WTO CASE REVIEW 2002[1]

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1. This *WTO Case Review* is the third in an annual series on the substantive international trade adjudications rendered by the World Trade Organization's Appellate Body. Each *Review* explains and comments on the Appellate Body reports adopted by the Dispute Settlement Body during the preceding calendar year (January 1–December 31), excluding decisions on compliance with recommendations contained in previously adopted reports. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457 (2002) [hereinafter *WTO Case Review 2001*]; Raj Bhala & David A. Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1 (2001) [hereinafter *WTO Case Review 2000*].

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In December 2002, Professor Bhala visited the WTO and benefited from many conversations with officials there. While their identities and contributions must remain anonymous, Professor Bhala wishes to thank them for their assistance and hospitality. He also wishes to thank his Research Assistant, Ms. Lucienne Attard, B.A. and M.Juris. (University of Malta), LL.M. (The George Washington University), S.J.D. candidate (The George Washington University), for her review of an earlier draft of this article.

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PART ONE: INTRODUCTION

STABILITY AMIDST TURMOIL

Implacable foes and inveterate supporters of the World Trade Organization (WTO) could agree on at least one point about the past year: 2002 was a tumultuous one in trade. Consider a few of the events, wholly apart from developments in the emerging body of international trade jurisprudence (reviewed below), that occurred in the last quarter of 2002:

In September:

Thailand's Dr. Supachai Panitchpakdi took the helm of the WTO, becoming its third Director-General (with a term expiring in September 2005), following Italy's Renato Ruggiero (who served from January 1995 to September 1999), and New Zealand's Mike Moore (who served from September 1999 to September 2002).[2]

In October:

A WTO panel met for the first time to consider complaints from eight WTO Members (Brazil, China, the European Union (EU), Japan, New Zealand, Norway, South Korea, and Switzerland) against American steel safeguard tariffs, ranging from eight to thirty percent, imposed by President Bush in March 2002, despite an array of exemptions from the measures granted by the United States.[3]

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2. *See* Daniel Pruzin, *Director-General Selection Process Remains Thorny Issue for WTO Members*, 19 Int'l Trade Rep. (BNA), No. 44, at 1901 (Nov. 7, 2002); Daniel Pruzin, *Trade Officials Give Moore Passing Grade as Head of WTO*, 17 Int'l Trade Rep. (BNA), No. 36, at 1396 (Sept. 14, 2000).

3. *See* Daniel Pruzin, *U.S., Complainants Hold First WTO Dispute Hearing on Steel Safeguard Duties*, 19 Int'l Trade Rep. (BNA), No. 44, at 1882 (Oct. 31, 2002) (reporting that the claims included:

> [T]he United States violated [the WTO] Safeguards Agreement provisions by failing to carry out a proper determination as to whether imported steel was causing serious injury to domestic producers, failing to show that imports were coming in such increased quantities as to cause or threaten serious injury to domestic producers, failing to establish the necessary causal link between increased imports and injury, and failing to show that increased imports were the result of 'unforeseen developments,' all requirements that must be met under WTO rules to justify the imposition of a safeguard measure).

An interim panel found that the steel safeguards violated WTO rules on March 26, 2003. *See WTO Interim Panel Rejects U.S. Steel Safeguard in Limited Ruling*, 21 INSIDE U.S. TRADE 13 (2003).

> In December:
>
> China completed its first year of Membership in the WTO, albeit on the terms of a non-market economy (NME), during which it participated in its first case (against the United States on steel safeguards).[4]
>
> The United States announced it completed a free trade agreement (FTA) with Chile,[5] and except for resolving the issue of capital controls, finished negotiations with Singapore on an FTA,[6] following the Congressional grant, in August, to President Bush of fast-track authority to negotiate trade deals (now called Trade Promotion Authority, or TPA).[7]

An environment can be tumultuous not only because of what takes place, but also because of what fails to happen. The lack of closure on a matter can catalyze or exacerbate confusion and disorder and even agitation and conflict. Consider some of the still-unresolved controversies during the last quarter of 2002:

> Following the November 2001 Doha Ministerial Conference and obdurate opposition by some EU members to major reforms in the Common Agricultural Policy (CAP), no agreement was reached among WTO Members on a draft compromise text for liberalization of trade in agriculture under the auspices of the agenda built into the WTO *Agreement on Agriculture* and the

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Interestingly, there are reports the safeguard measures are helping American producers restructure. *See, e.g., A Miracle at Bethlehem*, ECONOMIST, Jan. 11, 2003, at 55; Edward Alden & Caroline Daniel, *Tariffs 'Rejuvinating US Steel Dinosaurs': President Bush's Controversial Protection Measures Are Helping Bring About Restructuring of the Industry*, FIN. TIMES (LONDON), Jan. 15, 2003, at 7. Of course, there also are reports about the damage higher duties, leading to steel price rises of 20-50%, are inflicting on American motor and equipment manufacturers. *See, e.g.,* Jeremy Grant & Edward Alden, *Auto Industry Warned on Steel*, FIN. TIMES (LONDON), Jan. 28, 2003, at 8.

4. *See* Pruzin, *U.S., Complainants Hold First WTO Dispute Hearing on Steel*, *supra* note 3, at 1882.

5. *See* James Langman, *Chile Digests Conclusion of FTA Talks, Prepares for 'Selling' and Implementation*, 19 Int'l Trade Rep. (BNA), No. 50, at 2186 (Dec. 19, 2002).

6. *See* Rossella Brevetti, *Trade Official Defends U.S. Stance on Capital Controls in FTA Talks*, 19 Int'l Trade Rep. (BNA), No. 49, at 2136 (Dec. 12, 2002); Christopher S. Rugaber & Genevieve Wilkinson, *U.S.–Singapore Free Trade Accord Still Hung Up Over Capital Controls*, 20 Int'l Trade Rep. (BNA), No. 2, at 63 (Jan. 9, 2003).

7. For an interesting empirical analysis concluding political party affiliation has a causal effect on trade policy, see David Brady et al., *Does Party Matter? An Historical Test Using Senate Tariff Votes in Three Institutional Settings*, 18 J. L. ECON. & ORG. 140, 140-54 (2002).

timetable for the Doha Round of trade negotiations.[8] They also fought over the EU ban on food products containing genetically-modified organisms (GMOs), with the United States Trade Representative (USTR), Ambassador Robert Zoellick, using "immoral" and "luddite" as adjectives to describe European behavior.[9]

- Also following the Doha Conference, no agreement was reached on new rules about compulsory licensing of pharmaceutical patents, with the United States insisting that any easing of such rules remain limited to medicines that treat HIV/AIDS, tuberculous, and malaria,[10] and with the EU's trade commissioner,

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8. *See*, *e.g.*, Tobias Buck, *Climbdown on Farm Trade Boosts Hopes of WTO Talks*, FIN. TIMES (LONDON), Jan. 28, 2003, at 8 (reporting that France and Ireland dropped their opposition to a paper setting out the EU's position on liberalization of global farm trade, but continued to resist a central reform proposal, namely, severing the link between subsidies and production); Tobias Buck & Frances Williams, *Brussels Ready for Battle After Backing Radical Farm Reforms*, FIN. TIMES (LONDON), Jan. 23, 2003, at 3 (discussing the EU's proposed CAP reforms); Tobias Buck, *Fischler Set to Seek Farm Accord Ahead of World Trade Meeting*, FIN. TIMES (LONDON), Jan. 20, 2003, at 6 (discussing the proposal of EU Agriculture Commissioner, Franz Fischler, to reform the CAP by severing the link between spending and production, to end blue-box subsidies, the agreement of Germany, the Netherlands, and the United Kingdom with this proposal, and the staunch opposition to it from France); Tobias Buck & Guy de Jonquières, *Paris Blocks EU Plans for Reform of Farm Trade*, FIN. TIMES (LONDON), Jan. 22, 2003, at 12 (reporting France's blockage of the EU's plan to change the nature of farm support from production-linked subsidies, "blue box subsidies" that link payments to a farmer with the farmer's output, to income support and rural development subsidies); *Europe's Meagre Harvest*, ECONOMIST, Jan. 25, 2003, at 70 (explaining the United States wants countries with high-levels of farm support, such as EU members, to liberalize more quickly than other countries, while the EU favors equal reductions by all, and also stating the EU has retreated from plans to limit support payments to large farms, and to reform subsidies for dairy and sugar); *see also* World Trade Organization, *WTO Agriculture Negotiations–The Issues, and Where We Are Now* (Oct. 21, 2002), *available at*, www.wto.org (outlining the two phases of agricultural negotiations thus far, conducted during March 2000-01 and March 2001-02, the mandate in the *Doha Declaration*, modalities for further negotiations and proposals tabled).

9. *Review and Outlook: "Immoral" Europe*, WALL ST. J., Jan. 13, 2003, at A10.

10. The context in which the issue matters is a country that lacks the capacity to manufacture pharmaceuticals and/or a health care budget to produce the medicines. For that country, invariably a Third World one facing a public health crisis, and thus a need for medicines, the right to affect a compulsory license is of no help. That country needs to import cheap copies of the patented medicines; hence, the issue is whether WTO rules that protect patent holders ought to be waived to allow the country to do so. The American pharmaceutical industry argues that without limits on such a waiver (for example, for drugs to treat AIDS, but not for Viagra to treat sexual dysfunction), the waiver would undermine all drug patent protection. *See* Frances Williams, *WTO Tries to Break Deadlock on Medicines Access*, FIN.

Pascal Lamy, calling the opposition from the American pharmaceutical industry "very stupid."[11]

- Again following the Doha Conference, the United States and EU continued to quarrel over possible reforms of antidumping and countervailing duty laws, with the Europeans advocating–and the Americans opposing–a mandatory "lesser duty" rule and "public interest" test.[12]

- Russia continued to negotiate for accession, without coming to final terms,[13] though the United States and EU previously announced they would not consider Russia–in contrast to China (and Vietnam)–a non-market economy (NME).[14]

TIMES (LONDON), Jan. 28, 2003, at 6; *see also* Amir Attaran, *The Doha Declaration on the TRIPS Agreement and Public Health, Access to Pharmaceuticals, and Options Under WTO Law*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 859, 860, 883-85 (2002) (arguing the problem of access to patented pharmaceuticals can be remedied only imperfectly by the WTO's *TRIPS* Council, and that of the potential remedies the Council's best option would be to decide that an action for improved access should not be justiciable under WTO dispute settlement rules, and to urge a Ministerial Conference or the General Council to resolve the Doha Declaration mandate by consensus, without amending the *TRIPS* Agreement).

11. Guy de Jonquières, *EU Condemns Stance of U.S. Drugs Groups*, FIN. TIMES (LONDON), Jan. 21, 2003, at 6.

12. The "lesser duty" rule calls for antidumping or countervailing duties to be imposed only up to the rate necessary to prevent injury to a domestic industry, not to the full level necessary to cover the dumping margin or subsidization level. Article 19:2 of the *Agreement on Subsidies and Countervailing Measures* contains an optional version of the rule. The "public interest" test would consider whether the interests of other countries would be harmed by the imposition of an antidumping or countervailing duty. *See* Christoper S. Rugaber, *EU to Offer Subsidy Proposals at WTO Will Urge Mandatory "Lesser Duties" Rule*, 19 Int'l Trade Rep. (BNA), No. 46, at 1992 (Nov. 21, 2002).

13. *See* Daniel Pruzin, *Russia and WTO Members Agree on Accelerated Schedule of Negotiations*, 20 Int'l Trade Rep. (BNA), No. 1, at 20 (Jan. 2, 2003).

14. Vietnam's NME status is relevant to an emerging, and potentially major, series of trade problems with the United States. In December 2001, the two countries signed a trade agreement manifesting the political will in Hanoi and Washington, D.C. to improve relations. Catfish farmers in the American south do not share that will. Also in 2001, with the farmers' and packers' encouragement, Congress passed rules requiring the Vietnamese to label their product "basa" or "tri" rather than "basa catfish" (or another name indicating a local product), effectively forbidding the Vietnamese to apply the same rubric ("catfish") to the Vietnamese product. In January 2003, the United States Department of Commerce, in response to a petition from these farmers, announced antidumping duties of 38-62% on Vietnamese "fish fillets." *See* Notice of Preliminary Determination of Sales at Less than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 4986 (Jan. 31, 2003) (finding that "[c]atfish" are one of Vietnam's largest exports,

- The War on Terrorism proceeded with varying degrees of success, preparations continued for a possible military conflict with Iraq, but Saudi Arabia remained outside the WTO, and no new Muslim country acceded to the WTO as a full Member.

- The WTO staff engaged in a "work to rule" action (a refusal to work or give administrative support beyond normal business hours) to protest the paucity of recent pay raises, thereby disrupting several meetings at the WTO headquarters.[15]

- Several major trade disputes between the United States and the European Union (EU), in which final adjudications from the Appellate Body had been issued in previous years, remain unresolved, including *Beef Hormones*,[16] *Foreign Sales Corporation*,[17] and *1916 Act*.[18]

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employing 300,000 to 400,000 people in the Mekong delta, and Vietnamese "catfish" have recently accounted for 20% of the U.S. frozen catfish market). Vietnam's status as an NME country almost certainly makes it easier to render affirmative findings of dumping, in this and in future U.S. anti-dumping actions.

15. *See* Daniel Pruzin, *Staff Action to Push Pay Raise Disrupts Several WTO Meetings*, 19 Int'l Trade Rep. (BNA), No. 46, at 1985 (Nov. 21, 2002) (reporting that while the Director-General, Dr. Supachai Panitchpakdi, supports an across-the-board average pay hike of eight percent in line with increases at the United Nations, International Monetary Fund, and Organization for Economic Cooperation and Development, several WTO Members, including the United States and Germany, which are the two major contributors to the WTO budget, respectively, are opposed).

16. *See* Gary G. Yerkey, *EU Plans Initiative at WTO Seeking Removal of U.S. Sanctions in Beef Hormone Dispute*, 19 Int'l Trade Rep. (BNA), No. 50, at 2169 (Dec. 19, 2002) (reporting the EU will ask the WTO to require the United States to lift its annual sanctions worth $116.8 million against EU products, which the United States imposed in 1999 following the Appellate Body ruling on products, such as Danish ham, French mustard, and Roquefort cheese, because the EU now has scientific proof that six beef hormones–melengestrol acetate, oestradiol-17-beta, progesterone, testerone, trenbolone, zeranol–are a significant public health risk). The *Beef Hormones* case is explained and excerpted in RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 1674-1706 (2d ed. 2001).

17. *See* BHALA, *supra* note 16, at 988-1008 (explaining and excerpting *The Foreign Sales Corporation* case).

18. *See United States–Antidumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Sept. 26, 2000), *treated in* Bhala & Gantz, *WTO Case Review 2000*, at 44-52; *see also* Jeffrey S. Beckington, *The World Trade Organization's Dispute Settlement Resolution in United States–Anti-Dumping Act of 1916*, 34 VAND. J. TRANSNAT'L L. 199, 199-223 (2001).

Ironically on Veterans Day, November 11, 2002, the EU and Japan threatened to re-commence hostilities in the WTO against the United States for allegedly failing to comply with the Appellate Body ruling by repealing the 1916 Act. To be sure, the United States never has used the Act as the basis for a judgment resulting in criminal or financial penalties against dumpers, and it has introduced legislation to repeal the Act. One legislative proposal (H.R.

This list of non-achievements was not generated by a lack of interest or effort. Several WTO Members and officials from the WTO Secretariat went to considerable lengths to resolve these matters before the end of 2002.

The critics of the WTO might be inclined to cite this kind of list as yet more evidence of the problems plaguing their target institution. Interestingly, also during the last quarter of 2002, a lively exchange occurred in the pages of London's *Financial Times* about whether the WTO was good for anything.[19] One side argued trade liberalization in goods did not precede or accompany accession to the WTO. The other side pointed to post-accession reductions in tariff and non-tariff barriers on goods, as well as greater market access for cross-border trade in services. In this journalist exchange, defenders also lauded the WTO for its functioning dispute settlement system. Surely, the *raison d'être* of the WTO is not only to adjudicate disputes pursuant to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*Dispute Settlement Understanding*, or *DSU*). Yet, the defenders were on to something when they mentioned the *DSU*.

Amidst all the turmoil caused by events and non-events in 2002, one constant remained: the *DSU* did, indeed, continue to function. It might even be said the *DSU* functioned well, with some quiet dignity. To be sure, not everyone would agree. However, persistent objectors would have to admit the Appellate Body handed down decisions covering an impressive range of trade law topics:

3557) would not allow for any judgment under the Act to be entered after September 26, 2000, when the WTO Dispute Settlement Body adopted the Appellate Body Report. However, a different proposal–the Hyde bill–would allow cases initiated before that date to proceed. A WTO arbitration panel gave the United States until July 26, 2001 to comply, and the parties (the EU, Japan, and the United States) agreed to extend the deadline until December 31, 2001. Congress has yet to repeal the Act, hence the ire of the complainants. *See* Daniel Pruzin, *Japan Threatens Retaliation Against U.S. on Hot-Rolled Steel Dumping Duties*, 19 Int'l Trade Rep. (BNA), No. 45, at 1965 (Nov. 14, 2002); *see also* Daniel Pruzin, *EU Eyes Restarting Retaliation Proceedings Against U.S. for Failing to Correct 1916 Act*, 19 Int'l Trade Rep. (BNA), No. 45, at 1966-67 (Nov. 14, 2002).

19. Similar debates, albeit in more limited contexts than the WTO, arose or continued during 2002. For example, to what extent is duty-free treatment pursuant to the African Growth and Opportunity Act (AGOA) of 2000 assisting in the economic development of sub-Saharan African countries? Proponents pointed to the (1) increase in imports from Africa into the United States, and (2) change in the pattern of African exports from only oil and minerals to non-fuel products (for example, wedding dresses from Senegal, traditional clothes from Ghana, and cars from South Africa). Doubters explained: (1) African goods still account for less than 2% of American imports; (2) AGOA rules of origin restrict the number of goods eligible for tariff-free treatment (for example, for textiles, all cotton must be sourced from either Africa or the United States); (3) tariff-free treatment is used by the United States as a political weapon, creating uncertainty that discourages long-term foreign direct investment, and as economic leverage to gain increased access to African markets; and (4) a combination of import quotas and farm subsidies, exacerbated by low commodity prices and onerous sanitation inspections, limit opportunities for African farmers to export their produce to the United States. *See No Silver Bullet*, ECONOMIST, Jan. 16, 2003, at 69.

countervailing duties; safeguards; intellectual property; agriculture; and technical barriers to trade. In other words, the caseload put upon the Appellate Body demanded intellectual adroitness from these judges working in Geneva. They had no choice but to come to terms with rules from very different WTO texts.

Persistent objectors also would have to admit the Appellate Body took a significant, if not symbolic, step to highlighting the extent to which it relies on its emerging body of jurisprudence. For the first time, beginning in its *Carbon Steel* Report (reviewed below), the Appellate Body constructed a "Table of Cases Cited in This Report." Not every observer would infer from the Table that all Appellate Body members now agree their jurisprudence is, or at least ought to be, accepted as a source of international trade law. At the same time, the Table itself serves as a user-friendly device necessitated by the increasing use of cases in *DSU* proceedings. Surely, this kind of Table (which panels and the Appellate Body have built in subsequent opinions) is a small monument to the system of *de facto stare decisis* operating at the WTO.[20]

These are not the only points persistent objectors must admit. They would have to agree the Appellate Body adjudicated the cases before it in an atmosphere made tumultuous not only by the events and non-achievements mentioned above, but also by the attacks against it, as an entity. Even with the best of good will from Members, non-governmental organizations (NGOs), and commentators, it is not easy to sit in modestly-furnished rooms in the Appellate Division in the WTO in Geneva, read stacks of briefs, hear oral arguments, retire to serious deliberations, and come up with a report that will gain the respect of international trade lawyers and scholars around the world. Put aside the facts that the weather in Geneva probably is grey and cold, that the Appellate Body members probably have been called from far away at short notice, and that their ninety-day period in which to write a report is cut to about seventy-five days because of the increasingly dubious requirement that the report must be translated not only into Spanish, but also into French.[21] Set aside, too, the

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20. The authors note the existence of a trilogy of law review articles relating to this point. *See generally* Raj Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 GEO. WASH. INT'L L. REV. 873 (2001); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANSNAT'L L. & POL'Y 1 (1999).

21. For a critique on WTO's language rules, see Raj Bhala, *Poverty, Islam, and Doha*, 36 INT'L. LAW. 159, 170 (2002). While translation obviously makes WTO Appellate Body reports accessible to a larger number of potential readers around the world, it should be admitted candidly that some readers remain "potential" regardless of the language in which the reports are available. Moreover, among the reasons for calling the translation requirement "dubious" are: (1) an increasing number of trade officials can, and arguably should, read English, because it is the global business language; (2) reducing the already short 90-day time frame in which to contemplate and draft a report risks compromising the quality of the report, and does so at a period in the history of international trade law when the integrity of the Appellate Body's work is in question; and (3) one of the largest divisions of the WTO is dedicated to translation, yet the WTO is increasingly strapped for funds and resources, and

fact that neither the Appellate Body nor any official in the Appellate Division, by convention if not law, is at liberty to defend reports in public.

Aside from the fact that Appellate Body members are compensated for their official duties, what stands out–if one is working as or with an Appellate Body member–is that the *DSU* process remains a highly controversial area of international trade law, and no less so in 2002 than in any previous year. Consider a few of the tumultuous events in the *DSU* area in 2002. First, in the context of the Doha Round, many WTO Members tabled proposals for *DSU* reform.[22] Second, a United States Senator called the Appellate Body a "kangaroo court."[23] Third, several Congressmen resurrected the idea of a commission to review WTO adjudicatory outcomes that went against the United States, a proposal discussed and discarded in the context of the 1994 *Uruguay Round Agreements Act* by former Senator Robert Dole (R-Kansas) and former United States Trade Representative (USTR) Mickey Kantor at the conclusion of the Uruguay Round.[24] Fourth, worried about judicial activism in Geneva, a prominent commentator called for changes to the reverse consensus rule to allow the WTO Members to block the adoption of a Panel or Appellate Body decision, and suggested that the WTO should "adopt a less rigid, more flexible dispute settlement system."

Yet, through all this controversy, the Appellate Body soldiered on. Its members rendered decisions as best they could. They understood that the political context, in which they had to march, prevented them from writing with the candor and style they otherwise might have preferred to use so as to bolster the persuasive force of their reports and of their institution. Each knew that over one shoulder the United States peered and might threaten, and over the other shoulder the EU examined and might sneer. Thus, whenever possible, the Appellate Body made its changes to the style of its output, and to the substance of the emerging body of its jurisprudence, gradually and incrementally. This behavior, and the very effort to soldier on, provided stability in a tumultuous year in trade. Defenders of the WTO, at least, could be happy about that.

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arguably resources put to translation that is not strictly necessary could be put to better use, like training officials from less developed countries.

22. For a discussion of these proposals, see Raj Bhala & Lucienne Attard, *Austin's Ghost and DSU Reform*, INT'L LAW. pt. V(a) (forthcoming 2003) (manuscript on file with author).

23. Gary G. Yerkey, *Sen. Baucus Calls WTO 'Kangaroo Court' With Strong 'Bias' Against the United States*, 19 Int'l Trade Rep. (BNA), No. 39, at 1679 (Oct. 3, 2002).

24. RAJ BHALA, INTERNATIONAL TRADE LAW 174-78 (1996).

PART TWO: DISCUSSION OF THE 2002 CASE LAW

I. TRADE REMEDIES

A. Countervailing Duties and *de minimis* Margins: The *Carbon Steel* Case

Citation

United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R (issued November 28 2002, adopted December 19, 2002) (complaint by the European Communities).[25]

Explanation

1. Half a Percent Matters[26]

The *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*), reached during the 1986-93 Uruguay Round of multilateral trade negotiations, sensibly requires that "[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."[27] This sensible mandate, contained in Article 21:1, is designed to ensure an importing country does not continue to impose a countervailing duty on subject merchandise, even after that merchandise ceases to be subsidized, or receive the benefit of any past subsidy, from the government of the exporting country. The mandate is reinforced by Articles 21:2-3, which call for a "sunset review" of an outstanding countervailing duty order within five years from the date of the imposition of the order:

> 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

25. Report of the Appellate Body, *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (Nov. 8, 2002) [hereinafter *Carbon Steel* Appellate Body Report]. Appellate Body and Panel Reports are available on the WTO's website at http://wto.org and on a private website at http://www.worldtadelaw.net.

26. The discussion of the facts is drawn principally from, Report of the Panel, *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R (July 3, 2002) [hereinafter *Carbon Steel* Panel Report].

27. The *SCM Agreement* and its Annexes, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 473-520 (2d ed. 2001) [hereinafter HANDBOOK].

> 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.
>
> 21:3 Notwithstanding the provisions of paragraphs 1 and 2, *any definitive countervailing duty shall be terminated on a date not later than five years from its imposition* (or from the date of the most recent review under paragraph 2 if that review has covered both subsidization and injury, or under this paragraph), *unless* the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The duty may remain in force pending the outcome of such a review.[28]

In brief, a sunset review is a built-in effort at vitality. It is not a check against old age per se, but rather against protectionism created by a measure that has outlived its purpose of counteracting an illegal subsidy, and whose only conceivable *raison d'être* thus has become the assistance of a domestic industry against fair foreign competition.

In 1993, following final affirmative subsidy and injury determinations by the United States Department of Commerce (DOC) and International Trade Commission (ITC), respectively, the DOC issued a countervailing duty order against foreign steel. Originating in Germany, the subject merchandise was certain flat steel products, made of carbon and resistant to corrosion. The German company Preussag, which later became part of Salzgitter, produced this merchandise.[29] On August 2, 2000, the DOC published the result of its sunset review of the countervailing order against this merchandise. The review stated that revoking the order would likely lead to a continuation or to a recurrence of a countervailable subsidy. The DOC transmitted this result to the ITC, along with a finding that the amount of the net countervailable subsidy likely to prevail if the order were revoked would be 0.54 percent. (In 1993, the DOC had fixed the original countervailing duty at 0.6%.[30]) In turn, the ITC

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28. *SCM Agreement*, arts. 21:2-21:3, *reprinted in* HANDBOOK, *supra* note 27, at 501 (emphasis added).

29. *See* Daniel Pruzin, *WTO Appellate Body Overturns Ruling Against U.S. "Sunset" Review on Steel Duties*, 19 Int'l Trade Rep. (BNA), No. 48, at 2098 (Dec. 5, 2002).

30. *Id.*

performed a sunset review of the question of injury. On December 1, 2000, the ITC published its determination that revoking the order would likely lead to a continuation or to a recurrence of material injury to an industry within the United States within a reasonably foreseeable time. Thus, the American authorities refused to lift the countervailing duty order against corrosion-resistant carbon steel flat products from Germany.

