 1.1(a)(1)(i), noting that SDF levies were found to be collected by the JPC and, once collected, remitted to the SDF, and funds held by the SDF are disposed of according with the instructions of the SDF Managing Committee. Nor does the JPC resemble a private body because it operates under the supervision of the Management Committee and has no authority to issue loans.<sup>307</sup>

For the Appellate Body, it was significant that under Article 1.1(a)(1)(i) there must be a government practice involving a direct transfer of funds, including not only money but also financial resources. Moreover, the term “direct transfer” suggests “something occurring immediately, without intermediaries or interference.” The provision does not indicate under what circumstances the transfer may be considered to be direct.<sup>308</sup> Significantly:

The use of the word “involves” [in Article 1.1(a)(1)(i)] thus suggests that the government practice need not consist, or be comprised, solely of the transfer of funds, but may be a broader set of conduct in which such a transfer is implicated or included. The term also appears to introduce an element suggesting a lack of immediacy to the extent that it does not prescribe that a government must necessarily make the direct transfer of funds,

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<sup>303</sup> Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.291 (referring to 2001 Investigation Verification Report of GOI Responses (Panel Exhibit USA-74), at 3).

<sup>304</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.85.

<sup>305</sup> *Id.* ¶ 4.86.

<sup>306</sup> *Id.* ¶ 4.87.

<sup>307</sup> *Id.* ¶ 4.88.

<sup>308</sup> *Id.* ¶ 4.89.

but only that there be a “government practice” that “involves” the direct transfer of funds.<sup>309</sup>

Noting the tension between elements of Article 1.1(a)(1)(i) of the SCM Agreement that “alternatively appear to narrow and broaden the scope of coverage,” the Appellate Body reasoned that the Article “does not rigidly prescribe the scope of its coverage. Rather, the provision reflects a balance of different considerations to be taken into account when assessing whether a particular transfer of funds constitutes a financial contribution.”<sup>310</sup> Given that the term “direct” suggests a certain immediacy in the conveyance of funds and a close nexus for the actions relating to the transfer of the funds, the Appellate Body noted that the requirement in Article 1.1(a)(1)(i) that “a government practice involves” suggests a “more attenuated role for a government public body . . . than what would otherwise have been understood through an examine of the phrase ‘direct transfer of funds.’” Consequently, India over-relied on the word “direct.”<sup>311</sup>

The Appellate Body also indicated that circumstances may exist where the intermediary is “entrusted” or “directed” by the government under Article 1.1(a)(1)(iv) and that, in other situations, there may be insufficient entrustment or direction for Article 1.1(a)(1)(iv), but it may still qualify under Article 1.1(a)(1)(i). An assessment of the role and involvement of any intermediaries would be important in determining which of the two provisions is applicable.<sup>312</sup> Further, the Appellate Body rejected India’s contention that Article 1.1(a)(1)(i), through the use of the term “transfer,” requires:

that the resources must necessarily be drawn from government resources or result in a charge on the public account. . . . Indeed, there may be limited situations in which a government is able to exercise control over resources pooled from non-government contributors in such a manner that its decision to transfer those resources could qualify as a financial contribution under Article 1.1(a)(1)(i) of the SCM Agreement.<sup>313</sup>

In considering whether the SDF loans constitute a direct transfer of funds under Article 1.1(a)(1)(i), the Appellate Body noted that the USDOC found that the SDF Managing Committee was a public body, but made no similar finding with regard to the JPC. As noted earlier, the Panel had determined that the Management Committee was directly involved in providing the SDF loans.<sup>314</sup>

<sup>309</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.90.

<sup>310</sup> *Id.* ¶ 4.92.

<sup>311</sup> *Id.* ¶ 4.94.

<sup>312</sup> *Id.* ¶ 4.95.

<sup>313</sup> *Id.* ¶ 4.96.

<sup>314</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.97.

Given these circumstances, the relationship between the SDF and the loan beneficiaries is not “undermined by the nature of the involvement of the JPC,” and thus the Panel had a “credible basis” for concluding that the role of the Management Committee supported a finding that its actions involved a direct transfer of funds under Article 1.1(a)(1)(i).<sup>315</sup> The Appellate Body, like the Panel, also rejected India’s contention that under this Article the government body (the SDF Management Committee) must have title to the funds. Thus, the Appellate Body concluded that:

even if the issuance of SDF loans forms only part of an overall SDF loan scheme funded by the eventual loan recipients, it was nevertheless proper for the Panel to focus on the role of the SDF Managing Committee vis-à-vis the JPC in assessing whether it constituted a government practice that involves a direct transfer of funds.<sup>316</sup>

Consequently, the Panel was correct in rejecting India’s claim that the USDOC’s determination that the SDF Management Committee provided a direct transfer of funds that was inconsistent with Article 1.1(a)(1)(i) of the SCM Agreement.<sup>317</sup>

#### c. Benefit Under Article 14 of the SCM Agreement: “As Such” Claims

The Appellate Body began its benefit discussion by addressing India’s claims that the U.S. benchmarking mechanism, as set forth in the U.S. Regulations,<sup>318</sup> is inconsistent “as such” [as written on their face] with Article 14 of the SCM Agreement. India argued four grounds for the inconsistency of the benchmarking mechanism, used by the USDOC to set a benchmark or base that is compared in this case to the Indian prices, with the difference, if any, being the “benefit” conferred:

(i) it does not require in all cases an assessment of the “adequacy of remuneration” for government-provided goods from the perspective of the government provider, prior to an assessment of whether a benefit has been conferred on a recipient; (ii) it excludes the use of government prices as benchmarks; (iii) it permits the use of out-of-country benchmarks in circumstances not permitted by Article 14(d) of

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<sup>315</sup> *Id.* ¶ 4.98.

<sup>316</sup> *Id.* ¶ 4.102.

<sup>317</sup> *Id.* ¶ 4.103.

<sup>318</sup> 19. C.F.R. §§ 351.511(a)(2)(i)-(iv) (2015).

the SCM Agreement; and (iv) it mandates the use of “as delivered” prices as benchmarks.

All such claims were rejected by the Panel.

Under Article 14(d) of the SCM Agreement, “the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration.” Under the Commerce regulations, the determination by the USDOC whether the government price for goods or services constitutes a benefit usually involves a comparison of “the government price to a market-determined price for the good or service resulting from actual transactions in the country in question.”<sup>319</sup> This comparison is known as Tier I of the USDOC’s benchmarking mechanism, with the price of actual transactions being used as the benchmark or basis of comparison. If the price charged by the government is equal to the market price, the remuneration is considered adequate even though the government rather than private entities is the seller. If the price charged by the government is less than the market price, the remuneration is inadequate and the difference between the government price and the market-determined price is considered to confer a benefit under Article 1.1(b) of the SCM Agreement. In determining adequacy of remuneration, complexities arise, as in the case at hand, when the USDOC determines that “there is no useable market-determined price with which to make the comparison.” Under such circumstances:

the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.<sup>320</sup>

This alternative methodology is known as Tier II of the USDOC’s benchmarking mechanism.

Beyond Article 14(d), the *chapeau* of Article 14 imposes certain additional requirements. It provides that:

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member

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<sup>319</sup> § 351.511(a)(2)(i).

<sup>320</sup> § 351.511(a)(2)(ii).



concerned and its application to each particular case shall be transparent and adequately explained.

The most important of these is the transparency requirement.

Returning to the Commerce regulations, it is noted that they also permit the USDOC, where a world market price is unavailable, to assess “whether the government price is consistent with market principles.”<sup>321</sup> When the USDOC uses either Tier I or Tier II, the regulations further require the USDOC to “ensure that these prices reflect the price that a firm has actually paid or would pay if it imported the product. Such adjustments will include delivery charges and import duties.”<sup>322</sup>

The Appellate Body began its analysis by addressing India’s claim that “adequacy of remuneration” and “benchmark” require separate analyses, and that the USDOC, by focusing on Tiers I and II and ignoring Tier III, failed to analyze adequacy of remuneration and acted inconsistently with Article 14(d) of the SCM Agreement.<sup>323</sup> The Panel had rejected India’s contention, reasoning that, because the terms “remuneration” and “benefit” are connected by the concept of “adequacy,” Article 14(d) does not require treatment of remuneration as a separate threshold issue. Rather, “assessing the adequacy of remuneration for government-provided goods is part of the process of determining whether a benefit exists.”<sup>324</sup> Moreover, the Panel considered that, under Article 14(d), “the adequacy of remuneration must also be established from the perspective of the recipient” rather than from the perspective of the government provider, as India had argued, and that the title of Article 14, “Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient,” further reinforced this conclusion.<sup>325</sup>

The Appellate Body observed that a benefit must encompass some form of advantage for the recipient. This implies a comparison since there is no benefit unless the financial contribution makes the recipient “better off” and since the marketplace provides “the appropriate basis for comparison.” This is required because the trade-distorting potential of the financial contribution can be identified only “by determining whether the recipient has received [it] on terms more favourable than those available in the market.”<sup>326</sup> Since this is a “unitary assessment,” separate analyses of “benefit” and “remuneration” are not required as the Panel determined.<sup>327</sup> Similarly, the Panel found, “[o]nce it is established that the price paid to the government provider is less than the price that would be

<sup>321</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.109 (citing § 351.511(a)(2)(iii) of the regulations).

<sup>322</sup> *Id.* ¶ 4.110 (citing § 351.511(a)(2)(iv) of the regulations).

<sup>323</sup> *Id.* ¶ 4.112.

<sup>324</sup> Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶¶ 7.26-28.

<sup>325</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.114.

<sup>326</sup> *Id.* ¶ 4.123 (citing Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶¶ 153, 154, 155, 157 WT/DS70/AB/R (Aug. 2, 1999)).

<sup>327</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.126.

required by the market,' the government price in question is inadequate, and a benefit is thereby conferred."<sup>328</sup>

Several related "as such" challenges to the Panel determination under Article 14 of the SCM Agreement were rejected by the Appellate Body on the grounds that the fact that a particular argument is not addressed by the Panel does not constitute a failure by the Panel to make an "objective assessment" under Article 11 of the DSU.<sup>329</sup>

India had also challenged the U.S. benchmarking system because it excluded government prices as Tier I benchmarks (in-country) and allowed the use of Tier II benchmarks (world-market prices) in circumstances not permitted by Article 14 of the SCM Agreement. With regard to the first contention, the Panel noted that government prices were not excluded from the U.S. system in all cases and "further considered that it would be circular, and therefore uninformative, to include the government price for the good in question in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit." According to the Panel, private prices are the "primary benchmark" in determining whether the goods provided by the government were for "less than adequate remuneration."<sup>330</sup> Nor, according to the Panel, does the fact that the lack of government dominance in the market mean that such prices reflect market principles or that such prices would not have distorted private prices in the same market. Thus, the U.S. benchmarking mechanism is not inconsistent with Article 14(d) because it excludes use of government prices.<sup>331</sup>

With regard to India's challenge to the USDOC practice that Tier II prices could be used only when distortion is caused by the government playing a predominant role in the market, as in *US—Softwood Lumber IV*, the Panel considered that the Appellate Body's rationale should also apply in situations, as in the present case, where the government is not a predominant provider.<sup>332</sup> The Appellate Body began its analysis by observing that the *chapeau* of Article 14 "establishes 'guidelines' for determining whether a government-provided financial contribution confers a benefit on a recipient." However, such guidelines should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance."<sup>333</sup>

The determination of whether a benefit is conferred under Article 14(d), according to the Appellate Body, is reached through an analysis of whether the government has provided goods for less than adequate remuneration, implying a comparative exercise. If the result is that the government price is less than the

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<sup>328</sup> *Id.* ¶ 4.128 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.33).

<sup>329</sup> *Id.* ¶¶ 4.1-136.

<sup>330</sup> *Id.* ¶ 4.139.

<sup>331</sup> *Id.* ¶ 4.141.

<sup>332</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.142.

<sup>333</sup> *Id.* ¶ 4.147.

benchmark price, the difference is the benefit under Article 14(d).<sup>334</sup> The Appellate Body also noted that “Article 14(d) of the SCM Agreement prescribes that the adequacy of remuneration for a government-provided good or service ‘shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.’”

“Prevailing market conditions in the country of provision is thus the standard for assessing the adequacy of remuneration,” referring again to *US—Softwood Lumber IV*.<sup>335</sup> Moreover, the language in Article 14(d) suggests that “prevailing market conditions” would “consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices.”<sup>336</sup>

The Appellate Body emphasized the key is market conditions.<sup>337</sup> Thus:

Investigating authorities bear the responsibility to conduct the necessary analysis in order to determine, on the basis of information supplied by petitioners and respondents in a countervailing duty investigation, whether proposed benchmark prices are market determined such that they can be used to determine whether remuneration is less than adequate.<sup>338</sup>

The responsibilities for the investigating authority in conducting the analysis for a proper benchmark, according to the Appellate Body, “will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents. . . .”<sup>339</sup> The authority must also explain the basis for its conclusions. Moreover, in considering market-determined prices, the sale prices by private suppliers are a proper starting point but the inquiry does not have to end there; prices of government-related entities other than the one providing the financial contribution also need to be considered. There is no legal presumption under Article 14(d) that any in-country prices can be disregarded in the benchmark analysis.<sup>340</sup>

Still, referring to *US—Softwood Lumber IV*, the Appellate Body “[p]roposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of governmental intervention in the market” because the government, as a provider, may distort in-country prices when it sets an artificially low price. Under such circumstances, the investigating authorities may

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<sup>334</sup> *Id.* ¶ 4.148.

<sup>335</sup> *Id.* ¶ 4.149.

<sup>336</sup> *Id.* ¶ 4.150.

<sup>337</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.151.

<sup>338</sup> *Id.* ¶ 4.152.

<sup>339</sup> *Id.* ¶ 4.153.

<sup>340</sup> *Id.* ¶ 4.154.

“use an alternative benchmark to in-country private prices.”<sup>341</sup> However, as the Appellate Body indicated in *US—Antidumping and Countervailing Duties (China)*, “an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share.” Price distortion and government predominance are not equal, but “clearly, the more predominant a government’s role in the market is, the more likely this role will result in the distortion of private prices.”<sup>342</sup>

According to the Appellate Body, the investigating authority may be required to examine various aspects of the relevant market in deciding whether in-country prices can be relied upon and must explain the basis for its conclusions in arriving at a proper benchmark for the purposes of Article 14(d).<sup>343</sup> When the investigating authority departs from in-country prices in determining the benchmark, by relying on world market prices, “it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).”<sup>344</sup> Still, the Appellate Body considered that there is no “prescribed preference for the use of particular alternative benchmarks over others.” The appropriateness depends on how a benchmark method is applied in a particular case.<sup>345</sup>

The Appellate Body further noted that India’s objection that the USDOC had excluded government prices as benchmarks not emanating from “competitively run government auctions” and that the Panel agreed that such transactions can be “presumptively ignored.”<sup>346</sup> The United States noted that the Panel had found, contrary to India’s assertion on appeal, that the U.S. benchmarking mechanism did not “presumptively and conclusively” exclude government prices in all cases. Nor is there any basis in Article 14(d) for India’s assertion that government prices must be presumed to be market-driven.<sup>347</sup> The United States further observed that the Appellate Body had earlier found that the prices of “private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration.”<sup>348</sup>

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<sup>341</sup> *Id.* ¶ 4.155.

<sup>342</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.156 (quoting from Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 446).

<sup>343</sup> *Id.* ¶ 4.157.

<sup>344</sup> *Id.* ¶ 4.158 (quoting Appellate Body Report, *US—Softwood Lumber IV*, *supra* note 293, ¶ 106).

<sup>345</sup> *Id.* ¶ 4.159.

<sup>346</sup> *Id.* ¶ 4.161.

<sup>347</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.164.

<sup>348</sup> *Id.* ¶ 4.165 (quoting Submission of the United States, ¶ 75).

The Appellate Body began by noting that India had not been consistent in explaining which government prices should have been included in the benchmark analysis by the United States under Article 14(d) of the SCM Agreement, whether or not they were set by public bodies.<sup>349</sup> Thus, the Panel erred in inferring that government prices (other than those under of the agency furnishing the good) should be excluded simply because they may set prices on factors other than market-based profit maximization. Rather, Article 14(d) may still require the consideration of government related prices in determining the proper benchmarks.<sup>350</sup> This is because private prices and government-related prices “can both reflect prevailing market conditions in the country of provision.” *US—Softwood Lumber IV*, according to the Appellate Body, does not stand for the proposition “that Article 14(d) permits an investigation authority to refuse to consider whether government-related prices reflect prevailing market conditions in the country of provision.”<sup>351</sup>

The U.S. Regulations in pertinent part provide:

(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.<sup>352</sup>

For the Appellate Body, the “could include” language in the regulation, applicable to Tier I prices, suggests that government-related prices other than government auction prices, may constitute a Tier I benchmark; the regulation on its face thus “requires consideration of all market-determined in-country prices.”<sup>353</sup> Under such circumstances, the premise of India’s claim that such government prices are necessarily excluded as benchmarks under the U.S. benchmarking mechanism was not established, and the Panel’s finding rejecting India’s “as such” claim was upheld.<sup>354</sup>

The Appellate Body also addressed India’s claims concerning the USDOC’s use of world market prices to establish the benchmark under Tier II. Here, India had objected to the Panel finding that under Article 14(d) of the SCM

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<sup>349</sup> *Id.* ¶ 4.166.

<sup>350</sup> *Id.* ¶ 4.170.

<sup>351</sup> *Id.* ¶ 4.172.

<sup>352</sup> 19 C.F.R. § 351.511(a)(2)(i) (2015).

<sup>353</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.176.

<sup>354</sup> *Id.* ¶ 4.177.

Agreement it was permissible for the investigating authority to use out-of-country benchmarks in situations where the government is not a predominant provider of the goods in question. India also had appealed the Panel's finding that "the U.S. benchmarking mechanism requires that Tier II benchmarks reflect prevailing market conditions in the country of provision."<sup>355</sup>

India argued on appeal that, in *US—Softwood Lumber IV*, the circumstances in which out-of-country benchmarks were permitted all involved government intervention in the market and thus apply only when there exists government predominance in the market; out-of-country benchmarks are not permitted under Article 14(d) "simply because a limited set of in-country benchmarks are unavailable."<sup>356</sup> In defense and in support of the Panel, the United States responded that the findings in *US—Softwood Lumber IV* are not limited to situations where government predominance in the market exists but may be applied more broadly where in-country prices are not distorted by such government predominance.<sup>357</sup> Neither party argued that Article 14(d) precludes the use of out-of-country benchmarks when there is distortion from government intervention in the market; the disagreement exists over when out-of-country benchmarks may be used in other circumstances.<sup>358</sup>

In assessing India's claims, the Appellate Body noted that in *US—Antidumping and Countervailing Duties (China)*, none of the findings "indicate that the Appellate Body was foreclosing the possibility that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark."<sup>359</sup> Nor does *US—Softwood Lumber IV* establish that only when in-country prices are distorted by government intervention in the market may out-of-country prices be used; the Appellate Body to date has not addressed the issue of whether there may be other circumstances where Article 14(d) permits the use of out-of-country prices.<sup>360</sup> However, based on *US—Softwood Lumber IV*, in the view of the Appellate Body:

the rationale underpinning the Appellate Body's findings in *US—Softwood Lumber IV* is that, properly interpreted in the light of its context and object and purpose, Article 14(d) of the SCM Agreement does not prohibit the use of alternative benchmarks in situations where in-country prices cannot properly be used as a basis for determining a benchmark.<sup>361</sup>

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<sup>355</sup> *Id.* ¶ 4.178.

<sup>356</sup> *Id.* ¶¶ 4.180-81.

<sup>357</sup> *Id.* ¶ 4.182.

<sup>358</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.183.

<sup>359</sup> *Id.* ¶ 4.185.

<sup>360</sup> *Id.* ¶ 4.186.

<sup>361</sup> *Id.* ¶ 4.189.

Thus, other circumstances for using out-of-country benchmarks may exist, as where the information relating to in-country prices cannot be verified to determine if they are market determined. At the same time, the Appellate Body cautioned that an investigating authority's recourse to out-of-country prices may not be easy: "[t]o our minds, it is only once an investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision that it may, consistently with Article 14(d) of the SCM Agreement, use alternative benchmarks." If so, the investigating authority must then explain its basis for doing so.<sup>362</sup> Accordingly, the Panel did not err when it interpreted Article 14(d) as permitting the use of out-of-country benchmarks in situations other than when the government is the prominent provider of the affected goods.<sup>363</sup>

The Appellate Body also rejected India's challenge of the Panel's compliance with Article 11 of the DSU where India alleged that the Panel reviewed the U.S. benchmarking mechanism in a narrow manner.<sup>364</sup> The United States, supporting the Panel, noted that it was uncontested "that in-country benchmarks under Tier I of the U.S. benchmarking mechanism are used whenever they are available."<sup>365</sup> The Appellate Body found that the U.S. regulations on their face require the USDOC to exhaust all possible sources of in-country prices if determining a benchmark under Article 14(d).<sup>366</sup>

India also alleged that the Panel erred in rejecting India's contention that the U.S. regulations were inconsistent "as such" with Article 14(d) of the SCM Agreement "because it does not require that Tier II benchmarks, consisting of world market prices, be adjusted to reflect prevailing market conditions in the country of provision."<sup>367</sup> In rejecting India's contention, the Panel had relied on the language of the Tier II USDOC regulation:

(ii) Actual market-determined price unavailable. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary

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<sup>362</sup> *Id.* ¶ 4.190.

<sup>363</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.191.

<sup>364</sup> *Id.* ¶ 4.197.

<sup>365</sup> *Id.* ¶ 4.198 (quoting Submission of the United States, ¶ 97; Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.47).

<sup>366</sup> *Id.* ¶ 4.199.

<sup>367</sup> *Id.* ¶ 4.200.

will average such prices to the extent practicable, making due allowance for factors affecting comparability.<sup>368</sup>

India had further argued that the Panel erred by ignoring the text and meaning of the specific measure and simply accepted U.S. assertions about the parent legislation.<sup>369</sup> The United States countered that the regulations operated in conjunction with the U.S. statute,<sup>370</sup> which replicated Article 14(d) “nearly word for word,” and that this statutory provision was “context” that was available to the Panel.<sup>371</sup> According to the Appellate Body, the Panel correctly examined the legislation in ascertaining the meaning of the regulation, precluding any violation done by the Panel of Article 11 of the DSU. Nor is there a violation of Article 14(b). The relevant U.S. regulation “does not prohibit, and indeed requires, the USDOC to make, where necessary, adjustments to world market prices in order to ensure that they reflect prevailing market conditions in the country of provision, in accordance with the requirements of Article 14(d) of the SCM Agreement.”<sup>372</sup> According to the Appellate Body, nothing in the regulations suggests that the USDOC “is not mandated to make adjustments to Tier II benchmarks where necessary.”<sup>373</sup> The Panel’s determination rejecting India’s “as such” argument, the U.S. benchmarking mechanism provides for the use of Tier II benchmarks that fail to reflect prevailing market conditions, is upheld.<sup>374</sup>

As to mandatory use of “as delivered” prices under the U.S. benchmarking mechanism, the Appellate Body first discussed the pertinent regulation:

(iv) Use of delivered prices. In measuring the adequacy of remuneration under Paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.<sup>375</sup>

The provision applies when the USDOC uses either a Tier I or, as here, a Tier II benchmark. These adjustments for delivered prices are also made to the relevant government prices as India had accepted before the Panel.<sup>376</sup>

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<sup>368</sup> 19 C.F.R. § 351.511(a)(2)(ii) (2015).

<sup>369</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.203.

<sup>370</sup> 19 U.S.C. § 1677(5)(E) (2012).

<sup>371</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.204.

<sup>372</sup> *Id.* ¶ 4.211.

<sup>373</sup> *Id.* ¶ 4.212.

<sup>374</sup> *Id.* ¶ 4.213.

<sup>375</sup> 19 C.F.R. § 351.511(a)(iv) (2015).

<sup>376</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.217.



India had objected to the use of delivered prices, reasoning that when the government price in question does not include delivery charges, use of “as delivered” prices does not relate to prevailing market conditions in the country of provision.<sup>377</sup> The Panel and the United States disagreed on the grounds that “prevailing market conditions” do not require that terms of sale be the same but rather refer to the general condition of the relevant market where market operators engage in sales transactions.<sup>378</sup> Nor did the Panel accept India’s objection to “as delivered” prices because they would nullify the comparative advantage of the country of provision; if the delivered benchmark relates to prevailing market conditions then it would reflect any local comparative advantage.<sup>379</sup>

The Appellate Body initially expressed concern with the Panel’s statement that implies “a legal presumption under Article 14(b) that government prices cannot reflect prevailing market conditions in the country of provision.” The Appellate Body noted that Article 14(d) establishes no such presumption.<sup>380</sup> Still, the Panel dismissed India’s assertions on other grounds, namely that mandatory use of “as delivered” prices relate to general market conditions rather than the specific contractual terms under which the government provides goods.<sup>381</sup>

India further objected to the Panel’s conclusions on grounds that the Panel, in conflating the term “prevailing market conditions” under Article 14(d) with the contractual terms, had altered India’s claim and addressed a matter not before it in contravention of Article 11 of the DSU.<sup>382</sup> The United States suggested that India was simply trying to amend on appeal the argument it made before the Panel and that the alleged Article 11 violation lacks any factual basis.<sup>383</sup> The Appellate Body, in rejecting India’s contention, observed that India’s case focused on the USDOC’s use pursuant to the regulation of “as delivered” prices while the government’s price in question was an *ex works* price, contravening the requirement that the benchmarks do not relate to “prevailing market conditions,” a contention the Panel properly rejected as discussed above.<sup>384</sup>

India had also faulted the Panel for failing to make a finding on whether the sale of a good in the market generally on an *ex works* basis constitutes one of the “general conditions of the relevant market.” Should such a finding have been made, i.e., that sales on an *ex works* basis are one of the “general conditions” referred to by the Panel, then determining the adequacy of remuneration in each instance on an “as delivered” basis would result in disregarding “prevailing market conditions” where the good is sold on an *ex works* basis.<sup>385</sup> In this respect,

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<sup>377</sup> *Id.* ¶ 4.218.