The magnitude of the net countervailable subsidy, 0.54 percent, remains remarkably small. That size, coupled with Article 11:9 of the *SCM Agreement*, is the key to understanding the essence of the *Carbon Steel* case. To the reasonable mind not schooled in the ways of trade law, this amount would be laughably puny and not merit a penalty. Might this reaction change if the reasonable mind were educated about illegal subsidies and sunset reviews and about the lack of a *de minimis* subsidization rate for sunset reviews? Perhaps not. The reasonable mind might still focus more on the inconsequential size of the subsidy rather than on the non-existence of a formal rule on *de minimis* rates. That mind might still conclude, with good common sense, "forget about it!"[31]

In this conclusion, the reasonable mind might be persuaded by yet another legal fact. The *SCM Agreement* does have a *de minimis* rule, but just not one for sunset reviews. That rule, contained in Article 11:9, is for initial countervailing duty investigations. It states:

> An application under paragraph 1 [which calls for a written application by, or on behalf of, a domestic industry for an investigation to determine whether a subsidy exists, and if so, the degree and effect of that subsidy] shall be rejected and an *investigation* shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. *There shall be immediate termination in cases where the amount of a subsidy is de minimis*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. *For the purpose of this paragraph, the amount of the*

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31. The reasonable mind might ponder why the *SCM Agreement* ought to apply to the facts. The original countervailing duty investigation occurred in the United States in 1993, yet the *Agreement* entered into force on January 1, 1995. The answer is the sunset review, which provoked the dispute between the United States and EU, occurred after the *Agreement* took effect. *Id.*

This answer also is the reply to a point made by the EU, namely, that the initial investigation would have been terminated had the *SCM Agreement* applied to it. The *Agreement* (in Article 11:9) contains a one percent *de minimis* threshold for investigations, and the DOC found a net countervailable subsidy rate of 0.6%. However, the 1995 *Agreement* was inapplicable to the 1993 investigation.

> *subsidy shall be considered to be de minimis if the subsidy is less than 1 per cent ad valorem*.[32]

Having been duly informed of Article 11:9, the reasonable mind thinks precisely what the EC said in the *Carbon Steel* case, "[t]rue, there is no *de minimis* rule for sunset reviews, but if the United States cannot forget about the small rate based on common sense, then can we agree that we should forget about it based on an analogy to the *de minimis* rule for initial investigations?" That statement sounds reasonable indeed, except for the assumption embedded in it. It assumes that the Appellate Body should engage in interstitial law-making. In other words, it should fill the gap created by a lack of a *de minimis* rule for sunset reviews with a judicially-created analogy to the rule for initial investigations. With that assumption exposed, the reasonable mind looks too eager for judicial activism. That eagerness is exactly the weakness the United States exposed in the *Carbon Steel* case.

In any event, the refusal of the American authorities to lift the countervailing duty order against certain corrosion-resistant carbon steel flat products from Germany triggered a two-pronged attack from Brussels.[33] Not only was the American decision wrong, urged the EC, but also the statute under which it was taken violated the *SCM Agreement*.[34] That is, the EC claimed the statute (and, for that matter, the regulations and statement of policy practices implementing the statute) and its application in the case at bar, were inconsistent with America's WTO obligations. The United States, of course, disagreed–hence the *Carbon Steel* dispute. From the vantage point of critics of the WTO, particularly in the Congress, it appeared American trade remedies were under attack in Geneva. That perception circulating in the corridors of power in Washington, D.C. was reinforced by America's losses in disputes such as *British Steel*[35] and *1916 Act*,[36] by the rancor in the *Softwood Lumber* case,[37] and by the furor over impending and, ultimately imposed, safeguard remedies. Despite America's victory in *Carbon Steel* (described below), the perception–correct or not–remains commonplace.

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32. *SCM Agreement*, art. 11:9, *reprinted in* HANDBOOK, *supra* note 27, at 489 (emphasis added).

33. *See Carbon Steel* Panel Report, *supra* note 26.

34. *Id.*

35. *See 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 (June 7, 2000), *treated in* Bhala & Gantz, *WTO Case Review 2000*, *supra* note 1, at 63-73.

36. *See* Bhala & Gantz, *WTO Case Review 2000, supra* note 1 (discussing the *1916 Act* case).

37. *See* Request for the Establishment of a Panel by Canada, *United States–Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257 (Aug. 19, 2002); Report of the Panel, *United States–Preliminary Determinations With Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (Sept. 27, 2002).

What exactly does the contested American statute say? The statute is Section 751(c) of the Tariff Act of 1930, as amended.[38] Section 751 is entitled "Administrative review of determinations," and paragraph (c) bears the rubric "Five-year review." The relevant portion of that lengthy paragraph states:

> (1) In general.
>
> Notwithstanding subsection (b) of this section and except in the case of a transition order defined in paragraph (6), *5 years after the date of publication of–*
>
> (A) *a countervailing duty order* (other than a countervailing duty order to which subparagraph (B) applies or which was issued without an affirmative determination of injury by the Commission under section 1303 of this title [section 303 of this Act]), an antidumping duty order, or a notice of suspension of an investigation, described in subsection (a)(1) of this section,
>
> (B) a notice of injury determination under section 1675b of this title [section 753 of this Act] with respect to a countervailing duty order, or
>
> (c) A determination under this section to continue an order or suspension agreement,
>
> *the administering authority* [the DOC] and the Commission [the DOC] *shall conduct a review to determine*, in accordance with section 1675a of this title [section 752 of this Act], *whether revocation of the countervailing* or antidumping *duty order* or termination of the investigation suspended under section 1671c or 1673c of this title [section 704 or 734 of this Act] *would be likely to lead to continuation or recurrence of* dumping or *a countervailable subsidy* (as the case may be) and of material injury.[39]

This provision, by its own terms, operates in tandem with Section 752 of the 1930 Act.[40] Section 752 contains special rules for sunset reviews, and paragraph (b) focuses on such rules for the determination of the likelihood of continuation or

38. 19 U.S.C. § 1675(c), *reprinted in* HANDBOOK, *supra* note 27, at 1189.

39. 19 U.S.C. § 1675(c)(1), *reprinted in* HANDBOOK, *supra* note 27, at 1174 (emphasis added).

40. § 1675(a), *reprinted in* HANDBOOK, *supra* note 27, at 1183 (emphasis added).

recurrence of a countervailable subsidy. The relevant portion, Section 752(b)(1), provides:

> (1) In general.
>
> In a review conducted under section 1675(c) of this title [section 751(c) of this Act], *the administering authority* [the DOC] *shall determine whether revocation of a countervailing duty order* or termination of a suspended investigation under section 1671c of this title [section 704 of this Act] *would be likely to lead to continuation or recurrence of a countervailable subsidy*. The administering authority shall consider:
>
> (A) the *net countervailable subsidy determined in the investigation and subsequent reviews*, and
>
> (B) whether any change in the program which gave rise to the net countervailable subsidy described in subparagraph (A) has occurred that is likely to affect that net countervailable subsidy.[41]

In addition, Section 751(b)(3) requires the DOC to provide to the ITC the net countervailable subsidy that likely would prevail if the countervailing duty order were revoked.[42] In calculating that subsidy rate, the DOC looks to the rate it calculated in the initial investigation and any rate it calculated in reviews between the investigation and the sunset review at hand.

There is no doubt that American law contains a *de minimis* threshold for countervailing duty investigations. The relevant statute establishes one percent as the figure, below which, a net countervailable subsidy is not actionable.[43] Does the American statute say anything about a *de minimis* threshold for sunset reviews of countervailing duty orders? In other words, does the statute tell the DOC and ITC that an order must be revoked if the net countervailable subsidy rate is below a certain amount? The short answer is "yes and no."

The "yes" part of the answer is found in Section 752(b)(4)(B).[44] This provision provides that the DOC must apply in a sunset review the same *de minimis* standard it uses in a periodic review and a changed circumstances review. The "no" part of the answer is that the statute does not specify a threshold. That is, the statute

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41. § 1675a(b)(1), *reprinted in* HANDBOOK, *supra* note 27, at 1183 (emphasis added).

42. *See* § 1675a(b)(3), *reprinted in* HANDBOOK, *supra* note 27, at 1183-84.

43. *See* § 1671b(b)(4)(A), *reprinted in* HANDBOOK, *supra* note 27, at 1112 (concerning preliminary subsidy determinations by the DOC); § 1671d(a)(3), *reprinted in* HANDBOOK, *supra* note 27, at 1126 (concerning final subsidy determinations by the DOC).

44. *See* § 1675a(b)(4)(B), *reprinted in* HANDBOOK, *supra* note 27, at 1184.

does not tell the DOC what the *de minimis* rate for periodic, changed circumstances, and sunset reviews must be.

As is to be expected, the DOC filled this void in promulgating regulations to implement the statute. Section 351.106(c)(1) of Title 19 of the Code of Federal Regulations (C.F.R.) establishes a figure of 0.5 percent for periodic, changed circumstances, and sunset reviews.[45] Moreover, the *Statement of Administrative Action* written by the Clinton Administration to accompany the 1994 *Uruguay Round Agreements Act*, which implemented (*inter alia*) the *SCM Agreement*, states that with respect to a review of countervailing duty orders, "the Administration intends that [the Department of] Commerce will continue its present practice of waiving the collection of estimated deposits if the deposit rate is below 0.5 percent *ad valorem*, the existing regulatory standard for *de minimis*."[46]

Examining these statutory and regulatory provisions and their application to the case at bar, the EC argued that the United States violated Articles 11:9, 21:1, and 21:3 of the *SCM Agreement*. Most significantly, the EC criticized the American countervailing duty statute for failing to require application of a one percent *de minimis* rule in sunset reviews.[47] The EC charged that the omission of this rule from

45. *See Carbon Steel* Appellate Body Report, *supra* note 25, ¶ 60 n.52.

46. *Id.* ¶ 60 n.54 (*quoting Statement of Administrative Action*, at 939 n.40).

47. The EC offered an additional base for its claim against the American sunset review statute under Article 21:1 and 21:3 of the *SCM Agreement*. This base was not central to the *Carbon Steel* case, hence it is not discussed above.

In brief, the EC said the evidentiary standards contained in the American sunset review statute run contrary to the requirements of Article 21:1 and 21:3 of the *SCM Agreement*. By "evidentiary standards," the EC meant the way in which a sunset review is initiated, and the presumptions used by the authorities conducting the review. The statute requires automatic initiation, including self-initiation, of sunset reviews for all existing countervailing duty measures. It also allows for expedited reviews, through automatic initiation of a review and a presumption of likelihood of continuation or recurrence of subsidization and injury. While the EC agreed self-initiation of a review is consistent with WTO obligations, it argued automatic self-initiation changes what is supposed to be an exception (the continuation of a measure) into a general rule. That is because automatic initiation, along with procedural presumptions in the review, creates a major bias against termination. Statistical evidence shows this bias does, in fact, exist. Yet, there is a presumption in Article 21:1 and 21:3 of termination of all countervailing duty measures.

Both the Panel and Appellate Body rejected this basis, and in doing so, the Appellate Body handed the United States another victory under the *SCM Agreement*. For the Panel's discussion of this aspect of the case, see *Carbon Steel* Panel Report, *supra* note 26, ¶¶ 8.13-8.50, 9.1(a). For the Appellate Body's treatment, see *Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 52(b), 98-118, 177(b).

On appeal, the EC also made claims under Articles 6:2 and 11 of the *DSU*, concerning whether the request for the establishment of a panel satisfied the requirements of Article 6:2, and whether the *Carbon Steel* Panel met its duties under Article 11. On the Article 6:2 claim, the Appellate Body upheld the Panel's finding that the EC's request did not satisfy the requirements of that Article with respect to certain contentions of the EC about the consistency of American law (concerning ample opportunity to present evidence in a sunset the statute has the practical effect of perpetuating a countervailing duty measure for an additional five-year period in an instance in which there is no need to counter a subsidization that would be likely to cause injury–simply because that subsidization ended during the initial five-year period in which the measure was effective. That effect is seen, said the EC, in the sunset review of certain corrosion-resistant carbon steel flat products from Germany. The subsidization rate is not even close to one

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review) with Article 12:1 of the *SCM Agreement*. *See Carbon Steel* Panel Report, *supra* note 26, ¶¶ 8.120-8.145; *Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 52(d), 164-176, 177(d). The Appellate Body also found the Panel had satisfied its Article 11 duties. *See Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 52(c)(ii), 164-176, 177(c)(ii)-(d). These *DSU* issues were not central to the case and are not discussed above.

One other *DSU* Article 6:2 issue raised on appeal, but not treated above given its relatively small role in the case, also concerns the EC's request for the establishment of a panel. The EC questioned the consistency of the American sunset review statute with Article 21:3 of the *SCM Agreement*, because of the obligation in the statute to determine the likelihood of continued or recurring dumping. The Panel agreed this question was within its terms of reference. The United States disagreed and appealed the Panel's refusal to dismiss the question as outside its terms of reference. The Appellate Body held in favor of the EC, agreeing the question was properly within the Panel's terms of reference. *See Carbon Steel* Panel Report, *supra* note 26, ¶¶ 7.20-7.23; *Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 52(c)(i), 119-134, 177(c)(i). However, the EC lost on the merits of that question. The Appellate Body upheld the Panel's finding that the American statutory obligation regarding a sunset review determination of the likelihood of continued or recurred subsidization was consistent with Article 21:3 of the *SCM Agreement*. *See Carbon Steel* Panel Report, *supra* note 26, ¶¶ 8.85-8.106, 9.1(d); *Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 52(c)(ii), 135-163, 177(c)(ii).

On this last question, one point about the distinction between "mandatory" and "discretionary" legislation is noteworthy. The *Carbon Steel* Panel found nothing in the American sunset review statute to mandate behavior inconsistent with WTO obligations. In other words, the Panel read the statute to confer discretion on the DOC in determining the likelihood of continued or recurring subsidization. The EC appealed, saying the American law was not a genuinely discretionary one. In the words of the Appellate Body, the EC argued the American statute did not afford the DOC "discretion of sufficient breadth and nature to allow for the law to be applied in a WTO-consistent manner." *Carbon Steel* Appellate Body Report, *supra* note 25, ¶ 155. Rather, it was a complex and ambiguous web of procedures designed to show the illusion of discretion. The Appellate Body upheld the Panel's interpretation of the American statute.

The Appellate Body did not offer any substantive comment on the mandatory/discretionary distinction. Perhaps it sensed, wisely, that it need not do so to resolve the case, and there was no need to risk reinforcing critics who charge it is intrusive in reviewing domestic legislation. Still, the Appellate Body did provide a pithy summary of a now-familiar principle of WTO jurisprudence. It reiterated that a Member may challenge the consistency with a covered agreement of the law of another Member, wholly apart from the application of that law in a specific case. In doing so, the challenger bears the burden of proof, and the law of the respondent is presumed WTO-consistent unless proven otherwise. *See Carbon Steel* Panel Report, *supra* note 26, ¶¶ 156-157.

percent, yet the United States continued to countervail against the subject merchandise.

The hypocrisy of the European claim did not go unmentioned. The Appellate Body observed–politely, by relegating the point to a footnote–the EC's own legislation does not have a *de minimis* standard for sunset reviews.[48] True, in an expiry review of a countervailing duty on polyester fibres and polyester yarns from Turkey, the EC terminated its order because the subsidy provided by the Turkish government was less than two percent. However, that case involved a developing country (Turkey), and different thresholds are used for developed countries (like Germany). In other words, the EC did not seem to practice, in its own legislation, what it preached for the United States' Code.

Nevertheless, revealing no diffidence, the EC pressed its claim that the American statute on sunset reviews in countervailing duty cases violated Article 21, particularly paragraphs 1 and 3 of the *SCM Agreement* (quoted above). But, that was not the end of the matter, said the Europeans. They also claimed violations of Article 21:1 and 21:3 engendered two other violations. First, Article 32:5 of the *SCM Agreement* states that:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, *not later than the date of entry into force of the WTO Agreement for it* [which was January 1, 1995 for the United States], the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.[49]

Quite obviously, if the American statute was inconsistent with Article 21:3 of the *SCM Agreement*, and that inconsistency carried past January 1, 1995, then the United States violated Article 32:5 as well.

Second, the EC contended the United States ran afoul of Article XVI:4 of the *Agreement Establishing the World Trade Organization* (*WTO Agreement*).[50] This contention was an independent and broader basis for showing an inconsistency since it lay in the *WTO Agreement*, not the more narrowly-applicable *SCM Agreement*. But, substantively the charge was the same as under Article 32:5 of the *SCM Agreement*. Article XVI:4 of the *WTO Agreement* crisply orders each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[51] Obviously, the *SCM Agreement*–set forth in Annex 1A–is a covered agreement.

48. *See Carbon Steel* Appellate Body Report, *supra* note 25, ¶ 60 n.55.

49. *SCM Agreement* art. 32.5, *reprinted in* HANDBOOK, *supra* note 27, at 510 (emphasis added).

50. *See* HANDBOOK, *supra* note 27, at 273-84.

51. *WTO Agreement* art. XVI.4, *reprinted in* HANDBOOK, *supra* note 27, at 283.

The United States rebutted the EC's criticism of the American sunset review statute with the following straightforward text-based argument. The *SCM Agreement*, in Article 11:9, speaks about a *de minimis* margin only in the context of an initial investigation. It has no such rule for sunset reviews. The EC wants to expand the application of Article 11:9 to a context to which it is not applicable. To do so would distort the plain language of the provision, in violation of the customary rules of treaty interpretation, as well as the intent of the Uruguay Round negotiators who drafted the *Agreement*.

Moreover, suggested the United States, the DOC did apply a *de minimis* margin in sunset reviews. Based on the C.F.R., the DOC used a threshold of 0.5 percent. To be sure, the EC did not like this threshold, thinking it to be inconsistent with the *SCM Agreement* and *WTO Agreement* because it was not one percent. But, its dislike was irrelevant–what mattered was the language contained in, and omitted from, those texts. Contrary to the EC's claim, the DOC's practice of applying a 0.5 percent *de minimis* rate in sunset reviews could not be said to be incongruous with WTO obligations because there were no obligations on the subject.

Thus, the critical issue in the case was, as the Appellate Body framed it, about a difference of one-half of one percent in a *de minimis* threshold for subsidization. The Body explained:

> This issue requires us to consider whether, as the Panel found, the *same* 1 percent *de minimis* standard that must be applied, pursuant to Article 11:9 of the *SCM Agreement*, in countervailing duty *investigations*, must also be applied in *sunset reviews* carried out pursuant to Article 21:3 of that *Agreement*. The issue arises because United States law does not require application of a 1 percent *de minimis* standard in sunset reviews. Rather, United States law prescribes a *de minimis* standard of 0.5 percent *ad valorem* for sunset reviews. In its legislation and regulations implementing the results of the Uruguay Round, the United States provided for a *de minimis* standard of 1 percent to be applied in *investigations*, but maintained its pre-existing *de minimis* standard of 0.5 percent for *reviews*. These modifications reflected the view of the United States Administration, as expressed in the SAA [*Statement of Administrative Action*], that the "*de minimis* requirements of Articles 11:9, 27:10 and 27:11 of the Subsidies Agreement are applicable *only* to initial CVD [countervailing duty] investigations. Thus, . . . these standards are *not applicable* to reviews of CVD orders."[52]

As the above passage from the Appellate Body report indicates, it would be wrong to think the critical issue was "just" about a one-half of one percent. As explained

52. *Carbon Steel* Appellate Body Report, *supra* note 25, ¶ 60.

below, the case was very much about the extent to which the trade adjudicators in Geneva ought to plug holes in WTO texts.

2. The Dissent[53]

At the Panel stage, the EC prevailed on its principal claim that the American sunset review statute violates the *SCM Agreement* by not having mandated termination of countervailing duty measures against *de minimis* subsidization rates. The EC persuaded the Panel that, in the Panel's words, "the *de minimis* standard of Article 11:9 *is implied* in Article 21:3."[54] The Panel agreed the statute was inconsistent with Article 21:3, and thus so too Article 32:5 of the *Agreement* and Article XVI:4 of the *WTO Agreement*. Put simply, the Panel thought the United States should have amended its countervailing duty law, in the wake of the Uruguay Round, to include a one percent *de minimis* rule and that it should have applied that rule to the sunset review of the order on steel from Germany.

Significantly, not every panelist agreed with the EC. One member of the Panel (who remained unnamed) wrote a dissenting opinion, an extraordinarily rare (if not unprecedented) act in the first seven years of WTO jurisprudence. The dissenting opinion essentially embodied the American response to the EC's claim. The dissent found the American sunset review statute and the application by American authorities of a 0.5 percent *de minimis* threshold to be consistent with Article 21:3 of the *SCM Agreement*. The dissent particularly disagreed with the majority holding that silence in the *SCM Agreement* as to a *de minimis* rule for sunset reviews is not dispositive.

The dissent called for a strict application of Article 31 of the *Vienna Convention on the Law of Treaties*, for an examination of the relevant text (Article 21:3) in light of the object and purpose of the overall treaty (the *SCM Agreement*). A *Vienna Convention*-approach to the issue yields the conclusion that the *SCM Agreement* contains no *de minimis* rule for sunset reviews. The majority reached the opposite conclusion by implying such a rule, contrary not only to the *Vienna Convention* methodology for understanding treaty provisions, but also to the intention of the drafters of the *SCM Agreement*. Had the drafters wanted such a rule, then they would have added it during the Uruguay Round when they negotiated the text.

No doubt, said the dissent, the drafters knew what a *de minimis* rule is because they inserted one in Article 11:9 for initial investigations. No doubt, too, they knew how to link provisions, as evidenced from various explicit cross-references in the *SCM Agreement* (*e.g.*, in Article 21 to Articles 12 and 18). The simple fact, the dissent hammered, is that the drafters used the word "investigation," not the phrase "investigation and reviews," in the *de minimis* rule of Article 11:9. Likewise, in Article 27:10, the drafters restricted special and differential treatment in the form of a

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53. *See Carbon Steel* Panel Report, *supra* note 26, ¶¶ 8.80-8.81, 8.84, 9.1(b)-(c), 10.1-10.15; *Carbon Steel* Appellate Body Report, *supra* note 25, ¶ 52(a).

54. *Carbon Steel* Panel Report, *supra* note 26, ¶ 8.80 (emphasis added).

de minimis rule for imports from developing countries to the context of initial investigations. In brief, said the dissent, "[t]he most obvious inference one can draw from the absence of a cross-reference . . . is that the [WTO] Members chose not to have the *de minimis* standard of Article 11:9 be implied in Article 21:3," and "[t]here appears to me to be no textual basis to read Article 21:3 in the manner argued for by the European Communities."[55]

Cleverly, the dissent cited an Appellate Body precedent from 1996 that counseled against judicial activism. In *United States–Standards for Reformulated and Conventional Gasoline*,[56] the Appellate Body looked to the *Vienna Convention* to support the proposition that treaty interpretation must give meaning and effect to all terms in a treaty.[57] If the Appellate Body, said the dissent, found by implication in the text of the *SCM Agreement* a *de minimis* rule for sunset reviews, then it thereby would make redundant every explicit statement in the *Agreement* about cross-application. That is, if all of the rules for initial investigations were applicable to sunset reviews, then there would be no need for the explicit cross-references between the rules on investigations and reviews.

The dissent characterized the EC's argument as contextual, that is, as an effort to read Article 21:3 in the context of Article 11:9. Yet, contextual reading is not part of the *Vienna Convention* methodology the Appellate Body generally had advocated and applied. The dissent knew it had case law in its favor on this point too, and it adroitly used it when declaring that:

> The context of a legal provision, other paragraphs of the provision or related provisions elsewhere in the text, does not in and of itself create a legal obligation. The legal obligation must be found first and foremost in the text of the provision.

In its citation (footnote 370 of the *Carbon Steel* Panel Report) to this resolute statement, the dissent pointed to two further Appellate Body precedents: *Japan–Alcoholic Beverages*[58] and *Beef Hormones*.[59] In the 1996 *Alcoholic Beverages* case, the Appellate Body wrote that "interpretation must be based above all upon the text of the treaty."[60] In the 1998 *Beef Hormones* case, the Appellate Body intoned "[t]he fundamental rule of treaty interpretation requires a treaty

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55. *Id.* ¶ 10.3.

56. Report of the Appellate Body, *United States–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

57. *See Carbon Steel* Panel Report, *supra* note 26, ¶ 10.5 (quoting the Appellate Body's opinion in *Reformulated Gas*).

58. *See* Report of the Appellate Body, *Japan–Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Apr. 10, 1996).

59. *See* Report of the Appellate Body, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

60. *Carbon Steel* Panel Report, *supra* note 26, ¶ 10.8 n.370.

interpreter to read and interpret the words *actually used* by the agreement under examination, not words the interpreter may feel *should have been used*."[61]

Moreover, policy argument alone does not overcome the necessity of sticking with the *Vienna Convention* methodology. That kind of argument, noted the dissent, can cut both ways in the *Carbon Steel* case. On the one hand, the same *de minimis* standard of one percent for both investigations and sunset reviews would give balance to the disciplines that guide both processes. In other words, the processes would be subject to consistent regulation on the level of subsidization deemed immaterial. On the other hand, perhaps a different *de minimis* standard ought to regulate each process. Despite legal disclaimers to the contrary, a sunset review is an exercise in prognostication. A governmental authority forecasts a subsidization rate that likely would continue or recur. By its nature, a forecast is an approximation, sometimes with a good degree of speculation to it. Thus, a specific numerical threshold for a *de minimis* subsidization rate might be neither prudent nor practicable in a sunset review.

3. Let's Not Fill the Gap this Time[62]

The dissent did the United States and the Appellate Body a great service by poignantly framing the critical issue in the case in the following manner: Would the Appellate Body follow a *Vienna Convention*-approach to a disputed WTO textual provision, as it had done in many of its prior decisions, or would it plug a gap in that provision, as it also had done in several prior instances? Much to the delight of the United States, the Appellate Body chose the first course in *Carbon Steel*. The Appellate Body reversed the Panel's findings that the American statute was inconsistent with Articles 11:9, 21:1, and 21:3 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement* and held that the DOC's application of a 0.5 percent *de minimis* standard to the sunset review of German steel also was inconsistent with Article 21:3 of the *SCM Agreement*. This reversal meant a clear victory for the United States and the Panel's dissenter on the central issue in the case. The American argument on appeal essentially paralleled the dissenting opinion in the Panel report. Indeed, in yet another illustration of the increasingly deep integration of common-law argumentation in WTO jurisprudence, the United States underscored the views of the dissent, and the Appellate Body made note of that emphasis in its Report.[63]

Early in its Report, the Appellate Body signaled its support for the American position and the dissenting opinion in the Panel Report. It quoted from Article 31(1) of the *Vienna Convention on the Law of Treaties* to the effect that, "[a] treaty shall be

61. *Id.*
62. This discussion is drawn principally from *Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 52(a), 58-89, 92-97, 177(a).
63. *Id.* ¶ 59.

interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*."[64] Even a modestly-experienced reader of Appellate Body jurisprudence could predict what would come next. The Appellate Body looked carefully at the relevant language in the *SCM Agreement*, particularly Articles 11:9 and 21:3. Citing precedents it had created in the *Japan–Alcoholic Beverages* and *Canada–Patent Term* cases, the Appellate Body intoned: "[w]e have previously observed that the fact that a particular treaty provision is 'silent' on a specific issue must have some meaning."[65] Thus, at least at first blush, the lack of a *de minimis* threshold for sunset reviews in the *SCM Agreement* indicates that there is no such threshold.