<sup>378</sup> *Id.* ¶ 4.219.

<sup>379</sup> *Id.* ¶ 4.222.

<sup>380</sup> *Id.* ¶ 4.229.

<sup>381</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.230.

<sup>382</sup> *Id.* ¶ 4.231.

<sup>383</sup> *Id.* ¶ 4.232.

<sup>384</sup> *Id.* ¶ 4.236.

<sup>385</sup> *Id.* ¶ 4.238.

India asserted that the Panel acted inconsistently with its responsibilities under Article 11 of the DSU. In response, the United States asserted that the issue of such sales was not before the Panel; the Panel cannot be faulted for failing to make an “objective assessment” under Article 11 for an argument India had not presented to the panel.

The Appellate Body accepted the Panel’s rationale:

the term “prevailing market conditions” in Article 14(d) of the SCM Agreement describes the generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices. We therefore agree with the Panel’s finding that the terms “prevailing market conditions” and “conditions of sale,” in the second sentence of Article 14(d) of the SCM Agreement, do not relate to the specific contractual terms on which the government provides goods but, rather, “relate to the general conditions of the relevant market, in the context of which market operators engage in sales transactions.”<sup>386</sup>

Thus, in the Appellate Body’s view an assessment of “prevailing market conditions” necessarily involves an analysis of the market generally rather than isolated transactions. Nor can the conditions be assessed “solely from the perspective of the providers of the relevant good in question.” A determination of adequacy of remuneration “must capture the full cost to the recipient of receiving the goods.”<sup>387</sup> This conclusion is reinforced by the fact that “transportation” is listed among prevailing market conditions illustratively in Article 14(d) of the SCM Agreement,<sup>388</sup> although the Appellate Body assumes that when the sales being compared are made on different bases—*ex works* and “as delivered”—appropriate adjustments would be made in order for the comparison to be meaningful so it does not “overstate or understate the benefit.”<sup>389</sup> Nevertheless, “[i]t follows that, insofar as adjustments for delivery charges are required to undertake a proper assessment of benefit in the context of Article 14(d), any such adjustments must reflect the generally applicable delivery charges for the good in question in the country of provision.”<sup>390</sup>

When electing prices for use as benchmarks, the USDOC is required to “make due allowance for factors affecting comparability,” and the Appellate Body did not consider that the U.S. benchmarking mechanism precluded on its face adjustment to either Tier I or Tier II benchmarks that approximate the generally applicable delivery charges (e.g., local delivery charges) in the country of

<sup>386</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.243.

<sup>387</sup> *Id.* ¶ 4.245.

<sup>388</sup> *Id.* ¶ 4.246.

<sup>389</sup> *Id.* ¶ 4.247.

<sup>390</sup> *Id.* ¶ 4.249.

provisions.<sup>391</sup> Turning to the question of whether the U.S. methodology nullifies comparative advantages of the local suppliers, the Appellate Body noted that the Panel considered that if a delivered price benchmark relates to the prevailing market conditions it would reflect any comparative advantage that the country of provision might have. Import transactions occurring even where minerals are sourced locally relate to prevailing market conditions in India because they are being made by entities operating under those market conditions. Under such circumstances, according to the Panel, the mandatory use of “as delivered” benchmarks does not nullify any comparative advantage for the domestic goods in question.<sup>392</sup>

The Appellate Body generally agreed with the Panel. In addition, it questioned India’s concept of comparative advantage. Such advantage is not automatic for locally supplied goods. The lack of import transactions does not necessarily mean that the local supplier has a comparative advantage; it may also mean that the government is providing the good for less than adequate remuneration. The levying of countervailing measures, under such circumstances, is not to countervail a comparative advantage but rather a subsidy.<sup>393</sup> As indicated earlier, it is the view of the Appellate Body that the U.S. regulations do not on their face preclude necessary adjustment to Tier I and Tier II benchmarks, ultimately meaning that the mandatory use of “as delivered,” out-of-country benchmarks does not result in countervailing of comparative advantages in the country of provision.<sup>394</sup>

#### d. Article 14(d) of the SCM Agreement: “As Applied” Claims

Turning to the “as applied” claims under Article 14(d) of the SCM Agreement, the Panel noted that India’s appeal relates to the Panel’s findings concerning the benefit determinations in the CVD investigation concerning (i) provision of iron ore by the NMDC, and (ii) provision of captive mining rights for iron ore and coal by the GOI. India had challenged the USDOC’s failure to consider and apply certain domestic pricing information as Tier I benchmarks: its exclusion of the NMDC’s export prices from the Tier II, world-market benchmark price and its use of prices from Australia and Brazil, which had been adjusted to reflect international delivery charges to India. The Panel rejected all claims except an assertion that the United States had put forward *ex post* rationales to justify the USDOC’s failure to consider certain domestic pricing information submitted by the GOI and Tata.<sup>395</sup>

<sup>391</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.251.

<sup>392</sup> *Id.* ¶ 4.253.

<sup>393</sup> *Id.* ¶ 4.257.

<sup>394</sup> *Id.* ¶¶ 4.259-60.

<sup>395</sup> *Id.* ¶ 4.265 (citing Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.141).

India's claims of Panel error on appeal relate to the *ex post* rationales relating to domestic price information, rejection of NMDC in determining Tier II benchmarks, and the USDOC's use of Australia and Brazil "as delivered" prices.<sup>396</sup>

During the CVD investigation, India had submitted to USDOC price charts compiled by the Mine Owners/Goa Mineral Ore Exporters Association and a table by Tata incorporating private iron ore supplier quotes of prices for sales of high-grade ore to Tata.<sup>397</sup> The Panel had found the USDOC's failure to consider domestic pricing information to be inconsistent with Article 14(d) and therefore Article 1.1(b) of the SCM Agreement.<sup>398</sup> Notwithstanding that finding, the Panel reviewed the *ex post* rationales in the event that the Appellate Body were to reverse its finding. While the Panel agreed that the USDOC would have been entitled to reject domestic pricing information because it was shown not to pertain to actual transactions or to specify the exact percentage of iron ore content, it also failed to see a reason why the domestic pricing information should not have been treated as actual transaction prices. The Panel also agreed with the United States that it could not use the Tata information as a benchmark because it was confidential and susceptible to public disclosure.<sup>399</sup>

With regard to the *ex post* rationales (those that had not been considered by the USDOC but only by the United States in defending its case before the Panel), India argued on appeal that it was a violation of Article 11 of the DSU for the Panel to examine the *ex post* rationales and that this portion of the Panel report should be declared moot by the Appellate Body.<sup>400</sup> The United States contended that the merits of the *ex post* rationales were not findings but merely considerations that would not become part of the DSB's recommendations and rulings. Given the absence of any findings, the United States asked the Appellate Body to treat India's Article 11 DSU violation claim as moot.<sup>401</sup> The Appellate Body reasoned that the United States, by not explaining in the USDOC report why the domestic pricing information was rejected except on an *ex post* basis, had failed to rebut India's prima facie case and therefore acted inconsistently with Articles 14(d) and 1.1(b) of the SCM Agreement.<sup>402</sup> Still, according to the Appellate Body, the Panel was not precluded from addressing the *ex post* rationales, although it was not required to do so, and, if such considerations related to rules of law, they could fall within the scope of appellate Review under Article 17.6 of the DSU.<sup>403</sup> Since the United States did not appeal the Panel's

<sup>396</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.267.

<sup>397</sup> *Id.* (referring to Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.148).

<sup>398</sup> *Id.* ¶ 4.269.

<sup>399</sup> *Id.* ¶ 4.270.

<sup>400</sup> *Id.* ¶ 4.271.

<sup>401</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.272.

<sup>402</sup> *Id.* ¶ 4.273.

<sup>403</sup> *Id.* ¶ 4.274.

finding of a violation of Articles 14(d) and 1.1(b) of the SCM Agreement, the Appellate Body declined to review those findings and declared them moot.<sup>404</sup>

With regard to the exclusion of the NMDC's export prices from the USDOC's Tier II benchmarks, the Appellate Body noted that, in the preliminary 2006 administrative review, as in previous reviews, the USDOC had used the "Tex Report," which included the NMDC prices, and thus meant that the Tier II benchmark was based in part on such export prices. However, in the course of the final 2006 administrative review, the USDOC revised the benchmark by excluding the NMDC's export prices from the Tex Report. This was done, according to the USDOC, because those NMDC export prices pertained to "the very government provider" that was the subject of the investigation.<sup>405</sup>

In rejecting India's argument, the Panel reasoned that just as Article 14(d) does not require the investigating authority to rely on a government's domestic prices when determining the benchmarks, the "same risk arises" if the investigating authority relies on the government's export prices. That government, the Panel reasoned, "might provide goods to export customers for less than adequate remuneration in order to promote domestic production and employment." The Panel rejected India's claim on this reasoning.<sup>406</sup> The Panel also rejected India's claim under the *chapeau* of Article 14, concluding that the USDOC had met the transparency requirement of the *chapeau* by explaining that its change in approach was clear and intelligible: the USDOC rejected NMDC export prices because they pertained to the "very government provider . . . at issue."<sup>407</sup>

On appeal, India argued that the Panel erred by finding that government prices, including NMDC export prices, can be presumptively rejected in determining benchmarks for the purpose of Article 14(d).<sup>408</sup> The United States emphasized that "comparing the price of the entity under investigation with another price of that same entity would be circular, uninformative, and contrary to the requirements of Article 14(d) of the SCM Agreement."<sup>409</sup> The Appellate Body began its analysis by highlighting the fact that proper benchmark prices would normally emanate from the market for the good in question in the country of provision. Under such circumstances, "an investigating authority must first consider in-country prices, that is, the prices of the same or similar goods on the market in the country of provision." Once this is accomplished, the investigating authority may use alternative benchmarks as long as they are consistent with Article 14(d) and provided it explains its basis for doing so.<sup>410</sup>

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<sup>404</sup> *Id.* ¶ 4.275.

<sup>405</sup> *Id.* ¶ 4.277.

<sup>406</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.278 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.189).

<sup>407</sup> *Id.* ¶ 4.279.

<sup>408</sup> *Id.* ¶ 4.281.

<sup>409</sup> *Id.* ¶ 4.282.

<sup>410</sup> *Id.* ¶ 4.283.

The world market price is an alternative benchmark, as suggested in *US—Softwood Lumber IV*. There, the Appellate Body had noted that alternative benchmarks “could include proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs.”<sup>411</sup> Such usage, however, puts the investigating authority “under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).” Appropriate adjustments must also be made to reflect prevailing market conditions in the country of provision.<sup>412</sup>

According to the Appellate Body, an export price such as the NMDC’s export price is not per se an in-country price since it cannot be presumed that market conditions prevailing in one Member relate to those in another Member.<sup>413</sup> Still, as noted in discussing the “as such” claims, while government may set prices in pursuit of public policy objectives rather than profits, such prices may not be presumptively discarded by the investigating authority in determining the benchmark. Rather, this must be proven by evidence.<sup>414</sup> While the Appellate Body was not prepared to state that the export prices at issue should have been used by the USDOC as calculating a Tier II benchmark, the Panel’s rejection of India’s claim that the USDOC should have used the NMDC’s export prices in the determination of a Tier II benchmark was legal error and was reversed.<sup>415</sup>

Here, the USDOC explained that, because the NMDC export prices were from the same provider of the goods at issue, they would not normally use the prices for comparison purposes for either Tier I or Tier II because other more appropriate data were available. Thus, the USDOC appeared to acknowledge that they were not precluded from using such prices for the Tier II benchmark. The USDOC also failed to explain why, having used NMDC export prices as part of the Tier II benchmark in previous reviews, it did not provide a reasoned and adequate explanation for the change or for reliance on world market prices from Australian and Brazilian sources as more appropriate. Consequently, the Appellate Body found that the use by the USDOC of these prices for the Tier II calculations were inconsistent with Article 14(d) of the SCM Agreement.<sup>416</sup> For the same reasons the Panel’s rejection of India’s claim of USDOC inconsistency with the *chapeau* of Article 14 was reversed.<sup>417</sup>

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<sup>411</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.284 (quoting Appellate Body Report, *US—Softwood Lumber IV*, *supra* note 293, ¶ 106).

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* ¶ 4.285.

<sup>414</sup> *Id.* ¶ 4.287.

<sup>415</sup> *Id.* ¶ 4.288.

<sup>416</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.290.

<sup>417</sup> *Id.* ¶ 4.291.

The use of Australian and Brazilian “as delivered” prices for the Tier II benchmark was attacked by India as inconsistent with Article 14(d) of the SCM Agreement because those “as delivered” prices were allegedly inconsistent with “prevailing market conditions” in India and because they allegedly nullified the comparative advantage of local iron ore sourcing.<sup>418</sup> The Panel had essentially rejected both claims on the ground that “prevailing market conditions” did mirror contractual terms, even though domestic sales were *ex mine* while Australian and Brazilian sales were as delivered.<sup>419</sup> The Panel was convinced of this conclusion in part by the fact that the Brazilian sale was an actual sale to an Indian steel mill, so that by definition the transaction took place at “prevailing market conditions.”<sup>420</sup> The Panel also observed that NMDC officials set domestic prices in light of competition from Australia and Brazil. Since those prices indicate what an Indian steel producer would be willing to pay, they again relate to prevailing market conditions in India.<sup>421</sup>

The Panel rejected India’s comparative advantage claim by observing that the fact that India was an iron ore producer did not alone establish a comparative advantage nullified by the use of “as delivered” prices, given the evidence that Indian steel producers actually imported ore from overseas because they obviously found a need to do so.<sup>422</sup>

India on appeal rejected the relevance of a single import transaction for Brazilian iron ore, contending that “prevailing market conditions” determinations required more than an isolated transaction and could not be expanded into the generic conditions applicable to the Indian market. Nor does the price that some steel producers are willing to pay mean that all suppliers of iron ore to the Indian market behaved in that manner, e.g., supplying the ore with an “as delivered” basis. Consequently, the Panel’s reliance on isolated import transactions was based on an incorrect reading of prevailing market conditions under Article 14(b).<sup>423</sup> The United States disagreed, asserting that Article 14(d) simply requires the investigating authority to assess adequacy of remuneration from the perspective of the recipient of the goods in relation to the prevailing market conditions in the country of provision.<sup>424</sup>

The Appellate Body had earlier decided that making the benefit comparison using the *ex works* prices as urged by India failed to capture the full cost to the recipient, noting that Article 14(b) requires that transportation costs be taken into account. Such methodology would thus “fail to assess whether the financial contribution at issue makes the recipient better off than it would

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<sup>418</sup> *Id.* ¶ 4.292.

<sup>419</sup> *Id.* ¶ 4.294.

<sup>420</sup> *Id.* ¶ 4.295.

<sup>421</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.296.

<sup>422</sup> *Id.* ¶ 4.297.

<sup>423</sup> *Id.* ¶ 4.300.

<sup>424</sup> *Id.* ¶ 4.301.

otherwise have been absent that contribution.”<sup>425</sup> At the same time, an analysis of the market generally with regard to prevailing market conditions is required. Thus, “it may be necessary for an investigating authority to seek, and engage with, evidence concerning the prevailing market conditions for the good in question, including the generally applicable delivery charges for that good.”<sup>426</sup> However, the Appellate Body agreed with India that the USDOC could not properly rely on a single import (from Brazil): “we do not consider that it can be inferred, without more, that a single, isolated import transaction for a particular good reflects or relates to prevailing market conditions for that good in the country of provision.”<sup>427</sup>

With regard to the “as delivered” price from Australia and Brazil generally, the Appellate Body recalled the Panel’s finding that NMDC set its own prices in light of competition from suppliers in these two countries. Under those circumstances, such prices necessarily relate to prevailing market conditions in India.<sup>428</sup> However, the Appellate Body faulted the Panel’s reliance on this data because, while it was in the administrative record of the investigation, the rationale for relying on it was never explained by the USDOC.<sup>429</sup> Further, according to the Appellate Body, because the USDOC had made adjustments to the “as delivered” prices from Australia in its own analysis, the Panel’s inference that NMDC’s domestic prices were set based on international prices inclusive of international delivery charges may not be justified.<sup>430</sup> Under such circumstances, the Appellate Body rejected the Panel’s conclusions “that the ‘as delivered’ prices from Australia and Brazil reflect prevailing market conditions in India.” The Appellate Body thus accepted India’s claim on appeal that the USDOC’s use of these prices in assessing whether the NMDC provided iron ore for less than adequate remuneration is inconsistent with Article 14(d) of the SCM Agreement.<sup>431</sup>

In seeking to complete the analysis, Appellate Body asked rhetorically whether there is a sufficient basis in the USDOC determination to support the finding that the “as delivered” prices from Australia and Brazil reflected prevailing market conditions, including applicable delivery charges for iron ore in India.<sup>432</sup> It decided in the negative: “we consider that the USDOC did not provide a reasoned and adequate explanation of the basis for its use of ‘as delivered’ prices from Australia and Brazil as benchmarks for assessing whether the NMDC provided iron ore for less than adequate remuneration.” Consequently, the

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<sup>425</sup> *Id.* ¶ 4.302.

<sup>426</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.306.

<sup>427</sup> *Id.* ¶ 4.309.

<sup>428</sup> *Id.* ¶ 4.310.

<sup>429</sup> *Id.* ¶ 4.311.

<sup>430</sup> *Id.* ¶ 4.312.

<sup>431</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.314.

<sup>432</sup> *Id.* ¶ 4.315.



USDOC acted inconsistently with Article 14(b).<sup>433</sup> The Appellate Body declined to address India's parallel claim under Article 11 of the DSU.<sup>434</sup>

The Appellate Body noted that the United States had not appealed the Panel's finding that the USDOC's use of the Tier II benchmark price to calculate the benefit from the grant of captive mining rights for iron ore was inconsistent with Article 14(b).<sup>435</sup> With regard to coal, the Appellate Body noted that the USDOC in calculating benefit had used actual "as delivered" prices paid by an Indian company for coal imported from Australia as a Tier I benchmark. According to India, this benchmark is suspect for the same reasons as the benchmark used by the USDOC for iron ore. Not so, according to the Appellate Body; the benchmark used for coal was different from that used for iron ore and India's request that it be rejected was declined.<sup>436</sup>

Turning to India's claim (ultimately rejected by the Panel) that the USDOC's methodology to construct a government price for iron ore was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, the Appellate Body noted that the USDOC compared its constructed prices with Tier I and Tier II benchmarks. The USDOC had calculated the royalties for mining rights paid to the GOI and added per unit operational mining costs for iron and for coal.<sup>437</sup> India had challenged this approach, arguing that "the USDOC should have assessed the adequacy of remuneration for the GOI by analysing the royalty rate charged by the GOI in comparison to royalty rates in other countries."<sup>438</sup> Given that the Panel had already concluded that the grant of mining rights was provision of goods under Article 1.1(a)(1)(iii), it considered that the steel producers were effectively provided the extracted minerals themselves. The Panel also believed that the USDOC "was entitled to assess adequacy of remuneration from the perspective of the recipient using a benchmarking methodology." Constructing a government price for the extracted minerals was also reasonable.<sup>439</sup>

India argued that the actual amount of "remuneration" under Article 14(d) was only what the GOI actually received, that is, the royalties; the USDOC should have determined whether the government price was set in accordance with market principles.<sup>440</sup> The United States countered that India was simply asking again that remuneration be assessed from the point of view of the government provider rather than the recipient.<sup>441</sup> The Appellate Body noted that it had already upheld the Panel's conclusion that Article 14(d) does not require separate analyses or adequacy of remuneration and of the benefit, nor that the assessment be made

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<sup>433</sup> *Id.* ¶ 4.317.

<sup>434</sup> *Id.* ¶ 4.319.

<sup>435</sup> *Id.* ¶ 4.321.

<sup>436</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.322.

<sup>437</sup> *Id.* ¶ 4.323.

<sup>438</sup> *Id.* ¶ 4.324.

<sup>439</sup> *Id.* ¶ 4.325.

<sup>440</sup> *Id.* ¶ 4.327.

<sup>441</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.328.

from the point of view of the provider of the goods; it was on this basis the Appellate Body again rejected India's position.<sup>442</sup>

The Appellate Body further observed that:

having concluded, in respect of a grant of mining rights, that it was proper to consider that the provided good consists of the extracted minerals, we consider that it is permissible for an investigating authority in a benefit calculation to construct a price on the basis of any fees and royalties paid for the mining rights plus the cost plus profit of the extraction process.

This was the USDOC's methodology when it calculated royalties and then added cost plus profit for the extraction of iron ore and coal, a methodology that India did not challenge.<sup>443</sup> Under these circumstances, the Appellate Body affirmed the Panel's findings that the USDOC's construction of government prices for iron ore and coal were not inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>444</sup>

India also claimed, in a somewhat spurious claim, that the United States had breached the international law principle of good faith in performing its treaty obligations under the SCM Agreement (Article 14(d))—this claim was rejected by both the Panel and the Appellate Body as being outside either's terms of reference.<sup>445</sup>

India also objected on appeal to the USDOC's conclusion that SDF loans conferred a benefit on Indian steel producers as being inconsistent with Articles 1.1(b) and 14(b) of the SCM Agreement.<sup>446</sup> The USDOC was faulted for "not adequately explaining how the benchmark it used, consisting of prime lending rates of the Reserve Bank of India, properly reflected the interest on a 'comparable commercial loan.'" India argued that the prime rates are for banks, not for actual loans disbursed, and that they do not take into account costs incurred by the steel producers to participate in the SDF loan program.<sup>447</sup> However, the Panel had accepted the USDOC's explanation for its benefit methodology as being "clear and intelligible, and . . . easily understood and discerned."<sup>448</sup> It had also accepted the USOC's use of prime lending rates<sup>449</sup> and its exclusion of any costs associated with obtaining the loans (absent any reference

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<sup>442</sup> *Id.* ¶ 4.330.

<sup>443</sup> *Id.* ¶ 4.332.

<sup>444</sup> *Id.* ¶ 4.335.

<sup>445</sup> *Id.* ¶ 4.334.

<sup>446</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.336.

<sup>447</sup> *Id.* ¶ 4.337.

<sup>448</sup> *Id.* ¶ 4.338 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.309).

<sup>449</sup> *Id.* ¶ 4.339.

to such costs in Article 14(b)).<sup>450</sup> The Panel further disagreed with India's contention that, because the steel producers had contributed to SDF, the loans should be treated as the steel firms' own funds; since the levies were collected from consumers and always destined for the SDF, they could not be invested elsewhere.<sup>451</sup> The United States defended the Panel findings, asserting that Article 14 requires no further credits or adjustments.<sup>452</sup>

The Appellate Body noted its stated view in *US—Anti-Dumping and Countervailing Duties (China)* that “a benchmark for purposes of Article 14(b) consists of a ‘comparable commercial loan,’ and that such a benchmark loan ‘should have as many elements as possible in common with the investigated loan to be comparable.’”<sup>453</sup> Further:

The Appellate Body has further relied on the use of the conditional tense in Article 14(b) to explain that, in the absence of an actual comparable commercial loan that is available on the market, an investigating authority should be allowed to use a proxy for what “would” have been paid on a comparable commercial loan that “could” have been obtained on the market.<sup>454</sup>

According to the Appellate Body, despite a certain flexibility in selection of benchmarks under Article 14(b):

the further away an investigating authority moves from the ideal benchmark of an identical or nearly identical loan, the more adjustments will be necessary to ensure that the benchmark loan approximates the “comparable commercial loan which the firm could actually obtain on the market” specified in Article 14(b).<sup>455</sup>

The Appellate Body rejected the idea that the administrative costs of the loan need not be included in the assessment under Article 14(b): “[t]he distinction that the Panel draws between costs associated with the interest or repayment terms of a loan, and other costs arising from entry or administrative charges, does not seem to reflect accurately the cost of the relevant loans from the perspective of the

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<sup>450</sup> *Id.* ¶ 4.341.

<sup>451</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.340.

<sup>452</sup> *Id.* ¶ 4.344.

<sup>453</sup> *Id.* ¶ 4.345 (quoting Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 476).

<sup>454</sup> *Id.* (quoting Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 487).

<sup>455</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.345.

recipient.” Those costs in some cases may be substantial and exclusion of them seems unduly arbitrary.<sup>456</sup> Moreover:

In examining whether the particular terms of a loan programme are in accordance with market terms, a benchmark must be selected that ensures that there are sufficient similarities between the investigated loan and the benchmark “as to make that comparison worthy or meaningful.” To the extent that the terms associated with a loan programme are determined by the conditions of funding for the programme, such terms should also be taken into account if a failure to do so would render the comparison meaningless.<sup>457</sup>

On the basis of these considerations, the Panel should not have excluded consideration of borrowing costs in assessing the cost of the loan program to the recipient. As a result, the Panel also erred by accepting the USDOC’s determination that the SDF loans conferred a benefit.<sup>458</sup> Nor did the Appellate Body accept the Panel’s conclusion that the levies collected from the steel producers were consumer funds; the evidence before the Panel did not support this conclusion.<sup>459</sup> The USDOC’s disparate statements that the steel producers “collected” the funds and “contributed” them to SDF suggests that they may be an opportunity cost for participation; the statements also reflected the view that the funds were analogous to tax revenues. The Panel was faulted by the Appellate Body for failing to reconcile these inconsistencies.<sup>460</sup> In any event, the record before the Appellate Body was insufficient:

We therefore do not consider that we have a basis upon which to assess whether the prime lending rates on which the USDOC relied constitute a ‘comparable commercial loan’ within the meaning of Article 14(b) of the SCM Agreement. We therefore find that we are unable to complete the legal analysis in this regard.<sup>461</sup>

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<sup>456</sup> *Id.* ¶ 4.347.