Might the drafters of the *SCM Agreement* have intended such a threshold? Nothing in the language of Article 11:9 supports an implication of one from that provision to Article 21. Article 11:9 contains obligations for the initiation and subsequent investigation of a countervailing duty case. It never ventures beyond the investigation phase; nor does it refer to Article 21:3. Yet, other provisions in the *Agreement* cross-reference one another. Hence, the drafters certainly were aware of how to apply a discipline contained in one Article to the context of a second Article by referring expressly in the second Article to the first Article. That awareness suggests that when there is no express cross-reference, the Appellate Body should "attach significance to the absence of any textual link between Article 21:3 reviews and the *de minimis* standard set forth in Article 11:9."[66] This served as a diplomatic way for the Appellate Body to communicate that it did not want to defend an accusation of judicial activism by upsetting the intention of the drafters, as conveyed by their silence.

What about the "object and purpose" of the *SCM Agreement*, as the *Vienna Convention* puts it? The Appellate Body accurately summarized (once again, looking to one of its precedents, *Brazil–Desiccated Coconut*), "[t]aken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve *GATT* [General Agreement on Tariffs and Trade] disciplines relating to the use of both subsidies and countervailing measures."[67] Accordingly, several provisions in the *Agreement* seek to strike a balance between: (1) the right to impose a countervailing duty to offset subsidization causing injury; and (2) the need to respect certain limitations on the imposition of those duties. But, appreciating this goal does not yield a conclusion about whether the one percent *de minimis* rate for investigations ought to extend to

64. *Id*. ¶ 61 (emphasis added). Interestingly, the Appellate Body added a rationale, not grounded in the *Vienna Convention*, toward the end of its Report. It observed that nothing in the negotiating history of the *SCM Agreement* supported inclusion of a *de minimis* threshold in the text of Article 21.3. Might the Appellate Body have aimed this rationale at Congressmen comfortable with the use of legislative history, but otherwise hesitant about (if not critical of) the Appellate Body's jurisprudence on remedies? *See id*. ¶ 89-90.

65. *Id.* ¶ 65.

66. *Carbon Steel* Appellate Body Report, *supra* note 25, ¶ 69.

67. *Id.* ¶ 73.

sunset reviews too. Evidence remains insufficient in the *Agreement* to support that extension as essential to securing the object and purpose of the *Agreement*.

At this juncture in its Report, the Appellate Body could have rested its case without being faulted for a thinly-reasoned opinion. However, the Appellate Body proceeded to de-construct the Panel's rationale for implying a one percent threshold to sunset reviews. The Appellate Body hardly deserves fault for issuing an opinion that simultaneously: (1) eschews interstitial law-making by not extending the Article 11:9 threshold to Article 21:3; and (2) fortifies its legitimacy by exposing flaws in the Panel Report. The Panel presumed a *de minimis* level of subsidization uncovered during an investigation equates with a non-injurious level. How, questioned the Panel, could subsidization below one percent not cause injury at the investigation stage, but cause injury at the five-year review stage? The Panel reasoned that without a one percent threshold in both stages that the object and purpose of the *Agreement* would be compromised.

The Appellate Body thought otherwise. The Appellate Body's critique of the Panel's rationale centered on the premise underlying that rationale. That premise was that a one percent rate in Article 11:9 of the *SCM Agreement* remains a threshold below and that subsidization always is non-injurious. As the Appellate Body put it tersely, "that *de minimis* subsidization is non-injurious subsidization."[68] The Appellate Body found three defects with this premise.

First, subsidization below that rate could cause injury. The Appellate Body observed that the Panel relied on a 1987 Note prepared by the *GATT* Secretariat for the Uruguay Round Negotiating Group on Subsidies and Countervailing Measures. But, careful inspection of that Note reveals two theoretical justifications in it for a *de minimis* standard: (1) the lack of injury caused; and (2) the principle of *de minimis non curat lex* (the law does not take notice of minimal matters).[69] But, the Note does not select one justification as more compelling or preferable than the other. For the Panel to pick one, and thereby rely selectively on the Note, was at variance with the *Vienna Convention* rules of interpretation.

So what? The Appellate Body observed that other parts of the *SCM Agreement*, especially the definition of "subsidy" in Article 1 and of "injury" in Article 15, are independent of one another. That is, the concepts of subsidization and injury are distinct, neither being derived from the other. The *Agreement* does not define "injury" in terms of a level of subsidization. Rather, the concept that links "injury" to "subsidy" is causation. Consequently, the Panel erred by over-emphasizing the importance of injury in understanding the *de minimis* threshold for subsidization.

The second defect in the premise underlying the Panel's reasoning concerned special and differential treatment. In light of this treatment, the Appellate Body said the Panel's rationale leads to a nonsensical result. The *SCM Agreement* (in Article 27:10-11) contains higher *de minimis* thresholds for investigations of alleged

68. *Id.* ¶ 82.
69. *Id.* ¶ 78 n.76.

illegal subsidization of subject merchandise from developing countries than from developed countries, namely, two to three percent depending on the facts of the case. Suppose, said the Appellate Body, the Panel is correct, and *de minimis* subsidization invariably means non-injurious subsidization. Then, subject merchandise from a developing country would not cause injury to an industry in the importing country if the rate at which it is subsidized remains 2.5 percent. But, the same merchandise from a developed country would cause injury to the domestic industry at that same 2.5 percent rate. How, asked the Appellate Body, could this result make sense? It would mean that injury depends on the country of origin of the subject merchandise, which it plainly does not. In brief, the Panel was wrong to think that subsidization at less than a *de minimis* threshold never can cause injury. In turn, there is no single rationale for a *de minimis* subsidization rate that must hold for all phases in a countervailing duty case.

As for the third defect, the Appellate Body reiterated what the dissent had said. An investigation and sunset review are distinct phases of a countervailing duty case and entail different processes. An investigation aims to uncover whether an illegal subsidy is being paid, and if so, whether it causes injury. A sunset review considers what the likely result would be if a countervailing duty were removed. The counterfactual inquiry made in a sunset review means a *de minimis* threshold different from the one-percent cut-off in an investigation may be warranted. That is not to impugn the nearly-automatic limit of five years for a countervailing duty order. In *obiter dicta* useful for the future, the Appellate Body emphasized "[t]ermination of a countervailing duty is the rule and its continuation is the exception."[70] And, it rightly warned if a subsidization rate is very low, then there had better be considerably more evidence than the initial affirmative injury determination, and the evidence had better be persuasive to support continuation of a duty beyond five years.

Commentary

1. Shifting Sands in the Desert

That the EC and the United States took the positions they did in *Carbon Steel* serves*,* perhaps, as a sign of both the increasing maturity of the *DSU* process and the brazen flexibility of legal minds. How many times has one side publicly castigated the Appellate Body of creative interpretation, if not outright judicial activism?[71] How many times has the other side praised (at least privately) the

70. *Id.* ¶ 88.

71. *See, e.g.*, Rossella Brevetti, *U.S. Officials Hail Two Recent WTO Decisions as Rejecting "Gap-Filling" in WTO Agreements*, 19 Int'l Trade Rep. (BNA), No. 48, at 2099 (Dec. 5, 2002) (quoting a U.S. trade official as saying the outcome in *Carbon Steel*, and in a compliance decision in *EC–Bed Linen*, proves the "Appellate Body has taken seriously our views that there have been some cases in the past where there have [*sic*] been creative interpretation of some of the agreements . . . .").

Appellate Body for a careful, reasoned ruling? In this iteration of the game, the world trade community was entertained by the spectacle of the EC arguing for interstitial lawmaking, while the United States urged restraint. Because the United States won, it came as no surprise that its Trade Representative, Robert Zoellick, declared: "This is a victory not only for the United States, but for the multilateral trading system . . . . With today's report, the Appellate Body has done what it should–interpret the WTO agreements as written."[72] No doubt in subsequent plays, the two sides will energetically adorn the uniforms the other had previously worn. The United States shall argue for an oh-so-limited extension of a provision in a WTO agreement to be made by the judges in Geneva. The EC shall decry the American position as an expansive interpretation unwarranted by either the facts of the case or the powers of the judges. If and when the United States wins in that case, then we can look forward to its Trade Representative (whoever it is) praising the Appellate Body for a balanced, well-reasoned opinion.

Entertaining as the game may appear, it really is not just a game, but a process of building the international rule of law, at least in trade relations (if not in other dimensions of cross-border activity). There are losers in this process, particularly as long as the "players" behave only in short-sighted, self-interested ways. First, the dispute settlement system loses in the sense of being strained by the lack of principled, consistent criticism. If a WTO Member abhors common law rule-making by the Appellate Body, then ought it not be consistent in its abhorrence? If it favors that source of law, then why not state and stick with that position? The system cannot improve by praising the decision-makers when major Members like the United States and EC win and excoriating them when they lose. It can improve only when the Members demonstrate a long-term commitment to the process, beyond the successes and vicissitudes of any one case.

A second group suffers from inconsistent and unprincipled positions about interstitial lawmaking in Appellate Body jurisprudence–the members of the Appellate Body and by extension, the Appellate Division. They know full well the subjects with which they deal in their official capacities remain inherently controversial. Indeed, in its *Carbon Steel* Report, the Appellate Body highlighted the importance of operating within the confines of Article 3:2 of the *DSU*, and that it not render a decision that adds to or diminishes from the rights and duties set forth in the WTO texts.[73] Thus, a campaign to remind the Appellate Body about separation of powers at the WTO probably remains unnecessary. However, what about the human dimension of service on the Appellate Body?

Perhaps a "Be Nice to the Appellate Body" campaign is not necessary, yet. Any judge (and that is what an Appellate Body member is) appreciates that adjudication puts him "in harms way," in an intellectual sense. If he does not, then he should not be a judge. Still, surely the Appellate Body members occasionally must wonder exactly what great trading powers, like the United States and EU, want from

72. *See* Pruzin, *WTO Appellate Body*, *supra* note 29.
73. *See Carbon Steel* Appellate Body Report, *supra* note 25, ¶¶ 88, 91.

an appeal. If the answer continues to be nothing more than a victory in the case, if a loss continues to be followed with excoriation, and if positions of litigants on gap-filling continue to shift like desert sands with changes in the wind, then surely the attractiveness of serving on the Appellate Body diminishes, if only a bit. As an institution for the strengthening of the international rule of law, the Appellate Body can be only as good as its members. The major trading powers, which are well-documented to be the most common users of the *DSU* process, might do well to keep these human-level realities in mind as they formulate arguments and make reform proposals. Surely, the Appellate Body will suffer as an effective institution if only the politically ambitious, but not the best and brightest, aspire to serve on it.

2. A Grander Role for the Director-General?

In the *Carbon Steel* case, the United States and EC could not agree on the composition of the Panel. Accordingly, the EC turned to the WTO's Director-General, then Mike Moore, who determined its composition. He acted under the authority of Article 8:7 of the *DSU*. This provision states:

> If there is no agreement on the panelists within twenty days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB [Dispute Settlement Body] and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.[74]

One of the interesting issues raised by the Director-General selecting the *Carbon Steel* panelists remains a general one: what ought the role of the Director-General be in WTO dispute settlement?

While a full analysis of this matter extends beyond the scope of the present commentary, a few points are worth making. First, the spectrum of possibilities that does exist, or potentially could exist, should be clear. At one end of the spectrum, the Director-General could be confined to his Article 8:7 duties. As such, in the event of a deadlock between litigating countries, he simply fills out a panel if requested to do so. Confining him in this way reflects a strict separation of powers between the

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74. *Dispute Settlement Understanding* (*DSU)* art. 8.7, *reprinted in* HANDBOOK, *supra* note 27, at 609.

judicial (or quasi-judicial) function of the panels and Appellate Body, and the executive (or quasi-executive) function of the head of the WTO Secretariat. At the other end of the spectrum, the Director-General could acquire the authority to play an aggressive role in a case, should he deem it appropriate to do so. This role could involve, for example: (1) discouraging (or encouraging) a prospective complainant from bringing a case based on a variety of legal, economic, political, or institutional motives; (2) cajoling a prospective respondent into settling a case before it is formally brought; (3) shaping the terms of compliance satisfactory to both sides; and (4) influencing the structure of compensation or retaliation in the event of non-compliance.

In between the two extremes lies the possibility of intervention by the Director-General upon request by either or both parties. Article 5 of the *DSU* essentially takes this intermediate position. It allows disputing Members to turn to the Director-General, but not for him to intervene *sua sponte* in an aggressive manner. It states:

> 1. *Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree*.
>
> 2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.
>
> 3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel.
>
> 4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

6. *The Director-General may*, acting in an *ex officio* capacity, *offer good offices, conciliation, or mediation* with the view to assisting Members to settle a dispute.[75]

Evidently, this Article is a compromise between the two extreme positions on the spectrum.

That is, it seems to say on the question of separation of powers between the "judiciary" and the "executive," there ought to be a balance and how that balance is struck should be left to the complainant and respondent in the individual case. Like all compromises, Article 5 is attractive because it is pragmatic. But also, like all compromises, the provision leaves a sense of dissatisfaction. It risks under-utilization of the talent of the Director-General. Consider a Leader who is particularly able to reduce trade friction and to keep a simmering dispute from exploding. (Arguably, the current Director-General, Dr. Supachai Panitchpakdi, is precisely that kind of leader. Many who have met him are struck by his calm and empathetic demeanour, no doubt in part due to his mastery of chess!) Under *DSU* Article 5, that leader only can offer himself under Paragraph 6, but easily can be rebuffed by one or both of the parties under Paragraph 1.

To be sure, to advocate for the powers of a strongman would be to risk a tyranny on the banks of Lake Geneva (at least with a subsequent Director-General). At the same time, what exists now is the prospect of tyranny by the litigants–a prospect arguably realized in some cases. Depending on the nature of the dispute and the political leadership in the countries involved, those parties may be incapable of seeing how the talents of the Director-General could help them. Even if they can see past their mutual animosity, they might not want the Director-General's help, much less to defer to his non-binding authority. Then, they risk injuring the system to satisfy their own interests and emotions.

Certainly, the fact Mike Moore picked members of the *Carbon Steel* Panel does not itself raise these sorts of issues. However, the issues of the appropriate role of the Director-General are indirectly implicated in the case. Unfortunately, they are not discussed frequently, at least not in the open. Rather, the *DSU* reforms discussions now underway in the Doha Round tend to focus on issues such as transparency and participation.[76] Might it be wise to expand the scope of this agenda? If so, then might it also be important to apply the argument of renowned

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75. *DSU* art. 5, *reprinted in* HANDBOOK, *supra* note 27, at 607 (emphasis added).

76. For a treatment of these discussions, see Bhala & Attard, *supra* note 22, at pt. V(a). However, the authors, unfortunately, do not raise the matter of the role of the Director-General in dispute settlement.

philosopher Yves R. Simon? In *A General Theory of Authority* (1962), he challenged the growing conventional wisdom that authority is the enemy of freedom. Rather, he saw authority as an essential accompaniment to freedom. How else could the demands created by autonomous behaviour, each pulling in a different direction, be shaped into an order that promotes not only the good of individuals, but also the common good? After all, is there any meaningful freedom in chaos? Might, therefore, a Director-General enhance the freedom of WTO Members simply by being permitted the exercise of greater authority?

B. Safeguards, Injury, and Causation: The *Line Pipe* Case

Citation

United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R (adopted March 8, 2002) (complaint by Korea, with Australia, Canada, the European Communities, Japan, and Mexico as Third Participants).[77]

Explanation

1. Introductory Note: Strict Scrutiny Again[78]

United States–Line Pipe Safeguard is the fifth in a series of Appellate Body decisions holding that safeguards imposed by a member of the WTO are inconsistent with *GATT* Article XIX, the Safeguards Agreement,[79] or both.[80] Like the earlier

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77. Report of the Appellate Body, *United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Feb. 15, 2002) [hereinafter *United States–Line Pipe Safeguard* Appellate Body Report]; Report of the Panel, *United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R (Oct. 29, 2001) [hereinafter *United States–Line Pipe Safeguard* Panel Report].

78. *See United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 1-14.

79. For the texts of the *Safeguards Agreement* and the *General Agreement on Tariffs and Trade*, respectively, see HANDBOOK, *supra* note 27, at 521-30, 183, 226-27.

80. *See* Report of the Appellate Body, *Argentina–Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter *Argentina–Footwear Safeguard* Appellate Body Report], *discussed in WTO Case Review 2000*, *supra* note 1, at 73; Report of the Appellate Body, *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (Dec. 14, 1999) [hereinafter *Korea–Dairy Product Safeguard* Appellate Body Report], *discussed in WTO Case Review 2000*, *supra* note 1, at 87; Report of the Appellate Body, *United States–Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *United States–Wheat Gluten* Appellate Body Report], *discussed in WTO Case Review 2001*, *supra*

rulings, *United States–Line Pipe* reflects very strict scrutiny by the Appellate Body of the actions of the competent authority (in this instance, the United States International Trade Commission) and the importing Member (the United States) for full compliance with relevant provisions of the *Safeguards Agreement*.

Safeguards were imposed on line pipe on February 18, 2000, after a finding by the U.S. International Trade Commission (USITC) that imports of the product were a substantial cause of serious injury (three commissioners) or a threat of serious injury (two commissioners), with one commissioner voting in the negative.[81] The Appellate Body report notes that the USITC analyzed a number of factors, in addition to increased imports, that had caused serious injury or threat. However, the majority of the USITC concluded that increased imports were "a cause which is important and not less than any other cause," thus meeting the "substantial cause" requirement of U.S. law.[82] The USITC later issued a series of recommended remedies, the United States and Korea held consultations, and the President issued a press release detailing the safeguard measures to be applied, which as usual, were different from those recommended by the USITC.[83] The measures ultimately imposed on February 18, 2000, consisted of a duty increase on line pipe imports for a period of three years (19 percent the first year, 15 percent the second, and 11 percent the third year).[84] This duty was applicable to imports from all countries except Canada and Mexico, the latter parties with the United States to the North American Free Trade Agreement (NAFTA).[85] NAFTA provides in pertinent part that global safeguards will not be applied by one NAFTA Party to another NAFTA Party except in circumstances where the imports of the affected good "contribute importantly to the serious injury, or threat thereof, caused by the imports."[86] Notification to the WTO's Committee on Safeguards took place pursuant to Article 12.1(c) of the *Safeguards Agreement* on February 22.

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note 1, at 608; Report of the Appellate Body, *United States–Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/10; WT/DS178/11 (May 23, 2001) [hereinafter *United States–Lamb Meat* Appellate Body Report], *discussed in WTO Case Review 2001*, *supra* note 1, at 620.

81. Circular Welded Carbon Quality Line Pipe, USITC Pub. No. 3261, Inv. No. TA-201-70, at I-7 (Dec. 1999) [hereinafter USITC Report]; *see* Proclamation No. 7274, 65 Fed. Reg. 9193 (Feb. 18, 2000) (imposing safeguards for a period of three years and one day, consisting of a tariff-rate quota under which the first 9,000 tons of annual imports are excluded from a graduated tariff (19% in year one, 15% in year two, 11% in year three)).

82. *See* 19 U.S.C. § 2251(b)(1)(B).

83. *See* Proclamation 7274, *supra* note 77.

84. *Id.*

85. *Id.*

86. *North American Free Trade Agreement* art. 802(1), *reprinted in* HANDBOOK, *supra* note 27, at 669, 752-73.

Both the United States and Korea appealed the results of the panel decision, with Korea carefully limiting its challenge to the safeguard measure per se, avoiding any attack on U.S. safeguards law as such.[87]

2. Principal Issues Raised on Appeal[88]

The Parties and various Third [Party] Participants raised numerous issues with the Panel, and the Panel determined that the United States had violated its *GATT* Article XIX obligations in its failure to show that the safeguards were applied due to "unforeseen circumstances." Since neither the United States nor Korea challenged this finding, even if the United States prevailed with respect to all of the issues raised with the Appellate Body, the United States would have been obligated to terminate the safeguards or face compensation or retaliation under the *Dispute Settlement Understanding.*[89]

Multiple issues were also raised before the Appellate Body:

a. Whether the United States failed to provide Korea with "an adequate opportunity for prior consultations," as required by Article 12.3 of the *Safeguards Agreement*;
b. Whether the United States failed to provide to Korea "a substantially equivalent level of concessions" under Article 8.1 of the *Safeguards Agreement*;
c. Whether the United States erroneously applied safeguards to developing nations whose imports are within the *de minimis* limits of Article 9.1 of the *Safeguards Agreement*;
d. Whether the United States violated Articles 3.1 and 4.2(c) of the *Safeguards Agreement* by omitting from the report a distinct finding that serious injury was caused by increased imports or increased imports threaten serious injury;
e. Whether Korea failed to establish a *prima facie* case that the United States violated Articles 2 and 4 of the *Safeguards Agreement* by including Canadian and Mexican imports in the serious injury determination but not in the safeguard measures;
f. Whether, as the Panel found, the United States was not entitled to rely on *GATT* Article XXIV as a basis for excluding imports from Canada and Mexico from the safeguard measures;

87. One may speculate that this occurred because Korea is among a number of countries that have imposed safeguards under their domestic legislation that have later been found inconsistent with *GATT* Article XIX and provisions of the Safeguards Agreement. *See Korea–Dairy Product Safeguard* Appellate Body Report, *supra* note 80.

88. *See United States–Line Pipe Safeguard* Panel Report, *supra* note 77, ¶¶ 76-80.

89. *DSU* art. 22, *reprinted in* HANDBOOK, *supra* note 27, at 603, 618-19.

g. Whether, as the Panel found, the United States erred by failing to explain how it "ensured that injury caused by factors other than increased imports was not attributed to increased imports;"
h. Whether, as the Panel found, the United States acted consistently with Article 5.1 of the *Safeguards Agreement* by failing to show that the safeguards on line pipe were "necessary to prevent or remedy serious injury, and to facilitate adjustment;" and
i. Whether, as the Panel found, Korea failed to meet the burden of asserting and proving that the United States violated Article 5.1 by imposing safeguards beyond the level required to prevent or remedy serious injury and facilitate adjustment.

3. Arguments of the Parties[90]

a. Need for a Discrete Determination of Serious Injury or Threat

The United States noted that under U.S. law, the six members of the International Trade Commission were not required to reach consensus on the basis for their findings. Here, three Commissioners found serious injury, two found threat. The determination that the line pipe was "being imported into the United States in such increased quantities as to be a substantial cause of serious injury or the threat of serious injury" was accompanied with detailed explanations of the findings and conclusions of all commissioners. There is no substantive requirement in Article 2.1 of the *Safeguards Agreement* of a discrete determination and with minor exceptions there are no differences, either procedurally or substantively, between a serious injury finding and a threat finding. Nor is there a need for distinction in applying safeguard measures under Article 5.1. To find otherwise would improperly interfere with U.S. discretion in the manner in which the United States structures internally "the decision-making process of its competent authority."

Korea (with the support of the European Communities) disagreed, contending that the Panel was correct in requiring a finding of either serious injury or threat. The United States sovereignty-based argument was irrelevant and should be rejected. For the EC, the distinction between serious injury and threat is important, as a measure "necessary" to prevent serious injury may be different from one addressing injury that already exists. The difference between a serious injury-based measure and a threat-based measure may also affect possible extensions under Article 7.2. For example, if the initial finding is based on threat, it would be difficult to argue three years later that injury is still imminent–that there is a threat of serious injury but no existing serious injury.

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90. *United States–Line Pipe Safeguard*, Appellate Body Report, *supra* note 77, ¶¶ 15-75.

b. Non-Attribution of Injurious Effects of Other Factors to Increased Imports

The United States protested that the Panel's presumption that United States' failings in *United States–Lamb Meat* and *United States–Wheat Gluten* were repeated here. Not so. The USITC Report demonstrated that the "United States identified and distinguished the effects of other factors, and that it did not attribute injury caused by other factors to imports."

According to Korea, the United States misread both Article 4.2(b) and the earlier cases. Here, the Panel assessed the USITC's causation analysis and concluded that the analysis failed to distinguish adequately the injury attributable to other factors. The United States tried to cure the flaws of the USITC analysis after the fact. The EC also faulted the United States' analysis, in that there was no evidence as to how the USITC had complied with its obligation "to ensure that the injurious effect of the other factors were not included in the assessment of the injury attributed to increased imports."

c. Prior Consultations and a Substantially Equivalent Level of Concessions

According to the United States, the Panel erred in requiring, under Article 12.3 of the Safeguards Agreement, that a Member proposing safeguards "ensure" that the exporting Member obtain the information Members must review in consultations. Rather, Article 12.3 provides only an "adequate opportunity" requirement with regard to reviewing certain information prior to consultations. It does not matter how the information was obtained by the exporting member. Under those circumstances, it was sufficient that Korea obtained the relevant information from the U.S. press release regarding United States' intention to impose safeguards.

Korea (with the support of Japan) observed that its information regarding the nature of the safeguard measures came solely from a White House press release; neither the contents of the measure, nor more detailed information had been earlier communicated. Since the press release was effectively the announcement of a *fait accompli*, Korea was deprived of its "adequate opportunity" for consultations required under Article 12.3. Japan added that a press release may not be available to all WTO Members having a "substantial interest."

d. Exclusion of *de minimis* Developing Country Exports from the Safeguards

According to the United States, while Article 9.1 of the *Safeguards Agreement* prohibits the imposition of safeguards upon the imports of developing country Members that account for less than three percent of imports, it does not specify how this obligation must be met. Thus, the United States' approach of establishing a 9,000-ton exemption for each country from the nineteen percent safeguard duty on imports complied with Article 9.1, and it was not necessary to publish a list of developing Members so affected.