<sup>457</sup> *Id.* ¶ 4.348 (quoting Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 476).

<sup>458</sup> *Id.* ¶ 4.349.

<sup>459</sup> *Id.* ¶ 4.351.

<sup>460</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.352.

<sup>461</sup> *Id.* ¶ 4.353.

### e. Specificity Under Article 2 of the SCM Agreement

Before the Panel, India challenged the USDOC's determination of de facto specificity as being inconsistent with Articles 2.1(c) and 2.4 of the SCM Agreement because the USDOC:

(i) failed to show that the subsidy discriminated in favour of "certain enterprises" over a comparative set of other, similarly situated enterprises; (ii) based its determination of specificity on limitations inherent in the nature of the product; (iii) failed to establish that the subsidy was used by a limited number of certain enterprises; (iv) failed to examine the mandatory factors listed in Article 2.1(c); and (v) failed to determine de facto specificity on the basis of positive evidence.<sup>462</sup>

The relevant provisions of the SCM Agreement read as follows:

- 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
  - (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions<sup>463</sup> governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
  - (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to

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<sup>462</sup> *Id.* ¶ 4.355.

<sup>463</sup> Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favor certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: [i] use of a subsidy programme by a limited number of certain enterprises, [ii] predominant use by certain enterprises, [iii] the granting of disproportionately large amounts of subsidy to certain enterprises, and [iv] the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.<sup>464</sup> In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

- 2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

The Panel had rejected India's position that a subsidy is specific only if it discriminates in favor of "certain enterprises" against a broader category of other, similarly situated enterprises: "[o]nce access to the subsidy is shown to be limited to certain enterprises, either de jure or de facto, the subsidy is specific." For the Panel, Article 2.1 provides "no requirement to show that the subsidy is at the same time not available to other, undefined—but similarly situated—entities."<sup>465</sup> The Panel criticized India's approach by noting that specificity would be impossible to establish under the theory where "certain enterprises" represent the totality of an industry.<sup>466</sup>

The Panel also rejected India's argument that specificity should not attach in circumstances where there were only limited users of the good because of its nature, as with iron ore being supplied to the only users, i.e., steel producers. It decided that the negotiating history did not support such a result and opined that, if access is limited by the fact that only certain enterprises may use the good, the subsidy is specific. The Panel also believed it was proper under Article 2.1(c) for the authority to determine a subsidy to be specific if it relies on the fact that the number of "certain enterprises" is limited.<sup>467</sup> However, the Panel agreed with India that the USDOC had failed, in determining de facto specificity, to take into account "the extent of diversification of the relevant economy and the length of

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<sup>464</sup> In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

<sup>465</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.357 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.125).

<sup>466</sup> *Id.* ¶ 4.358.

<sup>467</sup> *Id.* ¶ 4.360.

time that relevant programs had been in operation.” The United States did not appeal this finding.<sup>468</sup>

In considering India’s claims, the Appellate Body observed, based in part on the guidance provided in *US—Anti-Dumping and Countervailing Duties (China)*, that the definitions in the *chapeau* of Article 2.1—“group” and “certain”—“suggest rather that the relevant enterprises must be ‘known and particularized,’ but not necessarily ‘explicitly identified,’ and that they may have ‘some mutual or common relation or purpose,’ or ‘degree of similarity.’” Still, the determination of whether a number of enterprises or industries constitute “certain enterprises” must be on a case-by-case basis.<sup>469</sup> The Appellate Body reminds that under Article 2.1(a) specificity exists if the subsidy is expressly limited to eligible enterprises, but not under Article 2.1(b) when objective criteria govern eligibility.<sup>470</sup> When the issue is not resolved by Articles 2.1(a) or (b), *de facto* specificity may be examined using the factors set out in Article 2.1(c).<sup>471</sup>

With regard to *de facto* specificity, the Appellate Body, after referring to the Appellate Body Report in *US—Anti-Dumping and Countervailing Duties (China)*, opined that “[a]rticle 2.1(c) thus points to certain indicia that investigating authorities and panels may evaluate in determining whether, despite not being *de jure* specific, a subsidy may be specific in fact. The focus of this provision is therefore on *de facto* circumstances surrounding the use of a subsidy.” The Appellate Body then began its application of the four factors in Article 2.1(c) to the present case<sup>472</sup> on the basis of India’s appeal, addressing each of the four arguments in turn.

India had argued that, in this case, under the first criterion of Article 2.1(c), the USDOC was required to demonstrate that the alleged subsidy program was being used by a limited number of entities within the set of “users of iron ore.”<sup>473</sup> In responding, the Appellate Body noted:

Contrary to a *de jure* analysis that examines whether a granting authority, or the legislation pursuant to which it operates, explicitly limits access to a subsidy [Articles 2.1(a) and (b)], the focus under the first factor of Article 2.1(c) is on a quantitative assessment of the entities that actually use a subsidy programme and, in particular, on whether such use is shared by a “limited number of certain enterprises.”<sup>474</sup>

<sup>468</sup> *Id.* ¶ 4.361 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.136).

<sup>469</sup> *Id.* ¶ 4.365 (quoting Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 373).

<sup>470</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.366.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* ¶ 4.369.

<sup>473</sup> *Id.* ¶ 4.371.

<sup>474</sup> *Id.* ¶ 4.374.

In addressing the specific terms of Article 2.1(c), the Appellate Body further observed,

When this term is viewed in conjunction with the term “limited number” in Article 2.1(c), however, this would seem to suggest greater specification by requiring a more quantitative assessment of the users of a subsidy programme. As we understand it, this is consistent with a de facto exercise, which aims to identify evidence of allocation or use that provides an investigating authority or panel sufficient assurance as to the existence of specificity.<sup>475</sup>

While the Appellate Body did not disagree with India’s contention that the term “limited number” after “use . . . by” supports a focus on the “users of the program being limited in number,” it did not accept India’s assertion that the “limited number of users must form a subset of certain enterprises.” Rather, “a limited quantity of enterprises or industries qualifying as ‘certain enterprises’ must be found to have used the subsidy programme, without requiring that the limited quantity represent a subset of some larger grouping of ‘certain enterprises.’”<sup>476</sup> The Appellate Body is also mindful that, as argued by the United States India’s interpretation would mean that, even when a unique industry or only a single enterprise qualified as “certain enterprises,” the investigating authority would not be able to determine specificity.<sup>477</sup> Accordingly, the Panel was correct in concluding that there was no obligation on the part of USDOC to establish that only a “limited number” within the subset of “certain enterprises” actually used the subsidy program.<sup>478</sup>

The Appellate Body then considered India’s claim that the first factor of Article 2.1(c) requires examination of whether a subsidy program de facto discriminates between “certain enterprises” and “similarly situated” enterprises. The test, according to the Panel, is not about discrimination even though it could be about a restriction on access to the subsidy.<sup>479</sup> In contrast, the United States supported the Panel’s finding that “Article 2.1 is not concerned with other enterprises, and whether or not such other enterprises have been discriminated against.” The United States pointed out that India’s approach would leave no recourse for investigating authorities where “certain enterprises” was defined as an industry or a single unique enterprise. *US—Large Civil Aircraft (Second complaint)* does not support India’s position since the issue there was whether a

<sup>475</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.376.

<sup>476</sup> *Id.* ¶ 4.378.

<sup>477</sup> *Id.* ¶ 4.379.

<sup>478</sup> *Id.* ¶ 4.380.

<sup>479</sup> *Id.* ¶ 4.381.



financial contribution was granted in disproportionately large amounts to certain enterprises, a different factor under Article 2.1(c) than was at issue here.<sup>480</sup>

In considering India's argument, the Appellate Body pointed out that:

whether the inquiry is focusing on the de jure or de facto elements of a subsidy programme, determining that access to, or the actual allocation or use of, a subsidy is limited requires showing that the subsidy is available only to certain enterprises within the jurisdiction of the granting authority.<sup>481</sup>

The Appellate Body saw no textual basis in Article 2.1(c) requiring the investigating authority to identify which enterprises or industries are "similarly situated" before assessing whether only a subset have de facto access to the subsidy. Eligibility is the key to de jure specificity under Article 2.1(a) with eligibility limits that favor certain enterprises; Article 2.1(b) sets out criteria to guard against selective eligibility. If the inquiry proceeds to Article 2.1(c), it is to determine whether, for example, access to the subsidy is limited to a number of certain enterprises.<sup>482</sup>

With regard to India's arguments based on *US—Large Civil Aircraft (2nd complaint)*, the Appellate Body notes that the earlier case analyzed the third factor in Article 2.1(c): "relating to whether there had been a 'granting of disproportionately large amounts of subsidy to certain enterprises.'" There:

The Appellate Body underscored that the third factor in Article 2.1(c) reflects a relational concept, requiring a determination as to whether the actual allocation of the subsidy to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under subparagraphs (a) and (b).<sup>483</sup>

That analysis, according to the Appellate Body, was limited to that third factor and the circumstances of that case.<sup>484</sup> Accordingly, the Appellate Body rejected India's argument that "specificity must be established on the basis of discrimination in favour of 'certain enterprises' against a broader category of other, similarly situated entities."<sup>485</sup>

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<sup>480</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.382.

<sup>481</sup> *Id.* ¶ 4.384.

<sup>482</sup> *Id.*

<sup>483</sup> *Id.* ¶ 4.388 (quoting Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 879, WT/DS353/AB/R (Mar. 12, 2012)).

<sup>484</sup> *Id.* ¶ 4.389.

<sup>485</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.390.

India also had claimed Panel error because the Panel “allowed for a finding that a Government’s provision of goods can *be de facto* specific based merely on the inherent limitations on use of the goods provided.” India contends that “under the Panel’s interpretation, ‘[i]f an authority is permitted to determine *de facto* specificity based on the inherent characteristics of the goods provided by a government, all government provisions of goods that amount to a subsidy under Article 1.1(a)(1)(iii) would ipso facto be *de facto* specific in every case.’”<sup>486</sup> The United States disagreed, pointing out that the “Panel did not find that the provision of goods that are inherently limited in utility will ipso facto be determined to be specific, but, rather, that inherent limitations are not a bar to a finding of specificity.” A specificity determination is still required under Article 2. Moreover, India’s position “would create a loophole in the subsidies disciplines because it would mean that the provision of all goods would be exempt from a finding of *de facto* specificity.”<sup>487</sup>

The Appellate Body began its analysis of the Indian contention by pointing out that under *US—Anti-Dumping and Countervailing Duties (China)*, “certain enterprises” was said to refer to “a single enterprise or industry or a class of enterprises or industries that are known or particularized.”<sup>488</sup> If the financial contribution is a discrete transfer of value from the government to a class of recipients, and the class is more likely to be identified and circumscribed, “there is a greater likelihood of a finding of specificity in instances where the input good is used only by a circumscribed group of entities and/or industries.”<sup>489</sup> The Appellate Body also rejected India’s contention “that the potential for simultaneous affirmative determinations under financial contribution and specificity analyses can be characterized as reducing whole clauses or paragraphs of the treaty to redundancy or inutility.” The legal reasoning and conclusions under Articles 1.1(a)(1)(iii) and 2.1(c) remain distinct even when both lead to affirmative outcomes.<sup>490</sup> Nor is it clear from the negotiating history of the SCM Agreement that consensus was lacking “on the issue of determining specificity based solely on the inherent limitations of the goods.”<sup>491</sup>

Consequently, the Appellate Body rejected India’s argument “that, if the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is further limited to a subset of this industry.”<sup>492</sup>

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<sup>486</sup> *Id.* ¶ 4.391.

<sup>487</sup> *Id.* ¶ 4.392.

<sup>488</sup> *Id.* ¶ 4.393 (quoting Appellate Body Report, *U.S.—Countervailing and Anti-Dumping Measures (China)*, *supra* note 212, ¶ 373).

<sup>489</sup> *Id.*

<sup>490</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.394.

<sup>491</sup> *Id.* ¶ 4.395.

<sup>492</sup> *Id.* ¶ 4.398.

## f. Article 12.7 of the SCM Agreement: “Facts Available”

India appealed the Panel’s conclusion that Article 12.7 of the SCM Agreement does not require the investigating authority to “engage in a comparative evaluation of all available evidence with a view to selecting the best information” to be used when the respondents are unable or unwilling to provide the investigating authority with the information required to complete the investigation. Even if that ruling was correct, according to India, the Panel acted inconsistently with Article 11 of the DSU when it failed to take into account “relevant evidence” on the meaning of the measures at issue.<sup>493</sup> India also contended that “the Panel erred by applying an incorrect legal standard under Article 12.7 of the SCM Agreement in its evaluation of the USDOC’s use of the highest non-de minimis subsidy rates in the instances identified by India” or in the alternative, that the Panel applied an “unnecessary burden of proof” when challenging the legal standard of Article 12.7.<sup>494</sup>

The Appellate Body began by addressing India’s argument that Article 12.7 cannot be interpreted as

granting the right to draw adverse consequences or inferences in all cases of non-cooperation, because this would not involve a process of “comparative evaluation,” and would not lead to the use of the “best information” on which to base a determination under Article 12.7.<sup>495</sup>

The United States contended that “the ordinary meaning of the term ‘facts available’ does not speak to which facts should be selected by an investigating authority invoking Article 12.7.” Rather, under the Article, the investigating authority, “when faced with a situation in which necessary information has not been supplied, may apply those facts that are otherwise available, which may include facts that are less favourable to an interested party or Member.”<sup>496</sup>

The Appellate Body noted that the Panel’s conclusion rested in part on the basis of the Appellate Body’s Report in *Mexico—Anti-Dumping Measures on Rice*: “the standard in Article 12.7 of the SCM Agreement requires that all substantiated facts on the record be taken into account, that ‘facts available’ determinations have a factual foundation, and that ‘facts available’ be generally limited to those facts that may reasonably replace the missing information.”<sup>497</sup> However the Panel also had rejected India’s assertion that the “investigating

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<sup>493</sup> *Id.* ¶ 4.399.

<sup>494</sup> *Id.* ¶ 4.400.

<sup>495</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.404.

<sup>496</sup> *Id.* ¶ 4.405.

<sup>497</sup> *Id.* ¶ 4.407 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.438).

authorities engage in a comparative evaluation of all available evidence with a view to selecting the best information. . . .”<sup>498</sup>

Article 12.7 of the SCM Agreement (Evidence) provides that “[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.” The Appellate Body noted that the use of “facts available” is “limited to a context of missing ‘necessary information.’ It is the absence of this particular information that the use of the ‘facts available’ is designed to mitigate.” Use of facts available is thus a process of identifying replacements for the missing information and using facts on the record only to replace that information.<sup>499</sup>

As the Appellate Body stated in *Mexico—Anti-Dumping Measures on Rice*, the investigating authority must use “those ‘facts available’ that ‘reasonably replace the information that an interested party failed to provide’” so as to arrive at an accurate determination.<sup>500</sup> Significantly (because this is the USDOC practice), the Appellate Body stated that facts available may include “facts contained in the application of the domestic industry that led to the initiation of the investigation” as well as information submitted by other interested parties or Members. However, determinations made on the basis of “facts available” cannot be made on the basis of “non-factual assumptions or speculation,”<sup>501</sup> and “all substantiated facts on the record must be taken into account.”<sup>502</sup>

Moreover, “facts available” should not be used to punish non-cooperating parties,<sup>503</sup> and under Article 12.11 of the SCM Agreement the investigating authority must take “due account of any difficulties experienced by interested parties,” including those parties that have not provided the “necessary information” specified in Article 12.7.<sup>504</sup> Drawing on Annex II of the Anti-Dumping Agreement, the Appellate Body also reasoned that “ascertaining the reasonable replacements for the missing ‘necessary information’ involves a process of reasoning and evaluation . . . [and] calls for a consideration of all substantiated facts on the record.”<sup>505</sup>

Insofar as India’s specific claims are concerned, the Appellate Body observed that the Panel had ruled that “facts available” determinations must have

<sup>498</sup> *Id.* ¶ 4.408 (quoting Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.439).

<sup>499</sup> *Id.* ¶ 4.416.

<sup>500</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.416 (quoting Appellate Body Report, *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, ¶ 294, WT/DS295/AB/R (Nov. 29, 2005) [hereinafter Appellate Body Report, *Mexico—Anti-Dumping Measures*]).

<sup>501</sup> *Id.* ¶ 4.417.

<sup>502</sup> *Id.* ¶ 4.419.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.* ¶ 4.422.

<sup>505</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.424.

a factual foundation and could not be made on the “basis of non-factual assumptions or speculation” and are “generally limited to those facts that may reasonably replace the missing information.”<sup>506</sup> According to the Appellate Body, “[w]here there are several ‘facts available’ from which to choose, it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison,” as India had argued.<sup>507</sup> However, the “comparative evaluation” advocated by India, in the view of the Appellate Body, may not be practicable in some circumstances, for example “where there is only one set of reliable information on the record.”<sup>508</sup> The investigating authority is to arrive “at an accurate determination, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case.”<sup>509</sup>

India’s contention was based in part on analysis of the United States’ regulations, Statement of Administrative Action,<sup>510</sup> and judicial decisions,<sup>511</sup> in concluding that the U.S. statute<sup>512</sup> is inconsistent with Article 11 of the DSU “as such” because the measure (governing the use of facts available), while discretionary, allows the investigating authority to draw adverse inferences solely because the inference is adverse to the party concerned. India faulted the Panel for not conducting a proper review of the U.S. municipal law evidence that India had submitted.<sup>513</sup> The Appellate Body noted that the United States, citing the legislative history, asserted that the measure was in fact discretionary.<sup>514</sup> The Panel, having found that the U.S. provisions were not inconsistent with Article 12.7, did not address whether the measure was mandatory.<sup>515</sup> In defending the Panel’s action, the United States contended that:

India may not base its claims on arguments relating to a “practice” or “system” that is not reflected in the challenged measure, and that, to the extent India’s arguments do not relate to the measure itself, any such claims were outside the Panel’s terms of reference and the scope of the present appeal.<sup>516</sup>

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<sup>506</sup> *Id.* ¶¶ 4.417, 4.429 (citing Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶¶ 7.437, 7.441).

<sup>507</sup> *Id.* ¶ 4.431.

<sup>508</sup> *Id.* ¶ 4.434.

<sup>509</sup> *Id.* ¶ 4.435.

<sup>510</sup> The document that is sent by the U.S. Trade Representative to the Congress, explaining certain provisions of a trade agreement that is being submitted for approval and the changes in U.S. law that are requested.

<sup>511</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.442.

<sup>512</sup> 19 U.S.C. § 1677e (2012); 19 C.F.R. §§ 351.308(a)-(c) (2015).

<sup>513</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.442.

<sup>514</sup> *Id.* ¶¶ 4.437-38.

<sup>515</sup> *Id.* ¶ 4.439.

<sup>516</sup> *Id.* ¶ 4.443.

Thus, the United States stated that “the measure is, properly construed, discretionary in nature.”<sup>517</sup>

The Appellate Body, having reviewed the Panel’s treatment of the evidence provided by India on the U.S. measure, determined that the Panel had failed to comply with its duty under Article 11 of the DSU by holding that India had failed to establish a *prima facie* case.<sup>518</sup> This conclusion was based on statements of the Panel relating both to India’s evidence and to the U.S. rebuttal evidence, which suggested to the Appellate Body that “rather than considering the evidence and declining to ascribe it probative value, the Panel in fact did not consider evidence submitted by the parties beyond the text of the measure at issue.”<sup>519</sup>

The Appellate Body then proceeded to assess whether it could complete the legal analysis by “engaging with the evidence submitted by the parties to the Panel” after noting that “the participants do not dispute the veracity or factual existence of the relevant documents submitted as evidence, including judicial decisions, the Statement of Administrative Action, the legislative history of the measure, and quantitative and qualitative material on the application of the measure.”<sup>520</sup> After analyzing the statute and applicable regulations as they relate to “adverse inferences,”<sup>521</sup> the Appellate Body noted a requirement that determinations under the law and regulations “must have a factual foundation” and “must be based on facts and may not be made on the basis of non-factual assumptions or speculation.”<sup>522</sup> The Appellate Body further noted that “the measure is framed in permissive terms. In particular, it states that the investigating authority ‘may use an inference that is adverse to the interests of that party.’” As a result, the Appellate Body determined that “in the light of this permissive framing of the text of the measure, the use of the inference is capable of being limited to those instances where it accords with the legal standard for Article 12.7 of the SCM Agreement.”<sup>523</sup> Thus, the Appellate Body did not consider that “the measure at issue, on its face, requires the investigating authority to act inconsistently with Article 12.7.”<sup>524</sup>

The Appellate Body then reviewed the judicial decisions, the Statement of Administrative Action, and other secondary materials submitted by India to assess whether the evidence supported India’s contention that the measure required the USDOC to draw “an adverse inference and the use of the worst possible information in making a determination on the ‘facts available’ in every

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<sup>517</sup> *Id.* ¶ 4.452.

<sup>518</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.456.

<sup>519</sup> *Id.* ¶ 4.455.

<sup>520</sup> *Id.* ¶ 4.461.

<sup>521</sup> 19 U.S.C. § 1677e; 19 C.F.R. §§ 351.308(a)-(c) (2015); *see* Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶¶ 4.465-66.

<sup>522</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.467.

<sup>523</sup> *Id.* ¶ 4.469.

<sup>524</sup> *Id.* ¶ 4.470.

case of non-cooperation, notwithstanding the discretionary nature of the measure on its face.”<sup>525</sup> After a review of these materials, the Appellate Body was not “convinced by India’s assertion that the measure requires the USDOC to draw the worst possible inference in all cases of non-cooperation, or to assume that those ‘facts available’ with adverse consequences are the only facts that it may use.”<sup>526</sup> Accordingly, the Appellate Body concluded that India’s evidence does not “establish conclusively that the measure requires the USDOC to act inconsistently with the obligations of Article 12.7 reflexively in all cases of non-cooperation.”<sup>527</sup> That being said, the Appellate Body noted that its conclusion “does not mean that the measure is not susceptible to being applied in a manner inconsistent with Article 12.7.”<sup>528</sup>

India also challenged the Panel’s determination that India had failed to establish a *prima facie* case against the USDOC’s practice of using the highest non-de minimis subsidy rate, a practice that India considered to be inconsistent with Article 12.7 of the SCM Agreement. Having declined to reverse the Panel’s interpretation of Article 12.7 “as such,” noted above, the Appellate Body considered India’s second ground, “that the Panel erred by imposing an ‘unnecessary burden of proof’ on India,”<sup>529</sup> by requiring India in each instance of the use of the highest non-de minimis rate to establish how “the use of such rate does not reasonably replace the missing information, or is otherwise inconsistent with Article 12.7 of the SCM Agreement.”<sup>530</sup> India had further argued that the USDOC had applied a “mechanistic rule” so as to punish non-cooperating parties.<sup>531</sup>

The United States had countered that the:

USDOC’s benefit determination in each case reflects a reasoned analysis and is based upon a factual foundation, and that the rates it used reflect the actual subsidy practices of the central and state governments in India as reflected in the actual experience of companies in India. . . . Where a company refuses to provide information, it is reasonable to conclude that the company has benefitted from the subsidy programme under investigation at least as much as the cooperating company in the same industry who received the higher benefit amount.<sup>532</sup>

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<sup>525</sup> *Id.* ¶ 4.473; *see also* ¶¶ 4.474-80.

<sup>526</sup> *Id.* ¶ 4.481.

<sup>527</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.482.

<sup>528</sup> *Id.* ¶ 4.483.

<sup>529</sup> *Id.* ¶ 4.484.

<sup>530</sup> *Id.* ¶ 4.485.

<sup>531</sup> *Id.* ¶ 4.487.

<sup>532</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.488.

The Panel concluded that the “rule” on its face was consistent with Article 12.7 of the SCM agreement so that its application in a “given instance would not, in and of itself, demonstrate a violation of Article 12.7.”<sup>533</sup>

The Appellate Body faulted the Panel for failing “to have analysed and discussed the existence or scope of the ‘rule’ alleged by India to have been applied in a number of instances,” instead presuming that the rule existed and had been applied in about 230 instances identified by India.<sup>534</sup> Rather, according to the Appellate Body, the Panel should have assessed whether India had sufficiently identified the instances of application claimed to be inconsistent with Article 12.7, although it was correct in requiring India to explain how each application breached the Article 12.7 legal standards. Otherwise, India could not have made its *prima facie* case.<sup>535</sup> The Panel was thus correct in the burden of proof imposed on India.<sup>536</sup>

On appeal, India had also objected to the USDOC’s use of “facts available” in the 2013 Sunset Review as being inconsistent with Article 12.7 of the SCM Agreement and Article 11 of the DSU. This was based on the USDOC’s assumption that Indian steel producers benefitted from some ninety-two different subsidy programs.<sup>537</sup> Despite U.S. assertions that the 2013 review was outside the Panel’s terms of reference, the Panel addressed India’s contentions. It found that India had failed to make a *prima facie* case of Article 12.7 inconsistency since the allegations regarding the ninety-two programs were confined to a single paragraph of India’s written submissions, with no further support of its claims presented to the Panel.<sup>538</sup>

The Appellate Body agreed with the Panel. It noted that:

A plain reading of India’s claim on its face appears to reveal a number of ambiguities. First, the substance of India’s argument is vague, insofar as India stated “[o]n a similar note” and “for substantially the same reasons as enunciated above,” without making any reference to which particular reasons or arguments it sought to rely upon in making its claim.<sup>539</sup>

India also failed to submit a key document to the Panel—the document containing the 2013 sunset review; the lack of this document “diminishe[d] the sufficiency of

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<sup>533</sup> *Id.* ¶ 4.490.