According to Korea, the United States' distinction between the "non-application" and "not be applied" language was artificial. Regardless of such distinctions, the safeguard measure applied to imports from developing country Members. It therefore violated the rights of such Members under Article 9.1 because it did not assure that the safeguards would not be applied to developing countries when their share of imports was no more than three percent.

e. *GATT*, Article XXIV (Free Trade Areas and Customs Unions)

Korea (with the support of Australia, the EC, and Japan) objected to the Panel's finding that the United States, in excluding Canada and Mexico from line pipe safeguards, met the requirements of Article XXIV. While a free trade area is to "facilitate trade," a free trade area must be implemented in a manner so as "not to raise barriers to the trade" with non-Member countries. In *Turkey–Textiles,*[91] the Appellate Body indicated that a Member's reliance on Article XXIV required a demonstration that the measure at issue *fully* meets the requirements of Article XXIV and that the formation of the customs union would "be prevented if it were not allowed to introduce the measure at issue." Here, the line pipe safeguard should have been subject to the same necessity test. Moreover, the exclusion of Canada and Mexico from safeguards was inconsistent with Article 2.2 of the Safeguards Agreement, which requires that if safeguards are applied to a product it should be regardless of source. Footnote 1 of the Safeguards Agreement–relating to customs unions–does not in any event apply to actions of individual members or to Article 2.2. In *Argentina–Footwear*, the Appellate Body found that the first sentence of footnote 1 establishes the scope of the entire footnote (that is, it affects only actions by a customs union as a whole).

The United States (with the support of Canada and Mexico) contended that it met all of the requirements of *GATT* Article XXIV when NAFTA was established. Korea's only complaint was that the Panel gave no weight to the draft report of the WTO Committee on Regional Trade Agreements (which reviews free trade agreements and customs unions for their consistency with Article XXIV). Moreover, NAFTA does not change the applicability of any of the Parties' safeguards laws as they apply to non-Parties. The requirement of NAFTA for exclusion from safeguards of imports from other NAFTA Parties under certain circumstances serve as one of the measures intended to eliminate duties and other restrictive regulations of commerce necessary to form the free trade area. Also, Article XXIV requires analysis of the

91. Report of the Appellate Body, *Turkey–Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, ¶ 57 (Oct. 22, 1999).

trade liberalization measures of a free trade agreement in the aggregate (as a "package" according to Canada) in determining whether failure to adopt them would prevent formation of an FTA. The "necessity" test is not to be applied to each measure separately, because that approach could prevent the liberalization anticipated by Article XXIV.

In the view of the EC, the Panel erred. Article XXIV of *GATT* cannot be used as a defense by the United States because the imposition of a new safeguard measure is in fact "the introduction of a trade restriction having an adverse effect on the trade of other Members." The facts do not indicate that exclusion of NAFTA imports for safeguards were authorized as part of the measures necessary to establish NAFTA; under NAFTA the United States has discretion to apply safeguards to imports from Canada and Mexico.

Japan argued that the Panel misinterpreted the relationship between *GATT* Articles XXIV and XIX. The list of exceptions to the "restrictive regulations of commerce" in Article XXIV:8(b) of *GATT* that must be eliminated in a free trade area is not exhaustive. For example, Article XXI– the national security exception–is not listed. Therefore, safeguards–Article XIX of *GATT*, "exceptional emergency actions"–should be included among the exceptions. The same arguments apply with regard to Article 2.2 [the non-discrimination provision] of the *Safeguards Agreement*, as is confirmed by the last sentence of Footnote 1 (which states that nothing in the *Safeguards Agreement* "prejudges the relationship between Article XXIV and paragraph 8 of Article XXIV").

Mexico disagreed, asserting that exclusion of Article XIX from the list is conclusive. Moreover, if WTO Members were required to show that the "elimination of a non-tariff restriction was the determining factor in establishing a free trade area," Article XXIV would be very difficult to invoke.

f. "Parallelism" Between the Investigation and the Safeguard Measures

Korea claimed that there was a gap between the scope of the United States' injury investigation and the scope of the safeguard measures ultimately applied (in that Canadian and Mexican imports were included in the investigation but not in the safeguard measures). While Korea did not raise this issue before the Panel, Korea believes the Panel imposed "flawed" standards for establishment by Korea of a *prima facie* case, erred in the manner it treated evidence submitted, and imposed arbitrary minimum conditions for establishing a *prima facie* case.

Despite the USITC's "exhaustive discussion" of data for imports from countries other than Canada and Mexico in footnote 168 of the USITC report, Korea makes the "bare assertion" that the analysis is of no legal significance. The footnote is clearly a part of the USITC's published determination. The Panel correctly accepted the USITC's statement in the footnote that the analysis of the aggregate import data and of the import data excluding Mexico and Canada, each of which led to an affirmative injury determination.

For the EC, footnote 168 of the USITC Report "is at best a hypothetical finding and has no significance." It does not justify the exclusion of Canada and Mexico from the safeguard measures.

g. Demonstrating the Necessity of the Line Pipe Safeguard Measures

Korea (with the support of Australia and the EC) objected to a Panel finding that a Member applying a safeguard under Article 5.1 of the *Safeguards Agreement*–which provides that safeguards shall be applied "only to the extent necessary to prevent or remedy serious injury or to facilitate adjustment"–is not required to explain at the outset how the safeguard measure complies with the requirements of this Article. This failing remains troublesome, because Article 5.1 is the only effective limitation on the extent of safeguard measures and means of avoiding abuse and prejudice of the rights of WTO members. For the EC, the requirement that any safeguard measure be "commensurate" with the goals of Article 5.1 requires an explanation by the part of the investigating authority.

In the United States' view, the Panel was correct in concluding that no *a priori* justification is required by the first sentence of Article 5.1, even though it is explicitly required in the second sentence (where quantitative restrictions may not reduce imports below the average of the past three years, "unless clear justification is given . . . ."). The obligation of Members to assure conformity with WTO provisions is part of its basic WTO obligation of good faith; there is no "separate obligation to issue a public explanation at the time of taking a measure . . . ."

h. Proportionality of the Safeguard Measures

Even if the United States was not, as contended in subsection (g) above, required to show that its safeguard measure was consistent with Article 5.1 at the outset, the United States should have been required to make that demonstration after the fact. The United States failed to identify the goal of the safeguards or whether it sought to prevent or to remedy the serious injury and otherwise did not meet the standard set out in *Korea–Dairy Products*–"ensuring that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment."[92]

According to the United States, Article 5.1 does not require a Member to indicate if its safeguard measure is based on serious injury or on threat. Moreover, the Appellate Body has already established in *United States–Wheat Gluten* and

92. *Korea–Dairy Products* Appellate Body Report, *supra* note 80, ¶ 96.

United States–Lamb Meat[93] that "the term 'serious injury' in Article 4.2(b) refers to injury caused both by imports and other factors." The United States has shown that its measures addressed only injury caused by imports. In any event, Korea failed to present a *prima facie* case on its Article 5 claim or to identify "any deficiency in the explanation given by the United States."

Rationale and Holdings

The Appellate Body begins its analysis, as in past safeguards decisions, by reiterating that "safeguard measures are extraordinary remedies to be taken only in emergency situations" under both Article XIX of *GATT* and the *Safeguards Agreement*. It points out that no unfair trade practice must be alleged. If safeguards are imposed "by restricting their imports, [the safeguards] will prevent those WTO Members from enjoying the full benefit of trade concessions under the WTO Agreement." The Appellate Body's long statement of policy in *Argentina–Footwear,* the first of the Appellate Body's series of safeguards decisions, is quoted at length.[94]

However, the Appellate Body concedes that the "*raison d'etre*" of Article XIX and, since 1995, the *Safeguards Agreement* "is, unquestionably, that of giving a WTO Member the possibility, as trade is liberalized, of resorting to an effective remedy in an extraordinary emergency situation that, in the judgment of that Member makes it necessary to protect a domestic industry temporarily." This dichotomy between the right to apply safeguards and avoiding restrictions beyond what is necessary to "provide extraordinary and temporary relief" creates a "natural tension." The "balance struck" is reflected in the Safeguards Agreement.

The proper analysis, according to the Appellate Body, is to determine first if there is a right to apply a safeguard measure and, if so, if that right has been exercised consistently with the limits of the *Safeguards Agreement*. The first requires a proper determination under Articles 2.1, 3 and 4 of the *Safeguards Agreement* that increased imports of a product that have caused or threaten to cause serious injury. If that conclusion is affirmative, the Member must have applied the measure in accordance with Article 5.1–"only to the extent necessary to prevent or remedy serious injury and facilitate adjustment." Thus, "the right to apply a safeguard measure–even where it has been found to exist in a particular case and thus can be exercised–is not unlimited."

93. *United States–Wheat Gluten* Appellate Body Report, *supra* note 80, ¶ 70; *United States–Lamb Meat* Appellate Body Report, *supra* note 80, ¶ 166.

94. *See Argentina–Footwear Safeguard* Appellate Body Report, *supra* note 80, ¶¶ 93-95.

1. Adequate Opportunity for Prior Consultations[95]

Article 12.3 provides:

> A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, *inter alia*, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective of [a substantially equivalent level of concessions].

In the instant case, notification was provided on August 4, 1999 by the United States to the Committee on Safeguards under Article 12.1(a) that the line pipe investigation had been initiated. On November 8, notice of an affirmative finding was provided to the Committee. On December 8, the USITC announced its remedy recommendations. On January 24, 2000, the United States made a supplemental notification summarizing the USITC Report and providing detailed information on the USITC's recommendations to the President and also held consultations with Korea in Washington, D.C. On February 11, 2000, the United States issued the press release announcing the President's decision, which was made effective as of March 1, 2000, by Presidential Proclamation issued February 18. The Presidential decision was notified to the Committee on February 22, 2000.

The Appellate Body first notes that in *United States–Wheat Gluten*, where the United States' efforts at consultations were found to be inconsistent with Article 12.1(b) of the Safeguards Agreement, the basis for the consultations was the USITC Report (which included no specific numerical quotas) and that there were no consultations on the final measures applied. The Appellate Body held in that case that the exporting Member would not have an:

> "[A]dequate opportunity" under Article 12.3 to negotiate overall equivalent concessions through consultations unless, prior to those consultations, it has obtained, *inter alia*, sufficiently detailed information on the form of the proposed nature, including the nature of the remedy.[96]

The facts here are similar, according to the Appellate Body. The notification on January 24, 2000, covered proposed measures that were substantially different from those announced on February 11, 2000 and eventually applied on March 1, 2000. Thus, the notifications were insufficiently precise to meet the

95. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 86-113.

96. *United States–Wheat Gluten* Appellate Body Report, *supra* note 80, ¶ 137.

meaningful prior consultations requirement of Article 12.3. Korea had neither sufficient information nor time to achieve a meaningful exchange with the United States. The issue is not how Korea obtained the information but whether Korea was provided with "sufficient time" for a "meaningful exchange" on that information. Here, Korea was not. The Appellate Body notes that the consultation requirement benefits not only the exporting but the importing Member as well because the latter may through consultations avoid excessive compensation. While the need for Members to act quickly when applying safeguards is recognized, it is the obligation of the importing Member to provide the information sufficiently in advance of the decision to permit a meaningful exchange, even if the exporting Member does not make a timely request for consultations.

2. Substantially Equivalent Level of Concessions[97]

The obligation under Article 8.1 of the *Safeguards Agreement* for the Member applying the safeguards to maintain a substantially equivalent level of concessions is linked, in the view of the Appellate Body, to the Members' consultation obligations under Article 12.3, as discussed in part (a), above. If there is an inadequate opportunity for prior consultations, a Member cannot possibly maintain an adequate balance of concessions. The Panel's reliance on the Appellate Body report to this end in *United States–Wheat Gluten*[98] was thus correct.

3. Exclusion of *de minimis* Developing Country Exporters[99]

Article 9.1 of the *Safeguards Agreement* provides:

> Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 percent, provided that developing country Members with less than 3 percent import share collectively account for not more than 9 percent of total imports of the product concerned.

The Appellate Body notes that the United States' measure had no explicit exclusion for developing countries exporting under the threshold levels or provision for including those countries if the thresholds were exceeded. There was no

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97. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 114-119.

98. *United States–Wheat Gluten* Appellate Body Report, *supra* note 80, ¶ 146.

99. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 120-133.

notification to the Committee on Safeguards that developing country Members meeting the requirements of Article 9.1 were excluded and, according to the Panel, none of the various U.S. government implementing documents contained a list of excluded developing countries or any indication as to how the United States planned to comply with Article 9.1. Moreover, the 9,000-ton exclusion limit was acknowledged by the United States to be only 2.7 percent of total imports, but rationalized on the ground that imports would decline under the safeguards, so that the 9,000 ton exclusion would, in the future, exceed three percent. (The Appellate Body notes that the Panel concluded that the exemption level would have had to be 10,000 tons to constitute three percent exclusion.)

The Appellate Body indicates its agreement with the United States that Article 9.1 does not specify any particular method of compliance and that it would be possible to comply without setting out a specific list of excluded members. However, "duties are 'applied' [against a product] irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether." Nor are expectations–as to the tonnage that would constitute three percent–realized automatically. There was no evidence before the Panel that the United States made an effort "to make certain that *de minimis* exports imports from developing countries were excluded from the application of the measures." Since the safeguard measure has been applied to developing countries whose imports are below the *de minimis* levels of Article 9.1 the United States did not meet its obligations under that provision.

4. Discrete Determination of Serious Injury or of Threat of Serious Injury[100]

Because of the split decision at the USITC (three commissioners finding serious injury, two finding threat, one finding neither), the determination was in the conjunctive, "line pipe . . . is being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury*." The Panel decided that the United States could not have it both ways; it needed to find either serious injury or threat.[101] This conclusion was based in part on the definitions in Articles 4.1(a) and 4.1(b), in that "if 'serious injury' is present, it cannot '*at the same time*' be 'clearly imminent,' as required to meet the definition of 'threat of serious injury.' Thus, the Panel saw these definitions as 'mutually exclusive.' "[102]

The Appellate Body begins by disclaiming any intent to tell the Members' competent authorities how to conduct the internal decision-making process, whether

100. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 134-177.

101. *United States–Line Pipe Safeguard* Panel Report, *supra* note 77, ¶ 7.271.

102. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶ 138 (*quoting United States–Line Pipe Safeguard* Panel Report, *supra* note 77, ¶ 7.264).

the decision is made by one, one hundred or six individuals. The only thing that matters is whether the determination is consistent with the *Safeguards Agreement*, particularly Article 2.1, which provides:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

According to the Appellate Body, the Panel read "cause or threaten to cause" as meaning one or the other but not both. The Appellate Body disagrees, as the language could also be read to mean "either one or the other, or both in combination," even though it agrees with the Panel that serious injury and threat are distinct concepts. Thus, a discrete finding (either serious injury or threat of serious injury) is not required for application of a safeguard measure.

However, this is not the end of the matter. For the Appellate Body, a threat finding sets a lower threshold for the right to apply safeguards than a serious injury finding. The Appellate Body concluded that the Members made this distinction "so that an importing Member may act sooner to take preventive action when increased imports pose a 'threat' of 'serious injury' but have not yet caused 'serious injury.' " There is a right to impose safeguards if the administering authority finds "at least" a threat of serious injury. In coming to this conclusion, the Appellate Body cited the 1947 *United States–Fur Felt Hats* case,[103] in which the Working Party "conducted a single analysis based on the presence of serious injury or threat of serious injury, and that it did not consider it necessary to make a discrete determination of serious injury or threat of serious injury."

5. "Parallelism" Between the Investigation and Application of Safeguard Measures[104]

The concept of parallelism comes from Articles 2.1 and 2.2 of the *Safeguards Agreement*:

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103. Working Party Report, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, GATT/CP/10, ¶¶ 13-30 (Oct. 22, 1951).

104. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 178-199.

> 1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
>
> 2. Safeguard measures shall be applied to a product being imported irrespective of its source.

The problem arises when the Members whose imports are used as the basis for a serious injury or threat of serious injury determination are not the same as the Members, to whom the safeguards are applied. In this case, as in *United States–Wheat Gluten*, imports from Canada and Mexico were included in the USITC's analysis, but those imports were ultimately excluded from the safeguards measures applied.

In *United States–Wheat Gluten*, the Appellate Body concluded, "the imports included in the determinations made under Articles 2.1 and 4.2 [of the Safeguards Agreement] should correspond to the imports included in the application of the measure, under Article 2.2."[105] In this case, as Korea alleged before the Panel, it is evident that the USITC considered in its investigation imports from all sources, including Canada and Mexico, while imports from the latter were excluded from the safeguards measure. Thus, for the United States to meet the requirements set out in *United States–Wheat Gluten*, the United States must show that "the USITC provided a *reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 . . ."

The United States relied on footnote 168 of the USITC Report, which explained that "we would have reached the same result had we excluded imports from Canada and Mexico from our analysis," and considered such factors as the fact that "imports from non-NAFTA sources increased significantly over the period . . ."and the "non-NAFTA imports were among the lowest-priced imports . . . ."[106] The Panel considered footnote 168 to be an adequate basis for compliance by the United States with the standard set out in *United States–Wheat Gluten*. However, the Appellate Body disagrees. Footnote 168 does not meet the "establishes explicitly" requirement and it is not a "reasoned and adequate explanation." Since the United States failed to meet these requirements, it has acted inconsistently with Articles 2 and 4 of the Safeguards Agreement by including Canadian and Mexican source

105. *United States–Wheat Gluten* Appellate Body Report, *supra* note 80, ¶ 96.

106. USITC Report, *supra* note 81, at I–26, I-27, *available at* ftp://ftp.usitc.gov/pub/reports/opinions/PUB3261.PDF (last visited Jan. 10, 2003).

imports in the serious injury and threat of serious injury analysis, but excluding them from the safeguards measures.

However, the Appellate Body explicitly avoided ruling on whether Article 2.2 of the *Safeguards Agreement* "permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguards measure," or on the question as to whether Article XXIV of *GATT* permits excepting other members of an FTA from safeguards, "in departure from Article 2.2 of the Agreement on Safeguards." This latter question, says the Appellate Body, "would only be relevant if (a) the administering authority exempted imports from the FTA partners from the injury investigation and from the safeguard measures or, (b) if the imports were included in the investigation but the administering authority had met its burden of "establishing explicitly" that non-FTA imports alone satisfied the serious injury or threat standard. Neither (a) nor (b) applies in this particular proceeding.

6. Non-Attribution of Injurious Effects of Other Factors to Increased Imports[107]

Article 4.2(b) of the *Safeguards Agreement* provides:

> The [serious injury or threat] determination shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. *When factors other than increased imports are causing injury to the domestic injury at the same time, such injury shall not be attributed to increased imports* (emphasis added).

In the investigation, other than increased imports, the USITC examined six factors.[108] The United States contended that the effects of these were properly distinguished; Korea disagreed. The USITC found that while one causal factor–declining demand in the oil and gas industry–was a contributor to the serious injury experienced by the United States industry, increased imports were a more important factor.

The Appellate Body noted that Article 4.2(b) requires, first, a demonstration of the causal link, and secondly, that injury caused by non-import factors must not be attributed to increased imports. There is no requirement that imports be the only cause of serious injury or threat. However, as the Appellate Body stated in *United*

107. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 200-222.

108. These included: reduced demand for line pipe as a result of reduced oil and gas drilling; competition among domestic producers of line pipe; a decline in export markets; shift from oil country tubular goods production to line pipe production; and a decline in raw materials costs. *United States–Line Pipe Safeguard* Panel Report, *supra* note 77, ¶ 7.283.

States - Wheat Gluten, the administering authority's determination must take account of the effects of increased imports *as distinguished from* effects of other factors. As indicated in *United States–Lamb Meat*, this can only be done "if the injurious effects caused by all the different causal factors are distinguished and separated."

In addition, since Article 3.5 of the *Antidumping Agreement*[109] contains language similar to the last sentence of Article 4.2(b) of the *Safeguards Agreement*, *United States–Hot Rolled Steel* is also instructive, in the requirement that the assessment by the administering authority:

> [M]ust involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors.[110]

Thus, as with injury determinations under the Antidumping Agreement, under the *Safeguards Agreement,* the administering authority must "identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from those injurious effects of the increased imports."[111] To comply with Article 4.2(b) (as interpreted by the Appellate Body) the competent authorities must meet a very high standard. They must:

> [E]stablish explicitly, through a reasoned and adequate explanation, that the injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.

Did the USITC in its line pipe safeguards determination meet this standard? No. The United States cited various provisions of the USITC Report in support of its conclusion that "after evaluating all possible causes of injury, we have determined that imports are an important cause of serious injury and are not less than any other cause." Korea's principal contention is that although the USITC "recognized that the

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109. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, *reprinted in* HANDBOOK *supra* note 27, at 392, 396.

110. Report of the Appellate Body, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001), *discussed in WTO Case Review 2001, supra* note 1, at 554.

111. *Safeguards Agreement*, art. 4.2(b), *reprinted in* HANDBOOK, *supra* note 27, at 521-30, 183, 226-27.

decline in oil and gas drilling and production caused injury, the USITC did not explain the nature and extent of the injurious effects attributable to decreased oil and gas drilling and did not properly separate and distinguish these injurious effects from those of the increased imports." The Appellate Body agrees with Korea: "Our examination leads us to conclude that those cited parts of the USITC Report do not *establish explicitly*, with a *reasoned and adequate explanation*, that injury caused by other factors is not attributed to increased imports." A mere assertion is not enough!

7. Application of the Measure: Express Justification and Permissible Extent[112]

Article 5.1 of the *Safeguards Agreement* provides:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is give that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

According to Korea, the first sentence of Article 5.1 creates both a procedural and a substantive obligation, and the United States violated both. Korea finds in Article 5:1 a procedural obligation by the United States to demonstrate, at the time safeguards are imposed, that they meet the requirements of the first sentence of Article 5.1. The United States, and the Panel, disagreed.

The Appellate Body recalls that in *Korea–Dairy* it stated that a Member is obligated to ensure that the safeguard measure is consistent with Article 5.1, first sentence, regardless of whether the safeguard is a quota, a tariff or a tariff rate quota.[113] If a quantitative restriction is used, *and* if the restriction reduces imports below a three-year average, then clear justification is required. There is, however, as stated in *Korea–Dairy*, no obligation to provide such justification (in the case of quantitative restrictions) if the three-year period is used. The same is true for the line pipe safeguard measures, since they are tariffs rather than quantitative restrictions, and the United States was thus not obligated to demonstrate necessity at the time of imposing the measure.

112. *United States–Line Pipe Safeguard* Appellate Body Report, *supra* note 77, ¶¶ 223-262.

113. *Korea–Dairy* Appellate Body Report, *supra* note 80, ¶ 103.

There remains, however, according to Korea, a general substantive obligation under Article 5.1, first sentence, to apply the safeguard measure "only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." The real issue here is whether the safeguard measure can address injury from sources other than imports. The Panel did not address this because it determined that Korea did not make a *prima facie* case demonstrating a United States violation of Article 5.1. According to the Appellate Body, the Panel thus did not reach the "crucial legal question . . . which is *whether the permissible extent of a safeguard measure is limited to the injury that can be attributed to increased imports, or whether a safeguard measure may also address the injurious effects caused by other factors.*" Clearly, the Appellate Body wishes to address this question!

United States–Wheat Gluten does not resolve this issue. There, the Appellate Body discussed only the right of the United States to apply a safeguard measure, not whether the *extent* of the measure was permissible or not. For the Appellate Body, the key is the first sentence of Article 5.1, interpreted in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*, that is, in good faith in accordance with the ordinary meaning of its terms, in their context and in light of the object and purpose of the treaty provision. Article 5.1, first sentence, sets the maximum permissible extent for the application of a safeguard measure. Article 5.1 refers to the same "serious injury" determined to exist by the competent authorities, that is the serious injury resulting from increased imports. If Article 5.1 "serious injury" had been intended to be broader, the language should have read, "remedy *all* serious injury."

Also, Article 4.2(b) of the *Safeguards Agreement,* (excluding the impact of causes of injury other than increased imports) a provision that serves as "context" for interpreting Article 5.1, seeks to prevent investigating authorities from inferring a causal link between serious injury and increased imports as a result of injurious effects from other sources. It is "a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports." For the Appellate Body, it would not be logical to impose the Article 4.2(b) obligation on an investigating authority, while at the same time permitting the investigating authority to apply safeguards addressing injury caused by all factors, including those not related to increasing imports. Moreover, such a result would be inconsistent with the Appellate Body's very restricted view of safeguards:

> If the pain inflicted on exporters by a safeguard measure were permitted to have effects beyond the share of injury caused by increased imports, this would imply that an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal trade practices, could be applied in a more trade-restrictive manner than countervailing and anti-dumping duties.

Also, as the Appellate Body observed in *United States–Cotton Yarn*, under general rules of international law it is necessary that "countermeasures in response to breaches by States of their international obligations be proportionate to such breaches."[114]

The result? Korea made its *prima facie* case that the safeguard measure on line pipe was inconsistent with the first sentence of Article 5.1. The United States might have rebutted this *prima facie* case by showing that the safeguard measure addressed only the proportion of injurious effects caused by increasing imports, but it did not do so.

Commentary

1. Mootness Does Not Really Matter

This appeal is somewhat unusual in a number of respects. First, as to the line pipe safeguards imposed by the United States, the issues raised here are moot. The safeguards were held invalid at the panel level because the Panel had determined that the United States had failed to demonstrate that the increased imports were a result of "unforeseen circumstances" as required by *GATT* Article XIX, and the United States had not appealed that ruling. Even if the United States had prevailed and Korea and the Third Party Participants had failed on all issues before the Appellate Body, the line pipe safeguards would have had to be withdrawn within a reasonable period of time, or the United States would have had to pay compensation. "Judicial economy" apparently had no role here given that both the United States and Korea were unsatisfied with the reasoning and results of other legal issues determined by the Panel.

2. Compliance Through the Back Door?

The United States and Korea were originally unable to agree on a "reasonable period of time" for implementing the decision, as required under Article 21.3 of the *DSU*, so the issue was submitted to arbitration. However, on July 24, 2002, the parties advised the arbitrator that they had reached agreement on a reasonable period of time, which resulted in termination of the arbitration.[115] The

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114. Report of the Appellate Body, *United States–Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, ¶ 120 (Aug. 10, 2001) [hereinafter *United States–Cotton Yarn* Appellate Body Report]; *see also WTO Case Review 2001*, *supra* note 1, at 633.

115. *See* Yasuhei Taniguchi, Report of the Arbitrator, *United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS202/17, ¶ 2 (July 26, 2002).

actual settlement was a unique one. The United States, instead of terminating the safeguards against Korea per se, modified the outstanding safeguards regime to provide Korea with a tariff-rate quota, under which Korean exports of line pipe to the United States, would be subject to restrictions only if those imports exceed 17,500 tons per quarter.[116] Prior to this action, imports of line pipe from any country that exceeded 9,000 tons per year (including Korea) were subject to a tariff of nineteen percent the first year, fifteen percent the second year and eleven percent the third year of the safeguard measures.[117] Presumably, the effect of this approach was to assure that under agreed projections for normal Korean line pipe exports to the United States the safeguards would not apply. In any event, Korea agreed to and accepted the arrangements.