<sup>534</sup> *Id.* ¶ 4.494.

<sup>535</sup> *Id.* ¶ 4.495.

<sup>536</sup> *Id.* ¶ 4.496.

<sup>537</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.498.

<sup>538</sup> *Id.* ¶ 4.500.

<sup>539</sup> *Id.* ¶ 4.506.



the evidence provided to support India's claim."<sup>540</sup> Accordingly, the Appellate Body rejected India's claim.<sup>541</sup>

#### g. New Subsidy Allegations in Administrative Reviews

India argued unsuccessfully before the Panel that the common practice of investigating authorities in administrative reviews of examining new subsidies was inconsistent with Articles 11, 13, 21, and 22 of the SCM Agreement. India's argument focused on alleged inconsistencies between Articles 11 and 21, and an alleged breach of duty by the Panel to conduct an "objective assessment" of the matter before it and provide a "basic rationale" for its findings.<sup>542</sup> India did not argue that the investigating authority may not examine new subsidy allegations in conducting an administrative review or the precise considerations taken into account by the USDOC in its examination.<sup>543</sup> However, India did contend "that Article 21 is not intended to govern the imposition of duties per se, and does not cover a new examination into the existence, degree, and effect of newly alleged subsidies." Accordingly, India submitted that the U.S. could not expand the scope of a review under Articles 21.1 and 21.2 of the SCM agreement so as to initiate new investigations against new subsidies.<sup>544</sup>

The Panel, in rejecting India's contentions, noted that the administrative review proceedings were conducted under Article 21, that the same product was at issue in the review as in the original investigation, that India alleged no breach of Article 21 by the USDOC, and that India's claim under Article 11.1 was limited to an alleged failure to initiate an investigation into new subsidies.<sup>545</sup> The Panel considered, notwithstanding India's assertions, that in Article 21.1 the term "subsidization" did not necessarily relate "to specific subsidy programmes or limit the meaning of this term to previously examined subsidization—i.e. subsidization under programmes formally examined and found to constitute countervailable subsidies in the original investigation." Nor did it exclude new subsidy programs.<sup>546</sup> Rather:

new subsidy allegations are relevant to the investigating authority's consideration of the need for continued imposition of the duty with respect to the particular subsidized imports, as continued imposition of the duty may be necessary in the light

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<sup>540</sup> *Id.* ¶ 4.508.

<sup>541</sup> *Id.* ¶ 4.509.

<sup>542</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.510.

<sup>543</sup> *Id.* ¶ 4.511.

<sup>544</sup> *Id.* ¶ 4.512.

<sup>545</sup> *Id.* ¶ 4.513.

<sup>546</sup> *Id.* ¶ 4.515.

of new subsidization, even if previously examined subsidization has expired.<sup>547</sup>

The Panel also rejected India's contention that "reviews under Article 21 of the SCM Agreement are aimed only at correcting or re-examining determinations relating to subsidization and injury that already exist."<sup>548</sup> It further noted the reference in Article 21.1 to possible continued imposition of countervailing duties where "necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both."<sup>549</sup> The Panel "concluded that the USDOC was entitled, under Articles 21.1 and 21.2 . . . to examine new subsidy allegations in the administrative reviews at issue."<sup>550</sup>

The Appellate Body began its analysis by discussing the relationship of Articles 11, 13, 21, and 22 of the SCM Agreement, all of which are part of Section V of the SCM Agreement, countervailing measures, and are designed to balance the right to impose CVD to offset injury-causing subsidization, as well as the obligations disciplining the use of countervailing measures.<sup>551</sup> Administrative reviews are governed by Article 21:

- 21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.
- 21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately. A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.

<sup>547</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.515.

<sup>548</sup> *Id.* ¶ 4.517.

<sup>549</sup> *Id.* ¶ 4.518.

<sup>550</sup> *Id.* ¶ 4.519.

<sup>551</sup> *Id.* ¶ 4.522.

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- 21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

The Appellate Body explained that while Article 21.1 requires periodic reviews, Article 21.2 “provides a review mechanism to ensure that Members comply with the rule set out in Article 21.1,” setting out requirements for a “rigorous review.”<sup>552</sup> These are related to Article 11, which provides for the “original investigation,”<sup>553</sup> and to Article 21.4, which imposes the Article 12 evidentiary rules on administrative reviews under Article 21, even though Article 11 requirements are not directly imported into Article 21.<sup>554</sup> The mandates for the investigating authority for original investigations and administrative reviews are somewhat different according to the Appellate Body; in the former, all conditions set out in the SCM Agreement must be fulfilled, while in reviews the investigating authority is required only those issues raised before it by the interested parties or on its own initiative.<sup>555</sup> This suggests to the Appellate Body that Article 11 does not apply to administrative reviews under Article 21.2 of the SCM Agreement.<sup>556</sup>

Article 13 of the SCM Agreement sets out the consultation requirements applicable to original investigations under Article 11: Members whose products may be subject for investigation are to be invited for consultations to “clarify” the situation. Since Article 13 uses the word “investigation” and makes no reference to “reviews,” the Appellate Body concluded that Article 13 does not apply to reviews.<sup>557</sup> In contrast, the notification requirements in Article 22 of the SCM Agreement do apply to both investigations and administrative reviews:

- 22.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 11, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

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<sup>552</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.525.

<sup>553</sup> *Id.* ¶ 4.526.

<sup>554</sup> *Id.* ¶ 4.527.

<sup>555</sup> *Id.* ¶ 4.528 (quoting Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R (May 10, 2000), ¶ 63).

<sup>556</sup> *Id.* ¶ 4.530.

<sup>557</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.532.

- 22.7 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 21 and to decisions under Article 20 to apply duties retroactively.

The Appellate Body noted that nothing in Articles 21.1 and 21.2 “confine the enquiry in an administrative review to the subsidies examined in the original investigation.” Rather, the determination to continue a CVD depends on the need to offset subsidization and whether the injury is likely to continue or recur if the duty is removed or varied.<sup>558</sup> Moreover, the Appellate Body considered that the term “subsidization” (as distinct from “subsidy” in Article 11.1) “allows for a broader scope of review than the precise subsidy or subsidies that were examined in the original investigation.”<sup>559</sup> Thus, as the Panel decided in *US—Carbon Steel*, when the likelihood of continued subsidization is considered in the event of revocation of the countervailing duty, “an investigating authority may well consider, *inter alia*, the original level of subsidization, any changes in the original subsidy programmes, and ‘any new subsidy programmes introduced after the imposition of the original’ countervailing duty.”<sup>560</sup>

Still, according to the Appellate Body:

Articles 21.1 and 21.2 limit the type of new subsidy allegations that may be examined in an administrative review. . . . These provisions expressly link the subsidization to the original countervailing duty imposed. This suggests that the only “new subsidies” that may be examined as part of the “subsidization” in an administrative review are those that have a sufficiently close link to the subsidies that resulted in the imposition of the original countervailing duty.<sup>561</sup>

The Appellate Body added a further cautionary note: “[w]e consider that allowing for an unfettered examination of all types of new subsidy allegations in administrative reviews would upset this delicate balance that Part V of the SCM Agreement seeks to achieve.”<sup>562</sup> Several factors could be taken into account by the investigating authority to establish a sufficiently close nexus, but India’s appeal, according to the Appellate Body, did not require the Appellate Body to determine which factors ought to have been taken into account.<sup>563</sup>

In rejecting India’s contention, the Appellate Body reiterated its view that the requirements of Articles 11.1 and 13.1 of the SCM Agreement do not apply to

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<sup>558</sup> *Id.* ¶ 4.538.

<sup>559</sup> *Id.* ¶ 4.539.

<sup>560</sup> *Id.* (quoting Panel Report, *US—Carbon Steel*, *supra* note 283, ¶ 8.96).

<sup>561</sup> *Id.* ¶ 4.541.

<sup>562</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.542.

<sup>563</sup> *Id.* ¶ 4.543.

administrative reviews. Moreover, as the Appellate Body decided in *Mexico—Anti-Dumping Measures on Rice*, “the conditions set out in Article 21.2 of the SCM Agreement are ‘exhaustive’ and Members are not allowed to condition the right of interested parties to an administrative review upon requirements other than those set out in Article 21.2.”<sup>564</sup> However, the Panel erred in interpreting Articles 21.1 and 21.2 of the SCM Agreement (the notification and explanation requirements) as not being applicable to administrative reviews. Thus, the Panel also erred in rejecting India’s claims that USDOC acted inconsistently with these two provisions when “examining new subsidy allegations in the 2004, 2006, and 2007 administrative reviews.”<sup>565</sup> However, the evidence on the Panel record did not permit the Appellate Body to complete the analysis because of divergent views between India and the United States as to what constitutes a sufficient public notice relating to the eight new subsidy allegations referred to in India’s claim.<sup>566</sup>

The Appellate Body rejected India’s claim that the Panel breached its obligations to conduct an objective assessment of the matter and provide a “basic rationale” for its findings under Articles 11 and 12.7 of the DSU.<sup>567</sup> For the Appellate Body:

the Panel did not ignore India’s claims; rather, it rejected them on the basis of its interpretation of Article 21 of the SCM Agreement. Consequently, we do not consider that India has demonstrated an independent claim under Article 11 of the DSU that the Panel failed to assess the matter before it objectively.<sup>568</sup>

Also, the Appellate Body noted that the Panel did provide an explanation of its findings; India simply did not agree with them.<sup>569</sup>

#### h. Cumulative Assessment of Imports in CVD Investigations

The U.S. International Trade Commission, which is the agency responsible for determining whether subsidized or dumped imports are causing or threaten to cause injury to domestic producers (material injury under U.S. law), has traditionally assessed cumulatively the impact of both subsidized imports that are the subject of a CVD action and non-subsidized imports that are subject to anti-dumping investigations when simultaneous CVD and AD investigation

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<sup>564</sup> *Id.* ¶ 4.548 (citing Appellate Body Report, *Mexico—Anti-Dumping Measures*, *supra* note 500, ¶ 315).

<sup>565</sup> *Id.* ¶ 4.550.

<sup>566</sup> *Id.* ¶ 4.553.

<sup>567</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.554.

<sup>568</sup> *Id.* ¶ 4.558.

<sup>569</sup> *Id.* ¶ 4.560.

petitions are filed with the USITC and the USDOC. India challenged these practices as being inconsistent with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.<sup>570</sup> The Panel accepted India's challenge, holding that, under Article 15.3, the effects of imports that are not subject to a CVD investigation cannot be addressed cumulatively with those of imports that are subject to a CVD investigation. The U.S. argument that, since Article 15.3 does not mention cross-cumulation of allegedly subsidized imports with dumped imports or otherwise address the situation where both anti-dumping and CVD investigations are progressing simultaneously, it does not regulate such imports, was rejected by the Panel.<sup>571</sup>

Article 15 provides in pertinent part as follows:

- 15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the *subsidized imports* and the effect of the *subsidized imports* on prices in the domestic market for like products<sup>572</sup> and (b) the consequent impact of these imports on the domestic producers of such products.
- 15.2 With regard to the volume of the *subsidized imports*, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the *subsidized imports* on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. . . .
- 15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidization established

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<sup>570</sup> *Id.* ¶ 4.563.

<sup>571</sup> *Id.* ¶ 4.564.

<sup>572</sup> Throughout this Agreement the term "like product" (*produit similaire*) shall be interpreted to mean a product that is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

- 15.4 The examination of the impact of the *subsidized imports* on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry . . . .
- 15.5 It must be demonstrated that the *subsidized imports* are, through the effects<sup>573</sup> of subsidies, causing injury within the meaning of this Agreement . . . The authorities shall also examine any known factors other than the *subsidized imports* which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. . . .

The Panel noted that, under Article 15.3, the existence of imports simultaneously subject to CVD investigations from multiple countries is a precondition to cumulation under Article 15.3; Article 15.3 does not address nor regulate “cross-cumulation of the effects of subsidized imports with the effects of non-subsidized, dumped imports.”<sup>574</sup> The Panel further noted that Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, as well as Article VI:6(a) of the GATT 1994, each refer consistently to “subsidized imports,” and it also noted that Article VI:6(a), which concerns both dumping and countervailing duties, refers to “effects of the dumping or subsidization, as the case may be” when addressing injury, with no reference to the effects of the subsidy *and* dumping cumulatively.<sup>575</sup> It observed that the Appellate Body Reports in *EC—Tube or Pipe Fittings* and *US—Oil Country Tubular Goods Sunset Reviews*, cited by the United States in support of its position, “addressed the rationale for cumulation of the effects of dumped imports from several sources, but did not address the issue of cross-cumulation of the effects of dumped and subsidized imports.”<sup>576</sup>

In its analysis, the Panel considered “the main question to be whether the use of the term ‘subsidized imports’ in these provisions [Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement] limits the scope of the investigating authority’s

<sup>573</sup> As set forth in paragraphs 15.2 and 15.4.

<sup>574</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.566.

<sup>575</sup> *Id.* ¶ 4.567.

<sup>576</sup> *Id.* ¶ 4.568 (citing Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶¶ 7.353-54).

injury assessment to subsidized imports only.”<sup>577</sup> The Panel observed that under U.S. law,<sup>578</sup> the USITC in certain circumstances is required “to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports” and that in the investigation at issue the USITC cumulated the effects of subsidized imports from India with non-subsidized dumped imports from six other Members which were subject only to parallel anti-dumping (but not CVD) investigations.<sup>579</sup>

The Appellate Body initially observed that Article 15.3 refers to imports “simultaneously subject to countervailing duty investigations,” permitting cumulation of such imports if the other conditions of Article 15.3 are met. For the Appellate Body, “[t]he text is clear in stipulating that being subject to countervailing duty investigations is a prerequisite for the cumulative assessment of the effects of imports under Article 15.3.”<sup>580</sup> The Appellate Body suggested that its finding in *EC—Bed Linen (Article 21.5—India)*, concerning an antidumping matter, is analogous to the present situation regarding subsidized imports:

It is clear from the text of Article 3.1 [of the WTO Anti-Dumping Agreement] that investigating authorities must ensure that a “determination of injury” is made on the basis of “positive evidence” and an “objective examination” of the volume and effect of imports that are dumped—and to the exclusion of the volume and effect of imports that are not dumped.<sup>581</sup>

The Appellate Body drew further support from its position in support of the Panel and India by noting that under Article 15.4 of the SCM Agreement, the evaluation of relevant economic factors relates to the impact of subsidized imports “to the exclusion of other non-subsidized imports” and to Article 15.5, where the investigating authority must establish that “the *subsidized imports* are, through the effects of *subsidies*, causing injury.”<sup>582</sup> Further, other provisions of Part V of the SCM Agreement (regulating CVD investigations) such as Article 11.2, stipulate that initiation of the investigation “must be based on, *inter alia*, evidence showing that alleged injury to a domestic industry ‘is caused by subsidized imports through the effects of the subsidies.’”<sup>583</sup> In consequence, the Appellate Body concluded that “Article 15.3 and Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement

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<sup>577</sup> *Id.* ¶ 4.569.

<sup>578</sup> 19 U.S.C. §1677(7)(G) (2012).

<sup>579</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.570.

<sup>580</sup> *Id.* ¶ 4.579.

<sup>581</sup> *Id.* ¶ 4.582 (quoting Appellate Body Report, *EC—Bed Linen (Article 21.5—India)*, ¶ 111, WT/DS141/AB/RW (Apr. 8, 2003)).

<sup>582</sup> *Id.* ¶ 4.584.

<sup>583</sup> *Id.* ¶ 4.585.



require that the injury analysis in the context of a countervailing duty determination be limited to consideration of the effects of subsidized imports.”<sup>584</sup>

In further rebutting the U.S.’ contentions, the Appellate Body questioned the relevance of the Appellate Body Reports in *EC—Tube or Pipe Fittings* and *US—Oil Country Tubular Goods Sunset Reviews*. The rationale of those cases “provides no basis for including non-subsidized imports within a cumulative assessment of the effects of subsidized imports from several countries in a countervailing duty investigation pursuant to Article 15 of the SCM Agreement.”<sup>585</sup> Moreover, although the United States argued “Article 15 must allow an investigating authority to take account of the effects that all unfairly traded imports are having on a domestic industry,” the Appellate Body noted in rejecting that contention that “the phrase ‘unfairly traded products’ or similar language is not used in Article 15 of the SCM Agreement.”<sup>586</sup> There is no basis in Article 15 authorizing the investigating authority to “consider a single group of ‘unfairly traded imports’” rather than imports simultaneously subject to countervailing duty investigations, as stipulated in Articles 15.1, 15.2, 15.4, and 15.5, respectively.<sup>587</sup> Nor is there a basis in the text of the various paragraphs of Article 15 for permitting the investigating authority from, as the United States asserts, “adequately taking into account the injurious effects of all unfairly traded imports” even if the interpretation of the Panel and the Appellate Body “consequently frustrate[s] the purpose of both the SCM Agreement and the Anti-Dumping Agreement.”<sup>588</sup>

Finally, the Appellate Body interpreted Article VI:6(a) of the GATT 1994, which provides:

No Member shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another Member unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.<sup>589</sup>

While the United States relied on the Article VI:6(a) language “as the case may be” to justify its conclusion that the unfair trade practices covered by the authority’s injury determination could involve dumping, subsidization, or both, the Appellate Body (supporting the Panel) disagreed. According to the Appellate Body, the “or” in “dumping or subsidization” means that the language “as the case

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<sup>584</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.586.

<sup>585</sup> *Id.* ¶ 4.593.

<sup>586</sup> *Id.* ¶ 4.594.

<sup>587</sup> *Id.*

<sup>588</sup> *Id.* ¶ 4.595 (citing the United States’ other appellant’s submission, ¶¶ 112-15; Panel Report, *US—Carbon Steel (India)*, *supra* note 283, ¶ 7.352).

<sup>589</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.597.

may be” clarifies that injury may be caused by either dumping or subsidization (but not both).<sup>590</sup> Accordingly the Panel was upheld and the U.S.’ cross-appeal was rejected.<sup>591</sup>

However, after a detailed analysis, the Appellate Body accepted the U.S. position that the Panel acted inconsistently with Article 11 of the DSU by failing to adequately address the terms of the U.S. statute at issue (19 U.S.C. §1677(7)(G)), in particular by failing to provide any reasons why the statute requires the USITC to assess cumulatively subsidized imports and non-subsidized imports.<sup>592</sup> There, the Panel was faulted for failing to explain which are the “certain situations” where the USITC is required to cross-cumulate.<sup>593</sup> Here, the Appellate Body found that the record before it made it able to complete the legal analysis and concluded in light of the foregoing that the statute at issue was inconsistent “as such” with Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.<sup>594</sup>

## 6. Commentary

This case probably has less ongoing significance as an explanation of the jurisprudence of the Appellate Body that might have been originally expected, but several important considerations have emerged.

### a. Post Hoc Presentation of Evidence is Largely Useless

If the investigating authority, and later its government, wish to use specific evidence to support their determination of, e.g., the use of a certain benchmark, it behooves the authority to explain fully the relevance and probative value of that evidence in the administrative determination. The fact that evidence exists in the administrative record that would provide support to a significant conclusion, with any indication that the investigating authority interpreted it and relied on it, is not sufficient.

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<sup>590</sup> *Id.* ¶ 4.599.

<sup>591</sup> *Id.* ¶ 4.600.

<sup>592</sup> *Id.* ¶ 4.615; *see also* ¶¶ 4.609-13.

<sup>593</sup> *Id.* ¶ 4.614.

<sup>594</sup> Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 263, ¶ 4.629.

b. Status as a Public Body Must Be Established by Evidence of *Actual Exercise* of Control

For corporate lawyers, it may seem that government ownership of ninety-eight percent of the stock, plus the right to appoint all officers and directors, establishes that the entity in question is a public body in the sense that the entity is controlled by the government. Not so. For the Appellate Body, it is necessary to demonstrate through factual evidence that the government exerts actual control over the major decisions of the entity in question. This will require additional collection of evidence by the investigating authority, likely by adding additional questions to the questionnaire that is submitted to the respondent government for completion, increasing somewhat the cost and complexity of the proceeding for all other parties. That being said, conceivably in some instances an alleged public body exists that actually does operate independently from the government.

c. No Inferences May Be Drawn When Providing the Rationale for Choosing a Benchmark Price, and for Loans All Costs to the Recipient Must Be Included

When calculating a “Tier II” benchmark based on world market prices established through a number of transactions, the export prices of the entity providing the alleged domestic subsidy, in this case NMDC, may not be excluded from the world-price analysis without first determining whether that export price is set based on market-economy factors or as a result of other considerations (e.g., maintaining employment or generating foreign exchange). In calculating the price of an allegedly subsidized domestic loan program, all relevant costs must be included, including any administrative or qualifying costs on the part of the recipient as well as interest payable. This requirement, again, can probably be met by adding questions in the investigating authority questionnaire sent to the government and to affected private interests, and by extending the verification of data in the respondent country.

d. Like It or Not, Foreign Producers Who Do Not Cooperate with the USDOC Will Be Hit with Adverse “Facts Available”

The Appellate Body report effectively confirms the acceptability under Article 12.7 of the SCM Agreement in most practical situations of the USDOC’s practice of punishing foreign respondents who do not respond fully and adequately to requests for information by the use of the data submitted in the petition by the petitioners in making their *prima facie* case for initiating the investigation. That data almost invariably purports to support high subsidy margins and is this likely to be less favorable to respondents than when the respondents provide the data requested by the USDOC. Punitive use of “facts

available” is not sanctioned by the Appellate Body, but the Appellate Body does permit the use of data on the administrative record submitted by petitioners. Since in many, if not most, instances petitioners’ data is the only data on the record when the respondents do not respond in a timely manner, the USDOC’s practice is likely to continue with few changes, resulting in higher margins.

e. Cross-cumulation of Non-dumped, Dumped, and Subsidized Imports in Determining Material Injury is Prohibited

The implications of this prohibition—seemingly required by the plain language of Article 15 of the SCM Agreement (addressing injury determinations in CVD cases) and referring numerous times to “subsidized imports” but never to dumped imports—will likely be significant. Typically, at least in the United States, dumping and countervailing duty petitions are filed simultaneously with the USDOC and the USITC and at the USITC the injury determinations are for all practical purposes combined. As a spokesperson for ASI complained, the ruling “will make it very difficult for domestic industries to obtain an effective remedy when facing both dumped and subsidized imports at the same time.”<sup>595</sup> One result may be that the domestic industries increase their efforts to file simultaneous CVD actions against imports from as many different countries as possible to increase the likelihood with cumulation that the USITC will find the volumes of potentially subsidized imports sufficient for a finding of material injury, particularly at the preliminary injury stage when the magnitude of any subsidy margins is unknown. This may well increase the costs of prosecuting and defending AD and CVD actions, particularly for importers who are close to de minimis levels<sup>596</sup> or that would not otherwise have been joined in the action.

f. Current Practices with Regard to Specificity and Addressing New Subsidies in Administrative Reviews

Current practices by the USDOC and most other investigating authorities in determining de facto specificity and analyzing new subsidy programs in administrative action are, with minor variations, affirmed. Again, the questionnaires will likely require some additional questions and verification by the

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<sup>595</sup> See Baschuk, *supra* note 269 (quoting AISI President and Chief Executive Officer Thomas Gibson).

<sup>596</sup> See Agreement on Subsidies and Countervailing Measures, art. 27.10(b), Apr. 15, 1994, 1869 U.N.T.S. 14 (providing an exclusion where “the volume of the subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, unless imports from developing country Members whose individual shares of total imports represent less than 4 per cent collectively account for more than 9 per cent of the total imports of the like product in the importing Member”).

investigating authority, where such verification is required under national legislation, meaning that the process probably becomes slightly longer and more complicated.

g. The Appellate Body and the Members Both Have Responsibilities to Make the Appeals Process More Transparent

It is difficult to know whether the length of this report (268 pages plus annexes) and its repetitiveness—problems very similar to those identified in the Commentary to *Fur Seals*—are the result of the Appellate Body’s excessive workload and inadequate staffing, time pressures, India’s lack of discretion in appealing some issues where the chances of the Appellate Body overturning the Panel ruling were minimal or nil (e.g., the challenges to the findings of de facto specificity and “facts available”), or a combination of all three. There is relatively little that the Appellate Body can do to encourage the Members to use restraint in compiling the lists of issues that are to be appealed, and perhaps not much to produce shorter, better organized reports, particularly when they are under pressure to produce the reports as soon after the expiration of the sixty-day/ninety-day time frame specified by the DSU<sup>597</sup> as practicable. However, those Members who have an interest in the smooth operations of the Appellate Body and the prompt rendering of Appellate Body Reports (presumably including both India and the United States), would do well to exercise restraint wherever feasible.

While the Appellate Body reports are of course publicly available on the WTO website, there is little de facto transparency in long and repetitive reports because only a few, besides the parties and counsel in a handful of law firms, government ministries, and academics in the universities, will take the time to read and digest them. One possible improvement would be to include case summaries, now relegated to an obscure section of the WTO’s website,<sup>598</sup> at the beginning of the published report once the report has been accepted by the Appellate Body. This would be similar to the long-standing practice of the U.S. Supreme Court, which includes a synopsis of the case at the beginning of each of the published opinions. Adoption of that practice by the Appellate Body would facilitate understanding of the reports by the interested non-experts and could in time give a greater legitimacy to the appellate process.

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<sup>597</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

<sup>598</sup> See *Find Disputes Cases*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/find\\_dispu\\_cases\\_e.htm#results](http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results) (last visited Feb. 4, 2015). The summary for *US—Carbon Steel (India)* is available at *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds436\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds436_e.htm) (last visited Apr. 12, 2015).