3. The Bar Remains High for Safeguards

The issues raised in the appeal reflect a mix of earlier problems experienced by the United States (and other Members, such as Korea and Argentina) in undertaking safeguards investigations that pass Appellate Body muster and violations of the *Safeguards Agreement* that in some report appear to be a result of negligence or indifference. On the other hand, it may be almost impossible in practice for an administering authority such as the USITC to distinguish between the effects of increasing imports in causing serious injury or threat thereof, and the serious injury or threat thereof caused by other factors, or to deal effectively with imports from other members of a regional trade agreement such as NAFTA. To date, the Appellate Body has provided administering authorities with the guidance as to how injury from imports can be separated from injury arising from other factors and, once that separation has been accomplished, how to locate the causal link. Nor for the administering authority is there any obvious answer to showing "unforeseen circumstances" under *GATT* Article XIX, at least until such time as the Appellate provides definitive guidance.

However, in contrast, the consultation requirements of Article 12.3 *are* fairly straightforward, as are the exclusion requirements for developing countries under Article 9.1. While it can be expected that the United States will do things differently for safeguards investigations undertaken post-Appellate Body decisions in *United States–Wheat Gluten* and *United States–Lamb Meat*, the uncertainties clarified only then are not a complete excuse for failing to read the language of the *Safeguards Agreement* (especially Articles 9.1 and 12.3) carefully and making a more serious effort to comply. No doubt, many of the issues raised in these cases, resolved and

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116. Rossella Brevetti, *Bush Signs Proclamation to Implement Line Pipe Agreement with Korea*, 19 Int'l Trade Rep. (BNA), No. 35, at 1518 (Sep. 5, 2002); *see* Proclamation 7585, 67 Fed. Reg. 56, 207 (Aug. 30, 2002).

117. Brevetti, *supra* note 116; *see* Proclamation 7274, 65 Fed. Reg. 9193 (Feb. 18, 2000).

unresolved, will be considered in the pending *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*.[118]

II. INTELLECTUAL PROPERTY AND TRADEMARK RIGHTS: THE *HAVANA CLUB* CASE

Citation

United States–Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R (adopted February 1, 2002) (complaint by the European Communities).[119]

Explanation

1. Introductory Note: The U.S. Regulatory Framework

While highly technical in nature, this proceeding–popularly known as the "Havana Club" case–is the first Appellate Body decision to analyze the national treatment and most-favored-nation (MFN) provisions of the WTO *Agreement on Trade Related Intellectual Property* (*TRIPS*)[120] in detail,[121] and the first to examine trademarks and trade names. It is also significant because the Appellate Body rules that trade names are subject to the requirements of *TRIPS*, even though they are not specifically listed in *TRIPS* along with other types of intellectual property, *e.g.,* patents, trademarks, copyrights.

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118. Communication from Chairman of the Panel, *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, WT/DS249, WT/DS251, WT/DS252, WT/DS253, WT/DS254, WT/DS258, WTDS259 (Feb. 24, 2003) (noting complaints filed by the European Communities, Japan, Korea, China, Switzerland, Norway, New Zealand, and Brazil).

119. Report of the Appellate Body, *United States–Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Feb. 1, 2002) [hereinafter *Omnibus Appropriations Act* Appellate Body Report]; Report of the Panel, *United States–Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R (Aug. 6, 2001) [hereinafter *Omnibus Appropriations Act* Panel Report].

120. *Agreement on Trade Related Intellectual Property*, *reprinted in* HANDBOOK, *supra* note 27, at 567.

121. The national treatment provisions of *TRIPS* were discussed to a limited extent in Panel Report, *Indonesia–Certain Measures Affecting the Automobile Industry*, WT/DS55, WT/DS59, WT/DS68 (July 7, 1988), but the case did not reach the Appellate Body. The United States had argued that Indonesia had discriminated against other WTO Members with regard to legal provisions on the acquisition of trademarks, in violation of the national treatment provisions of Article 3. The panel disagreed, largely on the ground that no evidence to support the assertion of discrimination had been put forward. *See Omnibus Appropriations Act* Panel Report, *supra* note 19, ¶¶ 14.267-14.279.

The long and complicated U.S. statute (Section 211) under challenge reads in pertinent part as follows:

> (a)(1) Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to section 515.527 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.
>
> (a)(2) No U.S. court shall recognize, enforce or otherwise validate any assertion of rights by a designated national based on common law rights or registration obtained under such section 515.527 of such a confiscated mark, trade name, or commercial name.
>
> (b) No U.S. court shall recognize, enforce or otherwise validate any assertion of treaty rights by a designated national or its successor-in-interest under sections 44 (b) or (e) of the Trademark Act of 1946 (15 U.S.C. 1126 (b) or (e)) for a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of such mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.
>
> (c) The Secretary of the Treasury shall promulgate such rules and regulations as are necessary to carry out the provisions of this section.
>
> (d) In this section:
>
> > (1) The term "designated national" has the meaning given such term in section 515.305 of title 31, Code of Federal Regulations, as in effect on September 9, 1998, and includes a national of any foreign country who is a successor-in-interest to a designated national.
> >
> > (2) The term "confiscated" has the meaning given such term in section 515.336 of title 31, Code of Federal Regulations, as in effect on September 9, 1998.

As the Appellate Body noted:

> Section 211applies to a defined category of trademarks, trade names and commercial names, specifically to those trademarks, trade names and commercial names that are the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated by the Cuban Government on or after 1 January 1959.[122]

A "designated national" is effectively defined under the regulations as Cuba, a national of Cuba, or a specifically designated national.[123] The Cuban Assets Control Regulations (CACR) constitute a comprehensive regulatory system, under which virtually any transaction involving property or property interests under U.S. jurisdiction where Cuba or a Cuban national has an interest, require a general or specific license from the Treasury Department's Office of Foreign Assets Control (OFAC). General licenses (which do not require specific OFAC approval) are limited to such matters as family visits, journalists' travel, professional research, certain religious and educational activities, public performances, athletic events and exhibitions.[124] All other transactions require specific licenses from OFAC for a particular transaction, which are seldom granted.[125] With regard to trademarks and trade names, the CACR includes a specific prohibition, as follows:

> (a)(2) No transaction or payment is authorized or approved pursuant to paragraph (a)(1) of this section with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated, as that term is defined in section 515.336, unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

As the Appellate Body observes, the effect of section 211 and the CACR is "to make inapplicable to a defined category of trademark and trade names certain aspects of trademark and trade name protection that are otherwise guaranteed in the trademark and trade name law of the United States," under both the common law and statute (Lanham Act).[126]

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122. *Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶ 4.

123. *See* 31 C.F.R. § 515.305 (2003) (finding that "[s]pecifically designated nationals" are those who have acted on behalf or are controlled by the government); *see also* 31 C.F.R. § 515.306 (2003).

124. *See* 31 C.F.R. §§ 515.61-515.67 (2003).

125. *See* 31 C.F.R. §§ 515.502-515.576 (2003).

126. *Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶ 8.

2. Principal Issues on Appeal[127]

The case and the appeal turn on the scope of Sections 211(a)(1), 211(a)(2), and (b) of the Omnibus Appropriations Act of 1998, as quoted above, although that focus is muddied somewhat by peripheral issues also raised by the parties before the Appellate Body. The case relates to the CACR, but only to the extent referred to in and necessary to the interpretation of Section 211. The EU does not challenge the WTO consistency of U.S. federal legislation protecting trademark and trade names in the United States, known the Lanham Act.[128]

The proceedings are complicated by the fact that trademark law in the United States is somewhat different from that in most other countries. Typically, a trademark owner establishes her ownership solely through registration. In the United States, in contrast, usage may convey ownership, although registration creates a *prima facie* presumption of trademark ownership, which is of course subject to rebuttal.[129] Where the person registering a trademark in the United States is not in fact the true owner, the registration is subject to cancellation. The EC challenge is not to the application of Section 211, but to the validity of the statute on its face. Under these circumstances, recent U.S. court decisions (such as *Havana Club Holding*[130]) are not under attack as WTO-inconsistent and are relevant only to the extent they show how Section 211 has been applied in practice.

The specific issues on appeal are as follows:

a. whether the Panel erred in finding section 211(a)(1) consistent with Article 2.1 of *TRIPS* (which incorporates by reference Article *6quinques* A(1) of the *Paris Convention (1967)*,[131] relating to filing and protection of trademarks);
b. whether the Panel erred in finding the same section consistent with Article 15.1 ("protectable subject matter") of *TRIPS*;
c. whether, as the Panel found, the EC failed to demonstrate that sections 211(a)(2) and (b) are inconsistent with Article 16.1 ("rights conferred") of *TRIPS*;
d. whether the Panel erred in finding that section 211(a)(2) was consistent with Article 42 ("fair and equitable procedures") of *TRIPS* regarding protection of trademarks, based on the EC's failure to prove inconsistency;

127. *Id.* ¶¶ 93-99.

128. 15 U.S.C. § 1051 (2003).

129. *See Omnibus Appropriations Act* Panel Report, *supra* note 119, ¶ 8.99.

130. *See, e.g.,* Havana Club Holding, S.A. v. Galleon, 203 F.3d 116 (2d Cir. 2000); Havana Club Holding, S.A. v. Galleon*,* 62 F. Supp. 2d 1085 (S.D.N.Y. 1999).

131. This article is part of the *Stockholm Act of the Paris Convention*, of July 14, 1967, which revised the original *Paris Convention for the Protection of Industrial Property*, dated July 7, 1884. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶ 123.

e. whether the Panel erred in concluding that Sections 211(a)(2) and (b) are consistent with Article 2.1 of *TRIPS*, read in conjunction with Article 2.1 of the *Paris Convention (1967)* and Article 3.1 of *TRIPS* (the national treatment provisions of both conventions);
f. whether the Panel erred in finding Sections 211(a)(2) and (b) are consistent with the most-favored nation provisions (Article 4) of *TRIPS*; and
g. whether the Panel erred in concluding that trade names are not covered by *TRIPS*, leading to the further conclusion that sections 211(a)(2) and (b) are consistent with Articles 2.1, 3.1, 4 and 42 of *TRIPS* and Articles 2(1) and 8 of the *Paris Convention (1967)*, all with regard to protection of trade names.

3. Arguments of the Parties[132]

a. *Paris Convention (1967)* Art. 6*quinquies*, Incorporated by *TRIPS*, Art. 2.1

This article of the *Paris Convention (1967)*, according to the EC (and contrary to the Panel's finding), "addresses all features of a trademark," not just the form. Where a trademark is already registered in the country of origin, Article 6*quinquies* facilitates the registration in other member countries of the Paris Union, but once that registration is complete it is independent of the initial registration. It follows, therefore, that a member of the WTO has very limited discretion in the "imposition of conditions for trademark registration." The requirement of section 211(a)(1) of the approval of a third party for registration is not within any of the exceptions of the *Paris Convention (1967)*, and therefore is inconsistent with Article 2.1 of *TRIPS* (which article incorporates certain provisions by reference into *TRIPS*).

The United States argues that the Panel correctly determined that Article 6*quinquies* does not require Members "to accept for filing and protect without question *all* trademarks that have been duly registered in their country of origin." That article is limited to the form of the trademark; while section 211(a)(1) does not deal with the form, it is thus not inconsistent with Article 2.1 of *TRIPS* as it incorporates Article 6*quinquies* of the *Paris Convention (1967)*. Moreover, there are exceptions to the registration requirements, as when registration would infringe on the rights of a third party who was the owner of a confiscated asset who used the trademark in conjunction with that asset. Registration under the *Paris Convention (1967)* may also be denied if the trademarks are contrary to public order, and in the

132. *Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 15-92.

United States' view a registration that would give effect in the United States to a foreign confiscation would be contrary to public order.

b. *TRIPS*, Article 15 (Protectable Subject Matter)

According to the EC, the Panel erred in determining that section 211(a)(1) is consistent with *TRIPS*, Article 15 and Article 6.2 of the *Paris Convention (1967)*; the U.S. statute is not domestic legislation that specifies "other grounds for registration as permitted under Article 15.2." Rather, section 211(a)(1) relates not to ownership but constitutes an additional procedural step for "the registration or renewal of certain trademarks." Under *TRIPS*, Article 15.2, the EC would limit only exceptions expressly foreseen in the *Paris Convention (1967)*, construing such exceptions narrowly, consistent with general interpretative practice. Thus, the third party approval requirement is also inconsistent with Article 15.

In the view of the United States, section 211(a)(1) relates to ownership since it defines in part who is *not* an owner. Article 15 of *TRIPS* does not by its terms preclude a Member from denying registration to a person who is not the owner of the trademark.

c. *TRIPS,* Article 16 (Rights Conferred)

The Panel, according to the EC, further erred in finding that the EC failed to prove that sections 211(a)(2) and (b) were inconsistent with Article 16 of *TRIPS*. In the EC's view, Article 16.1 requires that the owner of a registered trademark be considered the holder of the registration until it no longer holds registration. It makes no sense, as section 211(a)(2) specifies, to "consider an original owner who is not in the register as the lawful owner." Moreover, section 211(b) also violates *TRIPS*, Article 16. The section prohibits U.S. courts from recognizing any rights flowing from the Lanham Act that are asserted by a designated national, but it also covers by its terms cases in which nationals of WTO Members are holders of registered trademarks in the United States.

According to the United States, the assumption that a registrant is necessarily the owner of a trademark is false. In a national system where ownership and registration are not the same, registration only establishes a (rebuttable) presumption of ownership. The presumption may be overcome even if a party, having overcome the presumption, does not seek cancellation of the trademark. Thus, section 211(a)(2) is not inconsistent with the requirements of Article 16.1; the same rationale applies to section 211(b).

d. *TRIPS*, Article 42 (Fair and Equitable Procedures)

The EC also challenges the Panel's decision that section 211(b) is not inconsistent with Article 42 of *TRIPS*, even though it determined that section 211(a)(2) was such a violation. The two sections necessarily must be read together; the final *Havana Club Holding* U.S. court decision confirms that section 211(b) results in "the denial of judicial enforceability" of certain trade names affected by section 211(b). Not so, says the United States. With regard to section 211(b), the EC simply failed to present evidence of inconsistency to the Panel.

However, the United States challenged the Panel's conclusion that section 211(a)(2) breaches Article 42. The Panel was incorrect in finding that the section "limits, under certain circumstances, right holders' effective access to and, hence, the availability of civil judicial procedures." According to the United States, those "certain circumstances" are only the ones in which the claimant is not the legitimate owner or rights holder. All parties, including trademark registrants, may initiate judicial proceedings and present evidence and, if registrants, enjoy "the presumption of validity that registration confers."

The EC argues, in contrast, that *TRIPS* requires that "the record owner of a registered United States trademark must benefit fully from the protection offered by Article 42 until such moment that the trademark is definitively removed from the register." Since section 211(a)(2) limits the issues that may be subject to litigation, it violates Article 42.

e. *TRIPS*, Article 3; *Paris Convention (1967)*, Article 3 (National Treatment)

The EC believes, contrary to the Panel's finding, that section 211(a)(2) is inconsistent with the national treatment provisions of both conventions. The section is discriminatory on its face because it applies to "designated nationals." Designated nationals may be Cuban nationals or foreign (non-United States) nationals (under section 211(d)(1)). However, a U.S. national cannot be considered a designated national. The discrimination is not limited to registration of successors-in-interest to trademark rights, as the Panel concluded, but occurs as well with original registrants. In the latter instance, the provision discriminates between Cuban nationals on the one hand and United States and non-Cuban foreign nationals on the other hand. While all persons seeking to acquire an affected trademark would require the authorization of OFAC, United States nationals would have to clear only one hurdle–the OFAC approval process–while foreign nationals must also satisfy the requirements of section 211(a)(2).

According the United States, there is no discrimination under section 211(a)(2), as to the requirements for a license from the OFAC. For original owners, there is no discrimination on the basis of nationality. Moreover, the regulations themselves are broad "and generally prohibit any transactions involving property in which a designated national has any interest of any nature whatsoever, direct or indirect." They do not apply only to Cuban nationals. The OFAC has discretionary licensing authority, and it is up to the EC to demonstrate that this authority on its face mandates WTO-consistent action. This the EC has failed to do. Nor does section 211(b) violate the national treatment provisions. That section differs from section 211(a)(2) as section 211(b) specifically mentions U.S. nationals as successors in interest.

f. *TRIPS*, Article 4 (MFN Treatment)

Unlike the Panel, the EC considers that the discrimination between Cuba and Cuban nationals, and United States and foreign nationals, is obvious; section 211(a)(2) "targets" only Cuba and Cuban nationals. Since the coverage of section 211(b) is the same, the discrimination occurs here as well. The United States disagrees, observing that the original owner, regardless of nationality, consents to his own registration under section 211(a)(2). The section also treats all foreign successors-in-interest, whether Cuban or otherwise, in the same manner. Nor has the EC met its burden of demonstrating that section 211(b) is inconsistent with Article 4.

g. *Paris Convention (1967)*, Article 8 (*TRIPS*' Coverage of Trade Names)

The EC asserts that the Panel was wrong to conclude that trade names are not covered by *TRIPS.* The definition of intellectual property in Article 1.2 of *TRIPS* is not exhaustive. Rather, it is an illustrative and general definition of intellectual property. Since Article 2.1 of *TRIPS* incorporates Article 8 of the *Paris Convention (1967)* (requiring protection of trade names) by reference, such reference would be useless if *TRIPS* is interpreted to exclude coverage of trade names. As sections 211(a)(2) and (b) deny judicial enforcement for trade names, they effectively deny protection for trade names altogether. This is therefore a violation of Article 42 of *TRIPS* (fair and equitable procedures) as the sections relate to trade names.

The United States agrees that *TRIPS* covers trade names by incorporating Article 8 of the *Paris Convention (1967)* into Article 2.1. However, it would be inappropriate for the Appellate Body to complete the Panel's analysis, as the EC suggests, as there are insufficient factual findings by the Panel. In particular, the Panel failed to make any findings as to how trade name ownership is established under U.S. law or how registration affects the rights of the person asserting ownership of a trade name.

Rationale and Holdings

1. Scope of Appellate Review[133]

Before turning to the substantive issues, the Appellate Body attempted to set out the proper scope of appellate review and the nature of the measure (ownership or non-ownership) that was the subject of the action. The United States had argued that the Panel's review of a WTO Member's domestic law was a question of fact, and thus not subject to review by the Appellate Body. The United States based this conclusion on Article 17.6 of the *Dispute Settlement Understanding* (*DSU*),[134] which limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel." Since the EC on appeal did not challenge the Panel's findings on the meaning of section 211 under Article 11 of the *DSU*, those findings were not before the Appellate Body. The EC argues, in contrast, that the Appellate Body is not bound by the Panel's characterization of the meaning of section 211; that meaning is a question of law that is properly before the Appellate Body to determine if a Member's law is consistent with the WTO Agreement.

The Appellate Body, citing its decisions in *EC–Hormones*[135] and *India–Patents (US),*[136] confirms that such review is within the authority of the Appellate Body:

> The municipal law of WTO Members may serve not only as evidence of facts, but also as evidence of compliance or non-compliance with international obligations. Under the DSU, a panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreement. Such an assessment is a legal characterization by a panel. And, therefore, a panel's assessment of municipal law as to its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU.

On this ground, the Appellate Body concludes that if section 211 is to be assessed regarding its consistency with the provisions of *TRIPS* and the *Paris Convention (1967)* that have been invoked by the EC on appeal, the Panel's

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133. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 100-106.

134. *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU or Dispute Settlement Understanding)*, *reprinted in* HANDBOOK, *supra* note 27, at 602.

135. Report of the Appellate Body, *European Communities–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998).

136. Report of the Appellate Body, *India–Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (Dec. 19, 1997).

"examination of the meaning of section 211" must be reviewed, along with that of the CACR and the Lanham Act.

2. Nature of the Measure (Ownership or Non-Ownership)[137]

The meaning or nature of section 211, according to the Appellate Body, affects a number of the legal issues raised in the appeal. The United States has argued that section 211 concerns ownership; the EC argued that it does not. The Panel concluded that section 211(a)(1) deals with ownership or regulates ownership. The statute bars any transaction or payment with regard to a trademark, trade name, or commercial name "unless the original owner of the mark, trade name or commercial name, or the bona fide successor-in-interest, has expressly consented." The Panel found no inconsistency with Article15.1 of *TRIPS* because it believed that "other grounds" as used in that article could include denial or registration on the grounds that the applicant is not the owner under U.S. law.

The Appellate Body agrees that section 211(a)(1) is "a measure that deals with ownership." It is not necessary, as the EC asserts, that a measure must *establish* ownership to be an ownership measure. It is sufficient, as the United States asserts, that a measure that may determine who is *not* the owner in order for the measure to *relate* to ownership. As the same consent requirement is present in sections 211(a)(2) and (b), the same arguments apply to those sections as well. Accordingly, the Appellate Body "will address each of the legal issues raised in this appeal with the understanding that the measure before us, in the particular circumstances in which it applies, is, in its nature, one that relates to the ownership of a defined category of trademarks and trade names."

3. Article 6*quinquies* of the *Paris Convention (1967)*[138]

Article 6*quinquies* A(1) provides as follows:

> Every trademark duly registered in the country of origin shall be accepted for filing and protected *as is* in the other countries of the Union, subject to the reservations indicated in this Article. Such countries may, before proceeding to final registration, require the production of a certificate of registration in the country of origin, issued by the competent authority. No authentication shall be required for this certificate (emphasis added).

137. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 107-121.

138. *Id.* ¶¶ 122-148.

As the provision is incorporated by reference into *TRIPS* through *TRIPS* Article 2.1, Members of the WTO must comply with Article 6*quinquies* whether or not they are also members of the *Paris Convention.*

Also, as noted earlier, the Panel viewed Article 6*quinquies* as relating only to the *form* of a trademark; since section 211(a)(1) relates to *ownership* rather than to form, it is not inconsistent with Article 6*quinques* and by incorporation, *TRIPS*, Article 2.1. Thus, according to the Panel and to the United States, the United States may deny registration if the registrant is not the true owner of the trademark, as determined by the law of the United States. The Appellate Body notes that registration in a country other than the registrant's country of origin under the *Paris Convention (1967)* can be accomplished not only under Article 6*quinques* but also under Article 6(1). Under Article 6.1 of the *Paris Convention (1967)*, "the conditions for filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation." This language, the Appellate Body observes, gives each country considerable discretion "to determine for themselves the conditions for filing and registration of trademarks."

The rights granted in Article 6*quinquies* A(1) to members of the Paris Union and now to WTO Members are additional to those granted to a registrant under national legislation, who must comply fully with the requirements of her national law and, once so registered, may seek the benefits of Article 6*quinquies*. This relates particularly to the obligation to register the trademark "as is," which suggests that at least the form or registration must be in the same manner as in the registrant's home country. It is less clear whether the term "as is" relates to "other features and aspects of that trademark as registered in the country of origin." The Appellate Body favors a narrow reading, voicing the concern that if Article 6*quinquies* A(1) is "interpreted too broadly, the legislative discretion reserved for Members under Article 6(1) would be significantly undermined." There is no evidence that the drafters of the original *Paris Convention* intended to "establish a global system for determining trademark registration that could circumvent, and thereby undermine, a domestic regime of trademark ownership based on use." According to the Appellate Body, section 211(a)(1) in its ownership-related requirements is not inconsistent with Article 6*quinquies* and thus with Article 2.1 of *TRIPS.*

4. Article 15 of *TRIPS* (Protectable Subject Matter)[139]

The Panel had found that the "other grounds" language in Article 15.1 permitted the United States to impose a measure "that denies trademark registration on the basis that the applicant is not the owner under national, in this case, U.S. law

139. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 149-178.

and Section 211(a)(1) is a measure that deals with the ownership of trademarks used in connection with confiscated assets."[140] Article 15.1 provides:

> Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, *shall be capable of constituting a trademark*. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, *shall be eligible for registration as trademarks*. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible (emphasis added).
>
> As the Appellate Body notes, Article 15.1
>
> [D]efines which signs or combinations of signs are *capable of* constituting a trademark. These signs include words such as personal names, letters, numerals, figurative elements and combinations of colours . . . based on the distinctiveness of signs as such, or on their distinctiveness as acquired through use. If such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings, then they become *eligible for* registration as trademarks.

While Article 15.1 thus defines what can constitute a trademark by identifying signs that are *capable of* and *eligible for* registration as trademarks, it does not require that all trademarks that are capable of being registered must in fact be registered. Not all such subject matter is *entitled* to protection.

As in its discussion of Article 6*quinquies*, the Appellate Body notes "if Article 15.1 required the registration of any and every sign or combination of signs that meets the distinctiveness criteria specified in that Article, then WTO Members would be deprived of the legislative discretion they enjoy under Article 6(1) of the *Paris Convention (1967).*" Thus, Article 15.1 limits "conditions" imposed by national legislation *only* with regard to the distinctiveness requirements set out in that article. Since section 201(a)(1) does not concern those issues addressed by Article 15.1, or "prevent or preclude the registration of signs or combinations of signs that meet the requirements of Article 15.1, so long as the application for registration as a trademark is not made by a person who is not the legitimate owner of the sign or combination of signs according to United States law." Therefore, section 201(a)(1) is

140. *Omnibus Appropriations Act* Panel Report, *supra* note 119, ¶ 8.70.

not inconsistent with the definition of "protectable subject matter" specified in Article 15.1.

5. Article 16 of *TRIPS* (Rights Conferred)[141]

The Panel determined, against the wishes of the EC, that section 211(a)(2)–which denies access to U.S. courts for designated nationals or their successors-in-interest–was not inconsistent with Article 16.1 of *TRIPS*. The Panel was unconvinced that "US courts would interpret section 211(a)(2) in a manner that would deprive a person, who has been determined by the court to be the owner of a registered trademark, of its exclusive rights." The same rationale led the Panel to the same conclusion with regard to section 211(b). Again, the result was dictated by the Panel's belief that national law, rather than *TRIPS,* is determinative of trademark ownership.

Article 16 (rights conferred) reads as follows:

> The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

The Appellate Body begins its analysis by noting that "Article 16.1 confers on the *owner* of a registered trademark an internationally agreed minimum level of 'exclusive rights' that all WTO Members must guarantee in their domestic legislation." However, Article 16.1 does not specify how ownership is to be determined. Also, it is clear from the last sentence of Article 16.1 that these "exclusive rights" may be conferred on the basis of either registration or use. The definition of ownership is left "to the legislative discretion of individual countries of the Paris Union" under Article 6(1) of the *Paris Convention (1967)*. Thus, no provision of *TRIPS* nor the *Paris Convention (1967)* "determines who owns or who does not own a trademark."

Under these circumstances, are sections 211(a)(2) and (b) inconsistent with *TRIPS*? The Appellate Body notes that under U.S. law, registration is not conclusive evidence of ownership of a trademark, although such registration creates a *prima*

141. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 179-202.

facie presumption of ownership. Clearly, section 211(a)(2) can be invoked against presumptive ownership and, "if successfully invoked, will eviscerate the presumption of ownership flowing under United States' law from registration of a trademark." The same arguments are valid with regard to section 211(b); it is not inconsistent with *TRIPS* because neither Article 16 nor any other *TRIPS* article specifies how national legislation must determine the ownership of a trademark.

6. Article 42 of *TRIPS* (Enforcement of Intellectual Property Rights)[142]

Article 42 is part of Part III of *TRIPS*, "Enforcement of Intellectual Property Rights." The "broad coverage" of Part III applies to all of the intellectual property rights covered by *TRIPS.* As the Appellate Body observes, section 2 "introduces an international minimum standard which Members are bound to implement in their domestic legislation." Section 2 of Part III includes in Article 42 "detailed requirements which ensure that 'civil judicial procedures' are 'fair and equitable.' " It provides:

> Members shall make available to the right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements (emphasis added).

The Panel had found section 211(a)(2) inconsistent with Article 42 because the section "limits, under certain circumstances, right holders' effective access to and hence, the availability of civil judicial procedures." While recognizing that similar concerns might apply to section 211, the Panel considered that the EC had not made its case for an Article 42 violation. The essential disagreement between the United States and the EC, respectively, is whether Article 42 simply requires that Members provide "mere access" to civil judicial procedures, even though recognition may be denied in cases involving designated nationals, or whether the civil judicial procedures must permit a plaintiff "to pursue *all* issues or claims that arise and to present *all* relevant evidence."

142. *See id.* ¶¶ 203-232.

The Appellate Body suggests that the Article 42 requirement that civil judicial procedures be "made available" means providing "*access* to civil judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement." Here, however, the United States' reliance on the ownership issue fails. According to the Appellate Body, "rights holders" under Article 42 is not limited to trademark owners; it necessarily "includes persons who claim to have legal standing to assert rights." These rights under Article 42 are procedural in nature, and "guarantee an international minimum standard for nationals of other Members."

Do sections 211(a)(2) and (b) meet this standard? Designated nationals and their successors-in-interest have access to U.S. courts, and the Federal Rules of Civil Procedure, and the Federal Rules of Evidence are applicable to all parties in such proceedings. Should the U.S. court conclude "that an enforcement proceeding has failed to establish ownership–a requirement of substantive law–with the result that it is impossible for the court to rule in favour of that claimant's or that defendant's claim to a trademark right," this would not be a violation of Article 42. Nor is there anything "in the *procedural* obligations of Article 42 that prevents a Member, in such a situation, from legislating whether or not its courts must examine *each and every* requirement of substantive law before making a ruling." The Appellate Body reiterates its conclusion that section 211(a)(2) "deals with the substantive of ownership." Therefore, the section does not violate the procedural rights of Article 42 and is thus not inconsistent with Article 42 on its face. The same rationale applies to section 211(b).

The EC, the Appellate Body notes, did not challenge the *application* of sections 211(a)(2) or (b), and the Appellate Body therefore does not rule on whether a "particular U.S. court has or has not violated the requirements of Article 42" in applying sections 211(a)(2) and (b) in any specific case.

7. National Treatment Under the *Paris Convention (1967)* and *TRIPS*[143]

There are effectively two distinct national provisions that apply to trademarks under the WTO, Article 3.1 of *TRIPS*, and Article 2.1 of the *Paris Convention (1967)*, the latter of which is incorporated by reference into *TRIPS*. Article 2.1 of the *Paris Convention (1967)* provides as follows:

> Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the

143. *See id.* ¶¶ 233-296.

> conditions and formalities imposed upon nationals are complied with.

This national treatment obligation, the Appellate Body notes, "is a long-standing obligation for all of the countries directly involved in this dispute" as well as for many others, as the United States and most of the EC members became parties to the *Paris Convention* in the 1880s. This obligation long pre-dates the WTO Agreement, and would apply in the case of trademarks even if the WTO Agreement did not exist. What is new is that the *Paris Convention* obligations are now WTO obligations as well, through incorporation into *TRIPS.*

In addition, WTO members are also bound by Article 3.1 of *TRIPS,* "a fundamental obligation of *TRIPS*," which provides in relevant part:

> Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection [footnote 5] of intellectual property, subject to the exceptions already provided in, respectively, the *Paris Convention (1967)*, the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits . . . .
>
> Footnote 5: For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

The EC's fundamental argument is that sections 211(a)(2) and (b) treat non-United States nationals less favorably than U.S. nationals to which section 211 applies in two significant ways: first, with regard to successors-in-interest or *bona fide* successors-in-interest to original owners and, second, to original owners. Restrictions are imposed on Cuban and other foreign nationals that are not imposed on U.S. nationals because under section 211(a)(2) U.S. courts may not recognize rights held by "designated nationals." The Panel reasoned that since this category includes a "national of any foreign country who is a successor-in-interest to a designated national" and does not include U.S. nationals, it is "plausible" that in some circumstances a U.S. court would recognize U.S. national rights to trademarks while denying the same rights to non-nationals. The United States argued that under FACR, 31 CFR ' 515.21, the OFAC always denies licenses to U.S. nationals as well as to non-nationals, so there is in fact no discrimination. In the United States' view, a law is only inconsistent with WTO obligations on its face if it mandates WTO-inconsistent action. The Panel agreed, noting that OFAC had never granted a specific license "to allow any United States national to become a successor-in-interest to a 'designated national.' "[144]

On appeal, the EC contended that even assuming that no specific licenses are granted, non-U.S. nationals who are successors-in-interest are subject to an "extra hurdle" that constitutes discrimination. U.S. national successors-in-interest need only comply with the OFAC procedures and are not subject to the limitations imposed by section 211(a)(2). Non-U.S. national successors-in-interest are subject to the same OFAC procedures but, in addition, they also face "an additional proceeding under section 211(a)(2)."

The Appellate Body agrees with the Panel that a plain reading of section 211(a)(2) indicates "differential treatment" between United States and non-U.S. nationals and "that such treatment could be considered to provide a less favourable treatment to nationals of other Members as it denies effective equality of opportunities" to non-U.S. nationals. However, it also confirms "where discretionary authority is vested in the executive branch of a WTO Member, it cannot be assumed that the WTO Member will fail to implement its obligations under the WTO Agreement in good faith." Yet, the Panel's analysis (leading to a finding of non-violation) did not go far enough, and the EC's "extra burden" argument should have been considered.

According to the Appellate Body, the Panel was correct in determining that even the *possibility* of less favorable treatment of non-U.S. national successors-in-interest by the courts under section 211(a)(2) (in that they face two hurdles rather than one) is inherently less favorable. Effectively, the United States must show that in every individual case there is no discrimination; it is not enough for the United States to argue that there is a likelihood that a U.S. court would not enforce rights asserted by a U.S. national successor-in-interest, as it would certainly refuse to enforce rights asserted by a non-U.S. successor-in-interest. Therefore, the Appellate Body concludes, "Section 211(a)(2) imposes an additional obstacle on successors-in-interest who are not nationals of the United States that is not faced by United States successors-in-interest." This is a violation of the national treatment provisions of the *Paris Convention (1967)* and *TRIPS.*

The situation is different with regard to section 211(b), which applies to successors-in-interest of *any* origin, including U.S. nationals. That section is thus consistent with the two national treatment provisions.

As for the impact of sections 211(a)(2) and (b) on original owners, the Panel found no discrimination. The EC appealed on the ground that less favorable treatment is provided to Cuban nationals than to United States nationals who are original owners. Even if all other circumstances with regard to the acquisition of U.S. trademarks based on original trademarks acquired or used in Cuba in connection with a business or assets that were nationalized in Cuba are similar, if one trademark owner is a national of Cuba, and the other a national of the United States, sections

144. *Omnibus Appropriations Act* Panel Report, *supra* note 119, ¶ 8.138.

211(a)(2) and (b) will apply to the former, but not to the latter. This is, according to the EC, a *prima facie* case of discrimination.

The Appellate Body essentially agreed with the EC and reversed the Panel's decision. It reviewed various alternative hypothetical situations concerning Cuban owners of trademarks, whether residing in Cuba, the United States or a third country, with respect to the effect of sections 211(a)(2) and (b) and the CACR. In each instance, the Appellate Body determined that the Cuban owner would be treated less favorably than a U.S. owner. It was not persuaded by the United States' argument that the CACR (section 515.201) would effectively bar a United States national as well as a Cuban national from asserting trademark rights under similar circumstances. Perhaps this is true in some cases. But because "it has not been shown by the United States that it would do so in each and every case, the less favourable treatment that exists under the measure cannot be said to have been offset and, thus, eliminated." Therefore, national treatment provisions are violated with regard to treatment of original owners as well as of successors-in-interest.

8. Article 4 of *TRIPS*–Most Favored Nation Treatment[145]

The second cornerstone of the international trading system–most-favored-nation treatment (MFN)–is not found in the *Paris Convention (1967).* However, the Appellate Body notes the nearly fifty years of experience under Article I of the *GATT*, and the decision of the "framers of the *TRIPS* Agreement" to extend MFN obligations to intellectual property rights covered by *TRIPS*. Given this experience, it must be treated as a "fundamental" obligation. Article 4 of *TRIPS* provides:

> With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

The Panel found with respect to both section 211(a)(2) and (b) that Cuban nationals were not denied any advantage accorded to other foreign nationals. As the Panel (with the concurrence of both Parties) limited its analysis to the particular situation of Cuban confiscations,[146] and the EC appeal is restricted to original owners (rather than including successors-in-interest), the Appellate Body does the same. The hypothetical situation involves two separate trademark owners, one a Cuban national, the other a non-Cuban foreign national, who acquired United States trademarks based on Cuban registration before the confiscation occurred, and where in each case the trademark was used in conjunction with a business or asset nationalized in Cuba.

145. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 297-319.

146. *Omnibus Appropriations Act* Panel Report, *supra* note 119, ¶ 8.145.

As the Appellate Body notes, when the two owners seek to assert their trademark rights in the United States, the treatment is different on its face because of sections 211(a)(2) and (b). Non-Cuban foreign nationals are not "designated nationals," and thus are not subject to the sections; however, Cuban nationals are. The United States argues that sections 211(a)(2) and (b) are not applicable to Cuban original owners because the have their own consent to registration. However, the Appellate Body observes that this is not the situation when "a Cuban original owner of a trademark is not the same person as the original owner of the same or substantially similar Cuban trademark." Moreover, only those Cuban nationals who live in the United States are automatically "unblocked" under the CACR; Cuban nationals residing in an "authorized trade territory" (such as the member states of the European Union) must apply for unblocking to the OFAC. This required additional administrative step confirms that "treatment that is inherently less favourable persists." Nor is there any provision of the CACR that "in each and every case" would offset this less favorable treatment, according to the Appellate Body.

Accordingly, the decision of the Panel is reversed, and the Appellate Body finds that sections 211(a)(2) and (b) are inconsistent with Article 4 of *TRIPS.*

9. Article 8 of the *Paris Convention (1967)–TRIPS* Coverage of Trade Names[147]

Are trade names (as distinct from trademarks) covered by *TRIPS*? Article 8 of the *Paris Convention (1967)* provides: "A trade name shall be protected in all of the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark." However, as trade names are not specifically found in the list of intellectual property in Article 1.2 of *TRIPS*, the Panel determined that trade names are not covered by *TRIPS*, and thus Members have no *TRIPS* obligations (as distinct from obligations for Paris Union members under the *Paris Convention (1967)*) to protect trade names. Both the United States and the EC disagree with this determination.

The Appellate Body begins its review with Article 2.1 of *TRIPS*, which states, "For the purposes of this Agreement, the term 'intellectual property' refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II." Relying on Article 31 of the *Vienna Convention on the Law of Treaties*,[148] the Panel had reasoned that as there is no mention of "trade names" in Sections 1-7, trade names and other categories of intellectual property not mentioned in those sections are not covered by *TRIPS*.[149] The Panel had also reviewed the negotiating

147. *See Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶¶ 320-359.

148. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

149. *Omnibus Appropriations Act* Panel Report, *supra* note 119, ¶ 8.24. It also rejected coverage of trade names as "related rights" under Article 14 of *TRIPS.*

history of *TRIPS* and concluded that the negotiating history confirmed the exclusion of trade names.

The Appellate Body demurred. Article 2.1 of *TRIPS* explicitly incorporates Article 8 of the *Paris Convention (1967)* into *TRIPS*. "Article 8 . . . covers only the protection of trade names; Article 8 has no other subject." "[T]here would have been no purpose whatsoever in including Article 8 in the list of *Paris Convention (1967)* provisions that were specifically incorporated in the *TRIPS* Agreement" if the negotiators had intended to exclude coverage of trade names. The Appellate Body finds nothing in the negotiating history to support either exclusion or inclusion of trade names, as the only coverage debate during the *TRIPS* negotiations related to trade secrets. Thus, according to the Appellate Body, "WTO Members do have an obligation under the *TRIPS* Agreement to provide protection to trade names."

Because the Panel excluded trade names from *TRIPS* coverage, it did not determine if section 211 was consistent with Articles 2.1, 3.1, 4, and 42 of *TRIPS*, as section 211 affects trade names. The Appellate Body's practice in such circumstances in the past has been to complete the analysis where there "were sufficient factual findings in the panel report or undisputed facts in the panel record to enable us to do so."[150] This is such a case, since the Panel inquired into protection of common law trademarks, and the United States indicated to the Panel that such protection is identical to that given to trade names. Thus, the Appellate Body's conclusions with regard to the consistency or inconsistency of section 211 with the various *TRIPS* provisions for trademarks apply equally with regard to trade names.

Commentary

1. An Unusual Deference to National Legislation?

The technical complexities of section 211 and the various *Paris Convention (1967)* and *TRIPS* provisions which, while legally supportable, may have significant consequences for trademark registration in the years ahead.

According to the Appellate Body, the scope of Article 6quinquies of the *Paris Convention* and Article 2.1 of *TRIPS* does not extend to the determination of trademark *ownership*, which is left to national law. Thus, Section 211, which relates

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150. *See, e.g.,* Appellate Body Report, *United States–Gasoline*, *supra* note 56, at n.18; Report of the Appellate Body, *Canada–Certain Measures Concerning Periodicals*, WT/DS31/AB/R, n.469 (June 30, 1997); Appellate Body Report *EC–Hormones*, *supra* note 135 n.222; Report of the Appellate Body, *European Communities–Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, ¶ 156 (July 17, 1998); Report of the Appellate Body, *Australia–Measures Affecting Importation of Salmon*, WT/DS18/AB/R, ¶¶ 117, 193, 227 (Oct. 20, 1998); Report of the Appellate Body, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 123 (Oct. 12, 1998); Report of the Appellate Body, *Japan–Measures Affecting Agricultural Products*, WT/DS76/AB/R (Feb. 22, 1999).

to ownership (or non-ownership), is not inconsistent with those conventions. In reaching this conclusion, the Appellate Body demonstrates a high level of respect for and deference to the "legislative discretion" of the WTO Member governments under Article 2.1 of *TRIPS.* However, a good argument can be made that the intent of Article 6*quinquies* A(1), which states that "Every trademark duly registered in the country of origin shall be accepted for filing and protected *as is* in the other countries of the Union, subject to the reservations listed in this Article," is to assure that trademarks registered in one country are virtually automatically registered in other countries of the Union. Under Article 6*quinquies* B, the other countries of the Union are permitted to deny registration only under very limited circumstances, for example, when the trademarks infringe rights earlier acquired by third parties in the affected country, where they have no distinctive character, or are contrary to morality or public order, or intended to deceive the public.[151] Regardless of whether the Appellate Body's interpretation was justified, the result arguably expands the discretion of Members in refusing registration of trademarks, which could adversely affect U.S. interests abroad in the future.

2. MFN and Non-Discrimination are Sacred Principles for *TRIPS*

Secondly, under *TRIPS* as well as under *GATT* Articles I and III, national treatment and most-favored-nation treatment are fundamental, perhaps sacred, principles. Those relatively new national treatment and MFN obligations will be strictly construed when they relate to intellectual property, just as they have been for fifty-five years under *GATT 1947* and *GATT 1994* when relating to trade in goods. Given the Appellate Body's strict interpretation of the MFN and non-discrimination provisions of *GATT*, a similar approach to analogous language in *TRIPS* is not surprising.

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151. Article 6*quinquies*–provides:

> Trade marks covered by this Article may be neither denied registration nor invalidated except in the following cases:
>
> (1) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
>
> (2) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the *bona fide* and established practices of the trade of the country where protection is claimed;
>
> (3) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order. This provision is subject, however, to the application of Article 10bis.

Finally, the Appellate Body has no intention of limiting the scope of *TRIPS* with regard to trade names. Although the Panel commits an obvious interpretation error, *TRIPS* is confirmed to have broad coverage extending to all forms of intellectual property, including but certainly not limited to the different types of intellectual property specifically enumerated in Article 1.2 of *TRIPS*. WTO members have an obligation under *TRIPS*, similar to the obligation to protect trade names that Paris Union members have under the *Paris Convention (1967)*.

On March 28, 2002, the United States and the EC advised the WTO Secretariat that they had agreed the "reasonable time" period for implementing legislative action to bring section 211 into conformity with the United States' TRIPS obligations was to expire December 31, 2002.[152] In October 2002, the European Union, Japan, and Cuba complained about the United States' failure to comply with the ruling, *inter alia*, in *US-Section 211*.[153] In January 2003, the United States and the European Union announced that they had agreed to extend the deadline for U.S. compliance to June 30, 2003.[154]

3. Section 211 and the U.S. Trade Embargo

In apparent accord with the wishes of the EC and the United States, the Appellate Body essentially avoids addressing any aspect of the United States embargo of Cuba, except where the detailed analysis of section 211 requires otherwise. In this action, the United States and the EC agreed that the U.S. Trading with the Enemy Act[155] and the Cuban Assets Control Regulations (CACR)[156] were *not* at issue in the proceeding.[157] Thus, the Appellate Body explicitly refuses to be drawn into a discussion of the United States' "longstanding doctrine of foreign confiscations" when discussing national treatment and most-favored nation treatment.

Notwithstanding this caution, this case represents the first action to reach the Appellate Body that emerges from the more than forty-year-old United States' unilateral trade embargo of Cuba. However, Cuba did not participate in the proceeding.[158] The relatively technical and bland language of Section 211 of the

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152. *DSU* art. 21.3(b), *reprinted in* HANDBOOK, *supra* note 27.

153. *See* Daniel Pruzin, *U.S. Faces Ire from Trading Partners over Compliance with WTO Rulings*, 19 Int'l Trade Rep. (BNA), No. 40, at 1727 (Oct. 10, 2002).

154. Daniel Pruzin, *Intellectual Property: United States Secures Extended Deadline to Comply with WTO 'Havana Club' Ruling*, 20 Int'l Trade Rep. (BNA), No. 3, at 116 (Jan. 16, 2003).

155. 50 U.S.C. § App.1 ff.

156. 31 C.F.R. §§ 515.101-515.901 (1999).

157. *Omnibus Appropriations Act* Appellate Body Report, *supra* note 119, ¶ 95.

158. The reasons for Cuba's non-participation are not entirely clear. One former USTR attorney suggested that participation in the WTO proceedings would have been pointless for Cuba, because of the total U.S. embargo on any two-way trade with Cuba, dating from 1962. Should Cuba have prevailed, and the U.S. not complied, Cuba could not have sought

Omnibus Appropriations Act of 1988 partially masks its principal purpose as a statute enacted on behalf of Bacardi and Company, Ltd. in order to discourage economically beneficial use of assets expropriated by the Castro government, particularly in the United States, even though neither the original owners of the "Havana Club" trademark nor the controlling interests in the American firm that purchased the original trademark owner's rights were American citizens at the time of the taking in 1962.[159]

In 1993, Cuba had sought a distribution partner for "Havana Club" rum, and concluded a joint venture with a French international liquor distributor, Pernod Ricard, S.A., operating as "Havana Club International" (HCI). In 1997, Barcardi had acquired the rights of the Archeabala family, which had owned the "Havana Club" trademark before the Castro Government expropriated the family's assets in 1960.[160] Barcardi (through its predecessor in interest, Galleon S.A.) initially used the "Havana Club" name for limited quantities of Puerto Rum distributed in the United States in 1995 and 1996. HCI and a related company brought a suit for trademark infringement in U.S. federal courts, which was ultimately dismissed by the federal district court (and affirmed by the Second Circuit) on the basis of section 211, effectively denying the enforcement of HCI's alleged rights.[161] Shortly after the district court's final ruling, the EC sought WTO consultations.[162]

It also should be noted that another, more direct WTO challenge to the U.S. economic boycott, specifically the *United States–Helms Burton Act*, was wisely

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compensation or imposed trade sanctions because there is no significant commercial trade between the United States and Cuba. Another international trade law attorney suggested that if Cuba had decided to bring an action against the United States in the *DSU*, the United States would have refused to participate on the basis of the "national security" exception in Article XXI of the *GATT*. Perhaps Cuba's general lack of participation in WTO activities was a factor, particularly because Cuba in any event stood to benefit from the EC/Pernod victory in the Dispute Settlement Body.

159. "[T]he internationally recognized right of the United States to intervene on behalf of persons in whom it has an interest [espousal] is limited to its citizens or nationals." Memorandum from Assistant Legal Adviser Knute E. Malmborg, Jan. 24, 1978, *reprinted in* U.S. DEPT. OF STATE, 1978 DIG. OF UNITED STATES PRACTICE IN INT'L LAW 1207 (1978). Moreover, the United State traditionally does not settle claims or otherwise espouse expropriation claims unless "the property on which such claims are based was owned, wholly or partially, by a national or nationals of the United States *on the date of loss and continuously until the date of filing*." Letter from Ambassador Robert J. McCloskey, Assistant Secretary of State for Congressional Relations to the President of the Senate, Jun. 22, 1976, *reprinted in* U.S. DEPT. OF STATE, 1976 DIG. OF UNITED STATES PRACTICE IN INT'L LAW 430 (1976) (emphasis added) (relating settlement of U.S. citizen claims against the German Democratic Republic).

160. *See* Havana Club Holding, S.A. v. Galleon, S.A., 203 F.3d 116, 119-21 (2d Cir. 2000).

161. *Id.*; *see also* Havana Club Holding, S.A. v. Galleon S.A., 62 F. Supp. 2d 1085, 1099 (S.D.N.Y. 1999).

162. *Omnibus Appropriations Act* Panel Report, *supra* note 119, ¶ 1.1.

suspended by the European Communities about six months after filing.[163] This action raised much more serious questions than the Havana Club case, simply because the WTO panel and Appellate Body likely would have had to determine the scope of the *GATT* Article XXI, "national security" exception, and thereby possibly second-guessing a sovereign nation's (United States) actions in alleged defense of national security; or, equally troubling, accepting without analysis the assertion of the national security exception and perhaps opening the way to its future abuse as a means of avoiding *GATT* obligations.[164]

III. SPECIAL SECTORS: AGRICULTURE AND MINIMUM IMPORT PRICES

Citation

Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/AB/R (adopted October 23, 2002) (complaint by Argentina).

Explanation

1. Chile's Price Band System[165]

The *Price Band* case began because Chile implemented two specific measures against farm product imports that drew the ire of Argentina. First, on June 30, 1986, Chile implemented a Price Band System on imported wheat, wheat flour, and edible vegetable oils. Second, Chile imposed provisional and definitive safeguard measures on imported wheat, wheat flour, and edible vegetable oils, and extended those measures. Argentina challenged the first measure under *GATT*

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163. WTO, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/9, ¶ 151 (Oct. 29, 2002) (noting that the panel in *United States–The Cuban Liberty and Democracy Solidarity Act*, WT/DS38, had been suspended at the request of the EC on April 21, 1997). Helms-Burton provided, *inter alia*, a cause of action in U.S. federal court for American citizens (including naturalized American citizens) against persons who were benefiting from ownership rights in property that had originally been expropriated by the Castro government in Cuba. The right of action could be blocked by a "national interest" waiver every six months, which has been exercised continuously by the Clinton and Bush administrations without exception.

164. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Title III, 22 U.S.C. §§ 6021, 6081-6085, *reprinted in* HANDBOOK, *supra* note 27, at 1565.

165. This discussion is drawn from Report of the Appellate Body, *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R ¶ 250 (Oct. 23, 2002) [hereinafter, *Price Band* Appellate Body Report], and Report of the Panel, *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R (Oct. 23, 2002) [hereinafter *Price Band* Panel Report].

Article II:1, as well as under Article 4:2 of the WTO *Agreement on Agriculture*. Argentina challenged the second measure under *GATT* Article XIX and various provisions of the WTO *Agreement on Safeguards*.

Chile's bound tariff rate for wheat, wheat flour, and edible vegetable oils was 31.5 percent (though its applied most-favored nation (MFN) rate was much lower, at eight percent). Argentina claimed the Chilean Price Band System violated *GATT* Article II:1(b) because it caused Chile, in certain instances, to collect duties in excess of the bound rate. Argentina furthermore argued that the system potentially resulted in Chile applying specific duties in violation of the bound 31.5 percent tariff rate. According to Argentina, Chile imposed effective *ad valorem* duties on Argentine products, for example 64.41 percent on oils, and 60.25 percent on wheat flour. Article II:1(b), a pillar of *GATT*–WTO law, states:

> The products described in Part I of the Schedule [of tariff concessions on goods] relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, *be exempt from ordinary customs duties in excess of those set forth and provided for therein*. Such products shall also be exempt from all *other duties or charges* of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.[166]

Of course, Chile disagreed with Argentina and claimed that its Price Band System complied with Article II:1(b). At the same time, Chile admitted that the application of the additional duties plus the regular duties occasionally exceeded its bound rate. Thus, after Argentina brought the WTO action, Chile modified its System to ensure that any additional duties applied, when added to the normal MFN rate, would not exceed the bound rate of 31.5 percent.[167]

What, exactly, was Chile's Price Band System, and how did it work? Perhaps the best way to understand the Price Band System is to quote directly from the disputed provisions in the 1986 Chilean law, namely Article 12 of Law 18.525 of the *Rules on the Importation of Goods* (as amended on 19 November 2001 by Article 2 of Law 19.772, which added the last paragraph):

> [Paragraph No. 1] For the sole purpose of ensuring a reasonable margin of fluctuation of domestic wheat, oil-seeds,

166. *GATT* art. II:1(b), *reprinted in* HANDBOOK, *supra* note 27, at 186 (emphasis added).

167. *See* Daniel Pruzin, *WTO Appellate Body Upholds Panel Ruling Against Chilean "Price Band" on Farm Imports*, 19 Int'l Trade Rep. (BNA), No. 38, at 1655 (Sept. 26, 2002).

edible vegetable oils and sugar prices in relation to the international prices for such products, *specific duties are hereby established in United States dollars per tariff unit, or ad valorem duties, or both,* and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of such goods.

[Paragraph No. 2] *The amount of these duties* and rebates, established in accordance with the procedure laid down in this Article, *shall be determined annually by the President* of the Republic, *in terms which, applied to the price levels attained by the products in question on the international markets, make it possible to maintain a minimum cost and a maximum import cost for the said products during the internal marketing season for the domestic production*.

[Paragraph No. 3] For the determination of the costs mentioned in the preceding paragraph, the monthly average international prices recorded in the most relevant markets during an immediately preceding period of five calendar years for wheat, oil-seed and edible vegetable oils and ten calendar years for sugar shall be taken into consideration.

[Paragraph No. 4] These averages shall be adjusted by the percentage variation of the relevant average price index for Chile's foreign trade between the month to which they correspond and the last month of the year prior to that of the determination of the amount of duties or rebates, as certified by the Central Bank of Chile. They shall then be arranged in descending order and up to 25 per cent of the highest values and up to 25 percent of the lowest values for wheat, oil-seed and edible vegetable oils and up to 35 per cent of the highest values and up to 35 per cent of the lowest values for sugar shall be removed. To the resulting extreme values there shall be added the normal tariffs and costs arising from the process of importation of the said products. The duties and rebates determined for wheat shall also apply to meslin and wheat flour. In this last case, duties and rebates established for wheat shall be multiplied by the factor 1.56.

[Paragraph No. 5] The prices to which these duties and rebates are applied shall be those applicable to the goods in question on the day of their shipment. The National Customs Administration shall notify these prices on a weekly basis, and may obtain information from other public bodies for that purpose.

> [Paragraph No. 6] The specific duties resulting from the application of this Article, added to the ad valorem duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. [cost, insurance, and freight] value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.[168]

In practice, Chile's applied tariff rates were substantially below its bound rates. Paragraph No. 6, quoted above, mandates these lower tariff rates. It places a cap on the combination of (1) an applied *ad valorem* rate and (2) a duty increase resulting from operation of the Price Band System. The cap is the *ad valorem* rate Chile is bound by under the WTO schedule of concessions. However, placing this cap did not suffice to placate Argentina. Why the turgid prose that caused this controversy? In other words, what does the prose mean, and how did Chile operate its Price Band System?

As its name suggests, using certain international prices, the Price Band System creates an upper and lower band, or threshold, for import prices of wheat, wheat flour, oil-seed, and edible vegetable oils. Once a year, pursuant to Paragraph No. 2 of Article 12, the President of Chile issues a decree publishing these upper and lower bands, along with related specific duties. Paragraphs No. 3 and No. 4 address the procedure for setting these bands. In brief, the bands are intended to be calculated on the basis of average monthly prices over the last sixty months (five years), observed on certain exchanges,[169] adjusted according to an external price index constructed by Chile's Central Bank and denominated in United States dollars.

Presumably to narrow the potential width of its Price Band, Chile excludes certain adjusted average monthly prices. It lists all of these prices, starting with the highest and descending to the lowest. However, Chile then excludes up to twenty-five percent of the highest, and of the lowest, adjusted prices. The result is a narrower range of adjusted prices than otherwise would occur. Then, Chile adds normal tariff liabilities,[170] and importation costs, to the remaining prices. This step effectively means that Chile uses c.i.f. prices to establish its Price Band (which is implicit in Paragraph No.4 and explicit in Paragraph No. 6). That is, to compute a c.i.f. price, Chile factors in importation costs, such as freight charges, insurance fees,

168. *Price Band* Panel Report, *supra* note 165, ¶¶ 2.2-2.3 (emphasis added).

169. To calculate the Price Band for wheat, Chile used price data for Hard Red Winter No. 2 wheat, f.o.b. (free on board) Gulf, quoted on the Kansas Exchange. For oils, Chile examined crude soya bean oil prices, f.o.b. Illinois, quoted on the Chicago Mercantile Exchange. Following paragraph No. 4 of its Law (quoted above), Chile used the same Price Band to calculate the specific duty (or rebate) for wheat flour as for wheat and then multiplied the result by 1.56 to obtain the final specific duty (or rebate) for the wheat flour. *See id.* ¶ 2.5.

170. The "normal" duty would be the MFN or other applicable rate. *See id.* ¶¶ 2.6-2.7.

financing (*e.g.*, opening a letter of credit, interest on credit, or taxes on credit), fees for customs agents, unloading charges, costs of transportation to a plant, and wastage costs. The final result is a maximum and minimum listed adjusted price, on a c.i.f. basis, with the most extreme twenty-five percent of the prices having been excluded from the list. The highest listed price establishes the upper threshold of the Band and the lowest listed price sets the lower threshold.

The Price Band is only one component in Chile's overall System. Merely having a Band, without also providing target or, more accurately, "reference" prices, would be of no help in determining the applicable duties. How would a Chilean customs officer know whether to impose an additional duty if he were conscious only of (1) the Band and (2) the actual import price of a shipment? The officer needs a sense of whether the shipment he is assessing is "too low," "too high," or "just right" in relation to the lower threshold of the Band.

To be sure, one method for giving the customs officer that sense would be to use the actual import price as reference, for example, the transaction value of the merchandise. (This method characterizes a minimum import price scheme, which is discussed later). If the transaction value were below the lower band, then the officer would know to add an increased duty, a duty on top of the normal applicable *ad valorem* rate. He would calculate the difference between the transaction value and the lower band, and impose a duty based on that difference. Conversely, if the transaction value of the imported merchandise were above the upper band, then the officer would know that he should grant a rebate. He would calculate the gap between the transaction value and upper band, and provide a rebate based on that gap. If the transaction value fell between the upper and lower thresholds, then he would apply the normal duty, with neither an increase nor a rebate. In effect, this method makes use of the Price Band and actual import prices, comparing these prices with the upper and lower boundaries of the Band. The lower threshold becomes a minimum import price, above which imported merchandise is safe from an extra duty. Consequently, to exporters, it becomes a sort of "target" to price their merchandise.

However, this straightforward method is not quite what Chile's above-quoted Law 18.525 demands. Instead, paragraph No.5 of Article 12 requires the National Customs Administration to set a "reference price" for wheat, wheat flour, oil-seed, and edible vegetable oils. The Customs Administration sets these reference prices on a weekly basis (every Friday) by examining prices on foreign markets. The foreign markets are markets of concern to Chile, which for wheat include the United States, Canada, Australia, and the market of the complainant in the case, Argentina. The Customs Administration calculates reference prices by using the lowest f.o.b. prices for wheat, wheat flour, oil-seed and edible vegetable oils sold in these markets. Whereas Chile, in establishing the Price Band, computes c.i.f. prices by factoring in typical importation costs, the Customs Administration does not undertake the same calculation method with regard to reference prices (a reference price is an f.o.b. price, but prices in the Band are c.i.f. prices). The reference prices, then, become the gauge by which a Chilean customs officer decides whether to apply an increased duty, grant a rebate, or take no action at all. In any particular week, the same reference price applies to all products within a category (*e.g.*, wheat), regardless of the country of origin of the shipment, and regardless of the actual transaction value of the shipment.

Any international transaction lawyer appreciates that the c.i.f. price is higher than the f.o.b price for the same merchandise because the latter figure excludes costs, insurance premiums, and freight charges, which are built into the former figure. Strictly speaking, then, the two prices are not comparable. All other factors being equal (*ceteris paribus*), by virtue of the c.i.f. prices used to construct it, Chile's Price Band is higher than the f.o.b. reference prices used in connection with the Band. Consequently, the Price Band System has an inherent bias: the reference price for a particular shipment may be below the lower threshold of the Band, because that threshold includes importation costs not included in the price. (This point, appreciated by the Appellate Body, is discussed in further detail below.)

This inherent bias aside, the methodology explained above means that when a shipment of a product subject to the Price Band System, wheat, wheat flour, oil-seed and edible vegetable oils, arrives at the Chilean border, a customs officer calculates the duty liability using a three-step procedure. First, the officer imposes the usual *ad valorem* duty, the MFN or other applicable rate. Under Chile's simplified, general tariff structure, its MFN rate was eight percent.

In Step Two, the officer identifies the reference price applicable to a particular shipment. As discussed earlier, this reference price is not the transaction value of the merchandise. Rather, it is the price the National Customs Administration calculated on a weekly basis. The applicable reference price depends on the date in the bill of lading that covers the shipment. The date helps the customs official to decide the respective week from which to take the reference price. He needs the correct reference price if he is to determine whether an additional duty is required.

Argentina objected to Step Three of Chile's Price Band System inquiry. In this Step, the Chilean customs officer computes the total tariff liability on the shipment of imported merchandise by determining whether he needs to add an additional duty to the usual eight percent *ad valorem* rate he imposed in Step One. Simply put (with no pun intended), the seeds of controversy were sown between Chile and Argentina when a duty increase–a duty above that imposed in Step One–was triggered. Whenever the reference price pertaining to a shipment of imported wheat, wheat flour, oil-seed and edible vegetable oil was below the lower threshold of the Price Band, the trigger went off. This trigger is essentially provided for in Paragraphs No.1 and No.5 of Article 12. These paragraphs instruct the Chilean customs official to compare (1) the reference price pertaining to the shipment in front of him with (2) the upper and lower thresholds in the Price Band. Again, the transaction value of the merchandise is irrelevant (and, for that matter, so is the deductive value and computed value of the merchandise).

Suppose the applicable reference price were below the lower threshold of the Price Band. The Chilean customs officer would then increase the duty applicable to the imported merchandise. He would apply a specific duty to the merchandise, simply because the reference price is below the lower band. The amount of the specific duty would be the absolute difference between the "reference price" and the lower band. Because the officer would levy the specific duty on top of the *ad valorem* duty already computed in Step One, the specific duty is an "increase."

What would happen if the reference price relevant to the imported shipment is above the upper threshold of the Price Band? Then, the Chilean customs officer would provide the importer with a rebate. The amount of the rebate would equal the absolute difference between the reference price and the upper band (but could not exceed the applied *ad valorem* rate). In instances where the reference price fell within the boundaries of the Price Band, the officer would neither impose a specific duty nor grant a rebate. The only tariff liability would be the standard *ad valorem* rate of eight percent.

Consider a simplified example of this three-step procedure. Suppose the transaction value of 1,000 bushels of wheat imported from Argentina to Chile is U.S. \$2.00 per bushel, or \$2,000 total. Suppose, further, the wheat Price Band in the Chilean President's decree for the year of importation establishes a lower threshold of \$5.00 per bushel, and an upper threshold of \$10.00 per bushel. In Step One, a Chilean customs officer would assess an eight percent *ad valorem* duty on the \$2,000 shipment, or \$160.00.

In Step Two, the customs officer would ascertain the applicable reference price by checking both the appropriate publication of the National Customs Administration and the date contained in the bill of lading covering the Argentinean wheat. Assume the date is January 24, 2003, and the "reference price" determined for that week (for example, Friday, January 24 to Thursday, January 30) is \$4.50 per bushel. Clearly, the reference price is fifty U.S. cents below the lower threshold of the Price Band. Hence, the customs officer must assess a specific duty in that amount. Assuming further, the specific duty is levied on a per bushel basis, then the increased duty would be \$500.00 (the product of 1,000 bushels and \$0.50 per bushel). Via Step Three, the total tariff liability would be \$660, comprised of \$160, assessed on an *ad valorem* basis, plus an additional \$500 specific duty. It is not surprising that Argentinean wheat exporters would be upset about such additional duties.

2. Chile's Safeguard Measures[171]

The transparency of Chile's safeguard law and the decree implementing the same, issued by the Ministry of Finance, was not challenged by Argentina. Chile had fulfilled its obligation in this respect, notifying the WTO of both legal instruments on June 23, 1999. Two months later, on August 23, 1999, Chile's Ministry of Agriculture asked the country's national commission responsible for investigating alleged distortions in prices of imported goods to self-initiate a safeguards case on products subject to the Price Band System. (That commission is known, perhaps rather humorously to some exporters and importers, as the "Chilean Distortions

171. *Price Band* Panel Report, *supra* note 165, ¶¶ 1.1-1.8, 2.8-2.15.

Commission," or CDC). In other words, the Agriculture Ministry, presumably acting with the encouragement of domestic farming interests, sought safeguards protection against imported wheat, wheat flour, edible vegetable oils, and sugar. Indeed, the Ministry requested imposition of provisional safeguard measures, pending final outcome of the investigation. Shortly thereafter, on September 9, the National Commission agreed to commence the investigation, though the case it brought against sugar was not part of the claim Argentina brought to the WTO. On October 22, the National Commission recommended to the President of Chile that he impose provisional safeguards.

Relief came swiftly for Chilean farmers. On November 26, 1999, the President followed through on the recommendation of the National Commission. He imposed a provisional safeguard on foreign wheat, wheat flour, and edible vegetable oils. On January 7, 2000, the Commission recommended the relief be made final, and on January 22, the Ministry of Finance published a decree doing just that. The relief for domestic producers was definitive and to last for one year. The protection took the form of an *ad valorem* tariff surcharge on imports of the merchandise subject to the Price Band System. On November 25, 2000, the Finance Ministry, upon a recommendation from the National Commission, agreed to extend the safeguard measures for another year, which effectively meant until November 26, 2001. (Chile actually ended the protection for wheat and wheat flour early on July 27, 2001.) Again, transparency was not an issue in the WTO case as Chile notified the WTO of the measure and its extension.

The method, which Chilean authorities used to calculate the surcharge, was a bit tricky and was partially based on the Price Band System. Technically, the surcharge for each import transaction equaled the difference between (1) "the general tariff added to the *ad valorem* equivalent of the specific duty" calculated under the Price Band System, and (2) the tariff "level bound in the WTO" for the relevant product.[172] The Panel explained the calculation as follows:

> The safeguard measures consist of an additional duty on wheat, wheat flour and edible vegetable oils which "shall be determined by the difference between the general tariff added to the *ad valorem* equivalent of the specific duty determined by the mechanism set out in Article 12 of Law 18.525 [quoted earlier]–and its relevant annual implementing decrees–and the level bound in the WTO for these products." Thus, whenever the Chilean PBS [Price Band System] duty exceeds, in conjunction with the 8 per cent applied tariff, the 31.5 per cent bound rate, *the portion of the duty in excess of that bound rate shall be considered to constitute a safeguard measure*. Put another way, *the duty applied pursuant to*

172. *Id.* ¶ 2.12.

> *the safeguard measure is the Chilean PBS duty to the extent it exceeds the 31.5 per cent bound rate.*[173]

Thus, for example, consider the hypothetical 1,000-bushel shipment of Argentinean wheat at U.S. $2.00 per bushel. The transaction value is $2,000. Assume the bound tariff for wheat is 31.5 percent, as it was in Chile, and further assume the lower and upper bounds of the Price Band System are $5.00 and $10.00, respectively. The generally applied *ad valorem* tariff is eight percent, or $160.00 (the product of the tariff rate and the transaction value). Suppose, again, the reference price for the week in which the shipment occurs is $4.50.

According to these parameters, the fifty-cent gap between the reference price and the lower threshold is the specific duty (per bushel) under the Price Band System. Applied to a 1,000-bushel shipment, the additional duty is $500 (the product of 50 cents/bushel and 1,000 bushels). In turn, the total duty owed on the shipment is $660, which is the sum of the general tariff ($160) and the additional specific duty ($500). Based on this total, the amount of the safeguard measure can be determined. The safeguard measure is the excess of the total over the 31.5 percent bound rate. In the present hypothetical, the total duty liability is thirty-three percent of the transaction value of the shipment. The thirty-three percent figure is obtained by dividing the $660 liability into the $2,000 transaction value. Clearly, thirty-three percent is 1.5 percent higher than Chile's bound rate. Consequently, the safeguard measure is considered to be 1.5 percent, or $30.

3. Principal Issues on Appeal[174]

At the Panel stage, two legal arguments dominate the *Price Band* case; one about Chile's Price Band System and the other about its agricultural safeguard measures. Relevant to the first area of dispute were the familiar pillars of *GATT*, namely Article II:1b, concerning tariff bindings, and Article 4:2 of the *Agreement on Agriculture*. Argentina claimed the Price Band System also violated this provision of the *Agriculture Agreement*. Article 4:2 states:

> Members [of the WTO] shall *not* maintain, resort to, or revert to *any* measures of *any* kind which have been required to be *converted into ordinary customs duties* [footnote omitted], *except* as otherwise provided for in Article 5 and Annex 5.[175]

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173. *Id.* ¶ 7.109 (emphasis added).

174. *See Price Band* Appellate Body Report, *supra* note, 165 ¶¶ 125, 219; *Price Band* Panel Report, *supra* note 165, ¶¶ 3.1-3.2.

175. *WTO Agreement on Agriculture*, art. 4:2, *reprinted in* HANDBOOK, *supra* note 27, at 308 (emphasis added).

Of course, Chile took the opposite view, urging that the System complied with Article 4:2. Regarding this area of dispute, it is worth taking a moment to survey the provisions of Article 4:2. After all, Article 4:2 is not nearly as widely-known or well-understood as the famous tariff bindings principle in *GATT*.

The first clause of Article 4:2 of the *Agriculture Agreement* is a prophylactic rule. This clause bans new forms of protection against agricultural products for which "tariffication"–meaning the conversion of a non-tariff barrier to a tariff–is required. Footnote 1 to the first clause, defines non-tariff barriers as broadly as possible to include:

> [Q]uantitative import restrictions, *variable import levies*, *minimum import prices*, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties . . . .[176]

It does not matter whether the non-tariff barrier is maintained in connection with protections justified under the balance of payments exceptions contained in *GATT* Articles XII or XVII. The purpose of the first clause of Article 4:2 is to ensure that tariffication is not undermined by new, and yet more devious, non-tariff protection. In brief, the six categories of barriers listed in Footnote 1 illustrate the kinds of measures that had to be converted into an ordinary customs duty, by virtue of Article 4:2, to enhance market access opportunities for imports of agricultural products.

However, there are two exceptions to the prophylactic ban on non-tariff barriers against products subject to tariffication. These exceptions are set forth in the first clause of Article 4:2. The second clause of the Article creates both exceptions, by making explicit reference to two other parts of the *Agreement on Agriculture*. The first exception, incorporated in its entirety in Article 5, concerns special safeguard measures. Article 5 effectively allows a Member to invoke a special safeguard against imports of an agricultural product, as long as the volume of imports of an agricultural product exceed an established trigger level, or the c.i.f. price of those imports is below a trigger price level (equaling a reference price that is the average of c.i.f. prices in 1986-88).[177] The second limitation on the prophylactic rule against non-tariff barriers is set forth in Annex 5 to the *Agriculture Agreement*. Section A of this complicated Annex lays out certain circumstances in which the prophylactic ban of Article 4:2 is inapplicable. Those circumstances include: (1) a *de minimis* level of domestic consumption; (2) the lack of an export subsidy; (3) the existence of effective production-limiting measures; (4) products raising special non-trade concerns (*e.g.*, food security or special environmental concerns); or (5) products

176. *WTO Agreement on Agriculture* art. 4:2 n.1, *reprinted in* HANDBOOK, *supra* note 27, at 308 (emphasis added).

177. *Id.* art. 5:1, *reprinted in* HANDBOOK, *supra* note 27, at 308-09.

subject to minimum access opportunities.[178] Section B explains that the ban on non-tariff barriers does not apply to a primary product that is the predominant staple in the traditional diet of a developing country Member.[179]

Argentina's claim against Chile's provisional and definitive safeguard measures and the extension of the definitive measures, was based on *GATT* Article XIX as well as various provisions of the WTO *Agreement on Safeguards*. Chile took the position that the Panel should not rule on this claim. Chile supported its argument by stating that the provisional and definitive safeguard measures, which were the subject of consultations between the two WTO Members, were not in force. It furthermore said the extension of the measures were not the subject of consultations under WTO auspices. The Panel rejected the Chilean defense.

For seven reasons, the Panel held the Chilean safeguards on wheat, wheat flour, and edible vegetable oils were inconsistent with *GATT* Article XIX:1(a). Chile did not:

(1) demonstrate the existence of unforeseen developments;[180]

(2) illustrate the likeness, or direct competitiveness, of wheat, wheat flour, and edible vegetable oils made in Chile in comparison with those products imported from Argentina;[181]

(3) define the domestic industry (a consequence of the second reason);[182]

(4) show an increase in imports of merchandise subject to investigation;[183]

(5) prove that its domestic industry faced a threat of serious injury;[184]

(6) a causal link between increased imports and the threat of serious injury;[185] and

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178. *Id.* Annex 5–Special Treatment with Respect to art. 4, ¶ 2, § A, *reprinted in* HANDBOOK, *supra* note 27, at 329-30.
179. *Id.* Annex 5–Special Treatment with Respect to art. 4, ¶ 2, § B, *reprinted in* HANDBOOK, *supra* note 27, at 331.
180. *See Price Band* Panel Report, *supra* note 165, ¶¶ 7.132-7.140, 8:1(b)(1).
181. *See id.* ¶¶ 7.141-7.149, 8.1(b)(iii).
182. *See id.* ¶¶ 7.141-7.149, 8.1(b)(iii).
183. *See id.* ¶¶ 7.150-7.162, 8.1(b)(iv).
184. *See id.* ¶¶ 7.163-7.174, 8.1(b)(v).
185. *See Price Band* Panel Report, *supra* note 165, ¶¶ 7.175-7.180, 8.1(b)(vi).

(7) ensure that its safeguards were limited to the extent necessary to prevent injury (or remedy injury) and facilitate adjustment.[186]

On the basis of the same factual predicate, the Panel also found that the Chilean measures ran afoul of various provisions of the *Agreement on Safeguards*, namely: Articles 2 and 4 (because Chile failed to demonstrate the products produced in Chile were like or directly competitive with the subject merchandise, and thus failed to identify the domestic industry);[187] Articles 2:1 and 4:2(a) (because Chile failed to demonstrate an increase in imports);[188] Articles 2:1 and 4:2(b) (because Chile failed to demonstrate a causal link between increased imports and threat of serious injury);[189] Article 3:1 (because Chile did not publish the measures in an appropriate medium, nor set out findings and reasoned conclusions);[190] Articles 4:1(a)-(b) and 4:2(a) (because Chile failed to prove the existence of a threat of serious injury);[191] and Article 5:1 (because Chile did not ensure that the safeguards were limited to the extent necessary to prevent injury and facilitate adjustment).[192]

Chile did not appeal the Panel's findings on Argentina's safeguards claim. Given the sweeping loss it suffered on this claim, under both *GATT* Article XIX and the *Safeguards Agreement*, Chile was wise not to do so. The only point on which Chile managed to prevail before the Panel concerning the safeguard measures was that they were not, contrary to Argentina's contention, inconsistent with Article 3:1-2 of the *Safeguards Agreement*. The Panel agreed with Chile that it had, in fact, conducted an appropriate investigation by giving Argentina the full opportunity to participate.[193]

Chile, however, did appeal the Panel's ruling against it with respect to the Price Band System. Specifically, the Panel found against Chile on the grounds of both arguments that Argentina offered.[194] The Panel ruled that the additional specific duties Chile imposed under the System qualified as "other duties or charges" within the meaning of the second sentence of *GATT* Article II:1(b). Therefore, these additional duties were inconsistent with the second sentence. The Panel moreover held that Chile's System violated Article 4:2 of the *Agreement on Agriculture*. According to the Panel, the System was "similar" to a "variable import levy" and to a "minimum import price system" within the meaning of Footnote 1 to Article 4:2. The additional specific duties imposed by Chile under the System were not "ordinary customs duties" under Article 4:2. Because they were not "ordinary customs duties"

186. *See id.* ¶¶ 7.181-7.186, 8.1(b)(vii).
187. *See id.* ¶¶ 7.141-7.149, 8.1(b)(iii).
188. *See id.* ¶¶ 7.150-7.162, 8.1(b)(iv).
189. *See id.* ¶¶ 7.175-7.180, 8.1(b)(vi).
190. *See Price Band* Panel Report, *supra* note 165, ¶¶ 7.137-7.140, 8.1(b)(i-ii).
191. *See id.* ¶¶ 7.163-7.174, 8.1(b)(v).
192. *See id.* ¶¶ 7.181-7.186, 8.1(b)(vii).
193. *See id.* ¶¶ 7.189-7.190, 8.1(b)(viii).
194. *See id.* ¶ 125(c)-(d).

and because they resembled two of the items on the list of forbidden non-tariff barriers contained in Footnote 1, they were inconsistent with the prophylactic rule in Article 4:2. On appeal, Chile argued these holdings should be overturned. Instead, the Appellate Body upheld–though with significant modifications–the Panel's conclusions.

4. Three Thrusts, Three Parries[195]

As just intimated, Chile lost its appeal. However, the loss on appeal was less devastating than it had been at the Panel Stage. Chile made three well-considered thrusts.[196] First, the Panel had violated Article 11 of the *DSU* by

195. This discussion is drawn principally from *Price Band* Appellate Body Report, *supra* note 165, ¶¶ 145-262.

196. Chile scored on a fourth (albeit weak) thrust in its appeal under Article 4:2 of the *Agriculture Agreement*. Chile argued the Panel was wrong to define the term "ordinary customs duty" in Article 4:2 as "a customs duty which is not applied on the basis of factors of an exogenous nature." The Appellate Body agreed with Chile, and overturned the Panel's definition of the term. *See Price Band* Appellate Body Report, *supra* note 165, ¶¶ 264-280, 288(c)(ii).

The Panel said the term has both an empirical and normative connotation. By a "normative" connotation, the Panel meant an "ordinary customs duty" always relates either to the value of imported goods (in the instance of an *ad valorem* duty), or to the volume of imported goods (in the instance of a specific duty). (The empirical connotation was that WTO Members invariably express their commitments in their Schedules as *ad valorem* or specific duties, or combinations thereof). This distinction may well be ethereal, unfathomable, or a bit of both. In light of the facts of the *Price Band* case, the distinction is downright silly.

As the Appellate Body observed, Chile calculated an additional specific duty on the basis of (1) the per unit volume of a shipment, and (2) the difference between the lower threshold of its Price Band and the relevant reference price. Chile's additional duty related to the volume of goods, but it was not an "ordinary" duty. Likewise, antidumping and countervailing duties relate to the value of subject merchandise, but they are not "ordinary customs duties." In any event, the Appellate Body observed the Panel made the distinction by interpreting the French and English versions of the term "ordinary customs duty" in a manner different from the plain meaning of the English version of the term. That kind of interpretation, said the Appellate Body, violated Article 33:4 of the *Vienna Convention*. This provision mandates adoption of a meaning that best reconciles authentic versions of a text (*e.g.*, versions in two or more tongues) whenever a comparison of the texts reveals a difference in meaning.

As the Appellate Body pointed out, the Panel further erred by holding that an "ordinary customs duty" must not be applied on the basis of exogenous factors (*e.g.*, fluctuating world market prices). A WTO Member may decide upon an applied rate below its bound rate, for a variety of political and economic reasons. These reasons, typically pertaining to domestic consumers and producers, would be exogenous. Yet, none of which take the applied tariff outside the meaning of "ordinary customs duty." To hold otherwise might imply the consequent tariff was prohibited under *GATT* Article II:1(b), rather than being within the evaluating the Price Band System under the second sentence of *GATT* Article II:1(b). Chile argued that this issue was not properly before the Panel. Second, Chile urged that the Panel erred in assessing the System first under Article 4:2 of the *Agreement on Agriculture*, instead of Article II:1(b) of *GATT*. Furthermore, Chile insisted that the Panel should have first addressed *GATT*, and only then the *Agriculture Agreement* (an argument mildly reminiscent of the jurisprudence of the Appellate Body on examining the exceptions under, and then the *chapeau* to, *GATT* Article XX). Third, Chile thought the System was not similar to a "variable import levy" or "minimum import price," hence the Panel's analogical reasoning under footnote 1 to Article 4:2 was flawed.

The Appellate Body responded to Chile's arguments with skillful, lawyer-like parrying moves. In brief, they were:

- "Yes," the Panel should not have evaluated the System under the second sentence of Article II:1(b);[197]

- "No," the Panel acted appropriately in evaluating the System under the *Agriculture Agreement* before doing so under *GATT*; and[198]

- "No," in other words, the Panel's analogy between the System and a variable import levy, and its analogy of the System to a minimum import price, were persuasive.[199]

The result of these arguments and parries was that Chile won a reversal of the Panel's finding that its Price Band System violated the second sentence of *GATT* Article II:1(b).[200] However, Chile could not get the Appellate Body to overturn the lower tribunal's decision essentially condemning the measure under Article 4:2 (including Footnote 1 thereto) of the *Agriculture Agreement*.[201] Because the Appellate Body agreed the System violated this Article, it exercised judicial economy in not returning to *GATT* to consider whether the System violated the first sentence of Article II:1(b).[202] Thus, the appeal in the *Price Band* match centered on three important provisions of international trade law: *DSU* Article 11; *GATT* Article II:1(b) (second sentence); and Article 4:2 (including footnote 1) of the *Agriculture Agreement*.

"ordinary customs duty" column of the Schedule and below the bound rate stated therein, unless the Member recorded the tariff in its Schedule as an "other duty or charge."

197. *See Price Band* Appellate Body Report, *supra* note 165, ¶ 288(a).

198. *See id.* ¶ 288(b).

199. *See id.* ¶ 288(c)(i).

200. *See id.* ¶ 288(a).

201. *See id.* ¶ 288(c)(iii).

202. *See Price Band* Appellate Body Report, *supra* note 165, ¶¶ 281-287, 288(d).

5. Thrust–Parry No.1: The Matter Before the Panel[203]

To counter Chile's first argument, the Appellate Body responded with a finding that the Panel had acted inconsistently with *DSU* Article 11. This provision states:

> The function of panels is to assist the DSB [Dispute Settlement Body] in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an *objective assessment of the matter before it*, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[204]

As the highlighted language indicates, a panel must focus on "the matter before it." The "matter" is determined by the terms of reference for that panel and the arguments and defenses presented to it by the complainant and respondent, respectively. To support a holding that Chile's Price Band System violated *GATT* Article II:1(b), the Panel bisected this Article according to its first and second sentences. The Panel ruled that the Price Band System was not an "ordinary customs duty" within the meaning of the first sentence of Article II:1(b). Hence, the rule of that first sentence (exempting imported goods "from ordinary customs duties in excess" of those set forth in the Schedule of the importing country) was inapplicable.

According to the Appellate Body, the Panel should have stopped there. Neither Argentina nor Chile raised the second sentence of *GATT* Article II:1(b). Thus, whether the Price Band System is consistent with that sentence was not a "matter" before the Panel. Yet, the Panel expressly took the matter as such, and proceeded to characterize Chile's Price Band System as "other duties or charges of any kind" within the meaning of that sentence. Consequently, the Panel held that the System violated the rule of the second sentence (which exempts imported goods from "all other duties or charges of any kind imposed on or in connection with importation in excess" of those set forth in the importing country's Schedule). Although the Panel might well have been correct, indeed it probably was, as a technical legal matter, the technical correctness of the Panel's holding was not important for the Appellate Body's decision.

The Price Band Panel had strayed beyond the claim made by Argentina. Nothing in Argentina's written submissions, nor in its oral presentation, amounted to

203. *See id.* ¶¶ 145-177.

204. *DSU* art. 11, *reprinted in* HANDBOOK, *supra* note 27, at 611.

a claim the Price Band System violated the second sentence of Article II:1(b). The Panel had clearly gone astray. To focus on whether the Panel was right, rather than on whether it should have spoken in the first place, would undermine *DSU* Article 11. After all, the phrase "the matter before it" must be abided by, and the Appellate Body has the duty to ensure its enforcement if a panel does not take it seriously.

6. Thrust–Parry No.2: The Panel's Order of Analysis[205]

Chile's second appellate argument concerned the appropriate order in which the Panel should analyze a claim that an importing country has exceeded its bound rate of tariff with respect to an agricultural product. Should the adjudicator start with *GATT* Article II:1(b), which the Panel failed to do, or should it follow the Panel's example and commence with Article 4:2 of the *Agreement on Agriculture*? Or, is it inappropriate, maybe impracticable, to lay down a general rule of analysis? The Panel's order of analysis was not whimsical. It chose to look to the *Agriculture Agreement* first, because it provides a more specific rule (in Article 4:2) for the facts than does *GATT* (in Article II:1(b)).

The Appellate Body agreed with this argument. The Appellate Body observed that the *Agriculture Agreement* is more specific than *GATT* about agricultural products. *GATT* deals with all goods, whereas the *Agriculture Agreement* obviously focuses only on farm products. Thus, Article 4:2 of the *Agriculture Agreement* deals more specifically than does *GATT* with tariff commitments on these products and the circumvention of such commitments. The Appellate Body was refreshingly candid in pointing out the weakness of Chile's argument, with sentences like "this argument by Chile is flawed,"[206] and "we find no merit in this additional argument by Chile."[207] It also was direct in pointing out the near-irrelevance of Chile's position stating that "[w]e understand Chile to mean by this [Chile's concession that it was not reversible error for the Panel to apply Article 4:2 before applying *GATT* Article II:1(b)] that the order of analysis would not, taken alone, alter the outcome of the case."[208]

Significantly, the Panel did not develop an order of analysis on its own, but rather applied a precedent set by the Appellate Body. In the *Bananas* case,[209] the Appellate Body upheld the methodology applied by the panel. The Panel examined an issue about import licensing procedures first under the WTO *Agreement on Import Licensing*, and then under the *GATT* transparency rules in Article X. In *Bananas*, the Appellate Body agreed that it makes sense to go first to the text that "deals

205. *See Price Band* Appellate Body Report, *supra* note 165, ¶¶ 178-191.
206. *Id.* ¶ 187.
207. *Id.* ¶ 188.
208. *Id.* ¶ 189.
209. *See* Report of the Appellate Body, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 25, 1997); Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 971 (2000).

specifically, and in detail" with the issue at hand.[210] Doing so also reinforces the principle of judicial economy because, if the issue can be resolved under the first text, then there is no need to look to the second text. Conversely, if the panel had started with *GATT*, then it would have had to look at the *Agriculture Agreement* too, because Article 21:1 of that *Agreement* mandates that *GATT* applies, subject to the provisions of the *Agreement*. Why not choose a methodology that can save a step and thereby conserve judicial resources? Not surprisingly, then, the *Price Band* Appellate Body quoted from its *Bananas* Report, and upheld the Panel's order of analysis.

7. Thrust–Parry No.3: The Price Band System as a Forbidden Measure[211]

Conceptually, the Appellate's Body response to Chile's final thrust–parry combination was the most complex and hard-fought during the appeal. Chile's performance would stand or fall with its third argument. It lost the match, essentially because it failed to persuade the Appellate Body that the Panel was wrong in its analogical reasoning. Chile's thrust was that its Price Band System "was merely a system for determining the level of ordinary customs duties that will be applied up to the 31.5 percent bound rate."[212] The Appellate Body's response was as follows:

> A plain reading of Article 4:2 and footnote 1 makes clear that, if Chile's price band system falls within any *one* of the categories of measures listed in footnote 1, it is among the "measures of the kind which have been required to be converted into ordinary customs duties," and thus must not be maintained, resorted to, or reverted to, as of the date of entry into force of the *WTO Agreement* [January 1, 1995, as long as no exception applies].[213]

The judges at both levels agreed that Chile's Price Band System was akin to "variable import levies," and to "minimum import prices" within the meaning of Footnote 1 to Article 4:2 of the *Agreement on Agriculture*. That spelled the end for Chile and constituted a key victory for Argentina.

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210. *Price Band* Appellate Body Report, *supra* note 165, ¶ 184 (quoting *Bananas* Appellate Body Report, ¶ 204).

211. *Price Band* Appellate Body Report, *supra* note 165, ¶¶ 192-262. The Appellate Body observed that the provisions in the *Agreement on Agriculture* on special and differential treatment by developed country Members of developing country Members were inapplicable to the case. First, both the complainant and respondent were developing countries. Second, Article 4:2 of the *Agreement* does not exempt developing countries from the requirement not to maintain prohibited measures. *See id*. ¶¶ 197-199.

212. Pruzin, *WTO Appellate Body Upholds Panel Finding Against Chilean "Price Band," supra* note 167.

213. *Price Band* Appellate Body Report, *supra* note 165, ¶ 221 (emphasis in original).

Put differently, to understand *Price Band* it is critical to appreciate the legal mechanics of how the analogy triggered the application of Article 4:2. It was unnecessary for Argentina to prove Chile's Price Band System actually was a "variable import levy" or a "minimum import price," and neither the Panel nor the Appellate Body held the System constituted such a levy or price per se. Rather, it was the analogy that mattered. The Panel held Chile's Price Band System to be a hybrid instrument, which shared most (but not all) of the characteristics of both a variable import levy and a minimum import price.[214] The Appellate Body agreed. Likening Chile's Price Band System to a variable import levy or to a minimum import price meant finding that the System was a forbidden "measure." (Recall that Article 4:2 is a rule against "measures." Footnote 1 provides a non-exclusive list of exemplary "measures," and two of the examples are "variable import levies" and "minimum import prices.") That is, within the language of the rule, Chile's Price Band System was a "measure of the kind which ha[s] been required to be converted into ordinary customs duties."

Equally important to understanding *Price Band* is an appreciation of the "big picture." The purpose of Article 4:2 is to ensure the integrity of the process of this conversion. This process of tariffication is indispensable to enhancing market access for agricultural goods. Article 4:2 ensures its integrity by mandating WTO Members "shall not maintain, resort to, or revert to" any of a wide variety of non-tariff measures. As the Appellate Body helpfully explained:

> As its title indicates, Article 4 deals with "Market Access." During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. *The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports*. Thus, *they envisioned that ordinary customs duties would, in principle, become the only form of border protection*. *As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations*. The Uruguay Round negotiators agreed that market access would be improved–both in the short term and in the long term–through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in the Members' Schedules . . . .
>
> Thus, Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into

214. *See Price Band* Panel Report, *supra* note 165, ¶ 7.46.

> ordinary customs duties of certain market access barriers affecting imports of agricultural products.[215]

In brief, Article 4:2 states nothing more (or less) than that a Member is not permitted to impose a non-tariff barrier against agricultural imports if it is under an obligation to convert that kind of barrier to a tariff. Without this statement, tariffication could be circumvented by simultaneously changing non-tariff barriers to tariffs, and constructing new non-tariff barriers.

The Appellate Body recognized the importance of the wording of Article 4:2.[216] In phrasing the key rule, the provision uses the present perfect tense–"have been required," meaning that WTO Members are not to implement "*any* measures *of the kind* which *have been required* to be converted into ordinary customs duties . . . ."[217] The Appellate Body understood that the *Agreement on Agriculture*, like most other WTO agreements, articulates most of the other obligations in the present tense, and that a rule "expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present."[218] The Appellate Body was not being pedantic about English grammar, nor mechanically applying the principles of the *Vienna Convention on the Law of Treaties* concerning plain meaning, object and purpose, and context. Rather, it was considering an argument offered by Chile.

Chile suggested that the present perfect tense indicates that during the 1986-93 Uruguay Round negotiations, no country actually converted a price band system into tariffs (and no country asked Chile to "tariffy" its Price Band System). Accordingly, Chile argued that the rule of Article 4:2 applies only to non-tariff measures that a country actually did convert (or was requested to converted) during the Round. The Appellate Body disagreed.

Appreciating the legal implications of the nuances of grammar, the Appellate Body replied that the present perfect tense connotes both (1) the date by which a WTO Member must convert non-tariff measures covered by Article 4:2 into tariffs, and (2) the date from which Members must abstain from non-tariff measures. Contrary to Chile's contention, the conversion process actually did begin during the Uruguay Round. Each country recorded a variety of ordinary customs duties in its draft Schedule of concessions. These tariff concessions compensated for, and replaced, non-tariff barriers that each country had to eliminate. Once the countries formally signed the *Agreement Establishing the World Trade Organization* (*WTO Agreement*), on April 15, 1994, the option to replace a non-tariff barrier with an ordinary customs duty in excess of previously-bound rates expired (because the rates became bound as of that date). Further, once the *WTO Agreement* and the covered

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215. *Price Band* Appellate Body Report, *supra* note 165, ¶¶ 200-201 (footnote omitted, emphasis added).

216. *See id.* ¶¶ 205-208.

217. *Id*. ¶ 204 (emphasis added).

218. *Id*. ¶ 205 (footnote omitted, emphasis added).

texts like the *Agreement on Agriculture* entered into force, on January 1, 1995, each Member was obligated not to impose any non-tariff measures forbidden by Article 4:2. The prohibition applied regardless of whether the Member had converted a measure into a tariff by that date.

The Appellate Body pointed out that Chile misread the present perfect tense (have been required) as the present tense (are required). What would be the implication of this misinterpretation? It would mean Article 4:2 applies only to non-tariff measures that actually were converted into an ordinary customs duties during the Uruguay Round negotiations (or those measures requested to be converted). In turn, the misinterpretation would suggest a Member that had failed by the end of the Round to convert a measure forbidden by Article 4:2 into a tariff could replace that measure with an ordinary customs duty in excess of its bound tariff rates. The misreading of "have been" as "are" would remove all unconverted measures from the scope of tariff bindings. A Member could convert the measure to a tariff in excess of the bound rate, and do so with impunity without facing challenge under the *DSU*. Surely, that result would be wrong, and even Chile had to admit this fact. According to the Appellate Body, the present perfect tense in Article 4:2 ensures that a measure a Member was supposed to convert to a tariff as a result of the Uruguay Round, but had not yet done so, legally could not be maintained as of January 1, 1995, when the *Agreement on Agriculture* entered into force.

The Appellate Body's rendition of the present perfect tense gives full meaning to the words "any" and "of the kind" in Article 4:2. Moreover, as the Appellate Body observed, its reading is consistent with Footnote 1 to Article 4:2 of the *Agreement on Agriculture*.[219] The Footnote contains a non-exclusive list of forbidden measures, as evidenced by its use of the word "includes." This term "includes" means the Uruguay Round negotiators realized that there are non-tariff measures they did not specifically identify which have yet to be converted to tariffs. Like the listed examples in Footnote 1, these measures are also prohibited. Further, the Uruguay Round negotiators knew how to make the distinction between converted and unconverted measures. Whereas Article 4:2 speaks of "have been required to be converted," Article 5:1 uses the phrase measures that "have been converted" (thereby permitting a Member to impose a special safeguard only on agricultural imports regarding which a non-tariff measure actually has been changed to a tariff). Thus, if the negotiators had wanted to restrict Article 4:2 to measures converted during the Round, then they presumably would have used the past tense as they had in Article 5:1.

Having explained the legal significance of the present perfect tense for the scope of Article 4:2, the Appellate Body turned to Chile's next contention, specifically that the additional specific duty it applies as a result of the Price Band System already is an "ordinary customs duty" under that Article. Consequently, said Chile, Article 4:2 is irrelevant to the System because Chile already has done what is required of it, namely tariffication. Here, too, the Appellate Body disagreed. It found

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219. *See Price Band* Appellate Body Report, *supra* note 165, ¶¶ 209-210.

that Chile's contention distorted the meaning of the word "convert" in Article 4:2. Adroitly avoiding a metaphysical discussion of the meaning of "conversion," the Appellate Body turned to its favorite lexicographic source, *The New Shorter Oxford Dictionary*. That source states that "convert" means "undergo transformation," and "converted" means "changed in their nature" or "turned into something different."[220] Thus, just because a measure results in the imposition of a specific duty does not mean the measure is an ordinary customs duty. The measure leads to the form of a duty, but the nature of the measure itself remains a non-tariff barrier. To illustrate the point, the Appellate Body used both a variable import levy and a minimum price as examples. Each is a non-tariff measure, and each results in a duty, but neither is a duty.

Putting aside the grammatical and lexicographic debate, Chile's insurmountable problem was that it had maintained a non-tariff barrier against agricultural imports even though it was under an obligation to convert that barrier into a tariff. Chile, in contravention of Article 4:2 of the *Agreement on Agriculture*, had resorted to a "measure," the Price Band System, that it was obligated to convert to into an "ordinary customs duty." To be sure, Chile was able to prove to the Appellate Body that the Panel had not defined "ordinary customs duty" properly. However, that defect was not important. Chile's appeal hinged far more on the analogies between its System and two of the items listed in Footnote 1 to Article 4:2 (variable import levies and minimum import prices) than on this definition. In order to illustrate this, let us suppose the Panel's analogies were wrong, meaning the duties resulting from the Price Band System were actually "ordinary customs duties." Accordingly, there was nothing for Chile to "convert" to a tariff because the duties from its System already were tariffs, not "measures" forbidden by Article 4:2. How, Chile inquired, could Argentina and the Panel possibly think the additional specific duties applied under the System were non-tariff measures of the kind to be converted to tariffs? They were like any other ordinary customs duty, and therefore Article 4:2 was inapplicable to them because they are what the Article seeks, namely, a converted non-tariff barrier into tariffs. (As just discussed, Chile made this kind of argument on appeal, but unsuccessfully.)

Thus, quite appropriately, the Appellate Body spent considerable time and effort critically analyzing the analogies.[221] Indeed, one way to understand the appeal is to look past the legal jargon and technicalities associated with the *Agreement in Agriculture*. The appeal amounted to a spirited debate over one of the most important tools of a lawyer: reasoning by analogy. Lest there be any doubt about the universality of this tool, that somehow it exists in the toolkit of only common law lawyers, let it be remembered that analogical reasoning is a source of Islamic law. In the Classical Theory of the *Shari'a*, there are four such sources: *kiyaas* (reasoning by

220. *Id.* ¶ 216.
221. *Id.* ¶¶ 218-262.

analogy) and *ijmaa* (the consensus of the *ulama*) supplement the *Qur'an* and *sunna* of the Prophet (PBUH[222]) as the roots (or *usuul*) of principles and rules.[223]

8. Analogical Reasoning and Thrust–Parry No.3[224]

How, then, did the Appellate Body reach the conclusion that the Panel's analogies between (1) Chile's Price Band System and a variable import levy, and (2) the System and a minimum import price, were persuasive? Citing its opinion in *Beef Hormones*, the Appellate Body began by observing that the Panel had rendered a legal characterization when it interpreted the terms "variable import levies" and "minimum import prices" and applied these terms to the facts of the case, even though the Panel itself had referred to its consideration as being factual in nature.[225] The Appellate Body did so to dispense with any objection that re-evaluating analogies was not properly within its jurisdiction. That said, the Appellate Body re-traced each step in the Panel's analogical reasoning and essentially agreed that the Panel generally had tread correctly. There were four steps on this path.

First, the Appellate Body analyzed the Panel's definition of "similar." The Appellate Body felt the Panel dwelled on whether the shared characteristics were "fundamental," which set the bar too high. The trusty *New Shorter Oxford English Dictionary* explains that two or more items are similar if they share some, but not all, common characteristics. There must be a certain "resemblance or likeness," some indication the items being compared have "the same nature or kind."[226] Of consequence, according to the Appellate Body, was "whether two or more things have likeness or resemblance sufficient to be *similar* to each other," and that the inquiry "must be approached on an *empirical* basis."[227]

Second, the Appellate Body reviewed the characteristics shared by each of categories of non-tariff barriers listed in Footnote 1 to Article 4:2 of the *Agreement on Agriculture*. The object and purpose of the six categories–(1) quantitative restrictions; (2) variable import levies; (3) minimum import prices; (4) discretionary import licensing; (5) non-tariff measures maintained through a state-trading enterprise; and (6) voluntary export restraints–is to restrict the volume of import products in a manner different from an ordinary customs duty. Moreover, the six categories share the object and effect of distorting the price of agricultural imports in a way different from an ordinary duty. Finally, measures in the six categories separate the domestic price of an imported agricultural product from the world

222. Peace Be Unto Him.

223. *See, e.g.*, JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 21, 37, 46, 60 (1982).

224. *Price Band* Appellate Body Report, *supra* note 165, ¶¶ 192-262.

225. *See id.* ¶ 222-224.

226. *Id.* ¶ 226.

227. *Id.* (emphasis added).

market price of that product, and thereby impede the transmission of world market price to the domestic market.

Suppose Chile's Price Band System shared these three features with the other categories mentioned in Footnote 1 of Article 4:2. Could it then be classified as a "similar border measure," queried the Appellate Body? The answer is "not so fast," and is based on the lexicographic definition of "similarity." The Appellate Body stated that the specific configuration of Chile's System would have to possess "sufficient 'resemblance or likeness to,' " or be "of the same nature or kind" as, *at least one* of the specific categories of non-tariff measures listed in Footnote 1.[228] Chile did not dispute that the relevant categories were variable import levies and minimum import prices.

It is worth pausing here to observe the implications of Step Two. The Appellate Body was keeping the bar for "similarity" reasonably high. It would not be sufficient to simply liken Chile's Price Band System to the generic category of "similar border measure" provided for in Footnote 1 of Article 4:2 of the *Agriculture Agreement*. The Appellate Body insisted, in addition, on a showing that the System was akin to one of the six specific categories. Why? In other words, why not end with an analogy to the generic category? The most likely reason is that such an analogy would beg the question of "similarity" and create circularity; the System would be "similar" to the six specific categories because it would be a "similar border measure." In brief, as detailed and dry as the Appellate Body reasoning at this step may seem, that reasoning certainly was not sloppy.

Third, the Appellate Body observed that the Panel was unable to define "variable import levies" and "minimum import prices" using only the tools permitted by Article 31 of the *Vienna Convention on the Law of Treaties*. These terms were undefined in the *Agriculture Agreement*, and no other WTO text provided any clue as to their meanings. The Panel had to rely on "supplementary means of interpretation," that were permissible under Article 32 of the *Vienna Convention*. Using such means, the Panel identified four characteristics, which it said were "fundamental" in a variable import levy and minimum import price scheme:

> (a) Variable levies generally operate on the basis of two prices: a threshold, or minimum import entry price and a border or c.i.f. price for imports. The threshold price may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price. The import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price.

228. *Id.* ¶ 227.

> (b) A variable levy generally represents the difference between the threshold or minimum import entry price and the lowest world market offer price for the product concerned. In other words, the variable levy changes systematically in response to movements in either or both of these price parameters.
>
> (c) Variable levies generally operate so as to prevent the entry of imports priced below the threshold or minimum entry price. In this respect, when prevailing world market prices are low relative to the threshold price, the protective effect of a variable levy rises, in terms of the fiscal charge imposed on imports, whereas this charge declines in the case of ad valorem tariffs or remains constant in the case of specific duties.
>
> (d) In addition to their protective effects, the stabilization effects of variable levies generally play a key role in insulating the domestic market from external price variations.
>
> (e) Notifications on minimum import prices indicate that these measures are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated. Whereas variable import levies are generally based on the difference between the governmentally determined threshold and the lowest world market offer price for the product concerned, minimum import price schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.[229]

The Panel identified three additional features common to variable import levies and minimum import prices: they lacked transparency, and predictability, and they impeded the transmission of world market prices into the importing country.[230] On appeal, Chile did not quarrel with these characteristics.

In Step Three, the Appellate Body declined to endorse these characteristics as "fundamental."[231] It returned to the customary rules of interpretation under the *Vienna Convention*, namely, the ordinary meaning analysis under Article 31 of the *Convention*. Once again, the Appellate Body turned to *The New Shorter Oxford Dictionary* and looked up the words "levy," "import," "variable," and "measure."

229. *Price Band* Panel Report, *supra* note 165, ¶ 7.36.
230. *See id.* ¶ 7.34.
231. *See Price Band* Appellate Body Report, *supra* note 165, ¶¶ 230-231.

The Appellate Body made the unsurprising discovery that inherent in a "variable import levy" is a formula causing an automatic change in the amount of duty, upon the occurrence of certain conditions set forth in the formula, whereas an "ordinary customs duty" remains unchanged unless effected by legislative or administrative action.[232] Continuing with its *Vienna Convention* approach, the Appellate Body turned to the object and purpose of Article 4:2. It made the unremarkable observation that the lack of transparency and predictability of variable import levies undermine the object and purpose of this provision, again, a contrast with ordinary customs duties. With regard to the definition of "minimum import prices," the Appellate Body noted that the term meant what its name already implied, the lowest price at which a product can be imported.[233]

But what in the minds of the Appellate Body members made Chile's Price Band System "similar" to a variable import levy or minimum import price? In order to answer this question, the Appellate Body proceeded to Step Four. In Step Four, the Appellate Body members explained why Chile's System "shares sufficient features with these two categories of prohibited measures to resemble, or 'be of the same nature or kind' and, thus, also to be prohibited under Article 4:2."[234] First, there was a lack of transparency. Second, there was a lack of predictability. Third, as a consequence of its opaque and uncertain nature, the System impeded the transmission of international prices into Chile's domestic market. With essentially no discussion, the Appellate Body seemed to agree with Argentina's appellate argument that all three features are associated with paradigmatic variable import levy and minimum import price schemes.[235]

In what way did Chile's Price Band System manifest these features? One instance was the way in which Chile converted the highest and lowest world-market f.o.b. prices it had selected into c.i.f. prices. Chile added "import costs" to the upper and lower thresholds in the Band, but it had no published legislation or regulation detailing how it calculated these costs.[236] Another manifestation of non-transparency, uncertainty, and impeding price transmission existed in how Chile set a weekly reference price for the relevant imported agricultural products. As the Appellate Body explained,

> Under Chile's price band system, the price used to set the weekly reference price is the lowest f.o.b. price observed, at the time of embarkation, in any foreign "market of concern" to Chile for "qualities of products actually liable to be imported to Chile." No Chilean legislation or regulation specifies how the international "market of concern" and the "qualities of concern" are selected.

232. *See id.* ¶¶ 232-234.
233. *See id.* ¶¶ 235-237.
234. *Id.* ¶ 240.
235. *See id.*
236. *Price Band* Appellate Body Report, *supra* note 265, ¶ 246.

> Thus, it is not by any means certain that the weekly reference price is representative of the current world market price. Moreover, the weekly reference price used under Chile's price band system is certainly *not* representative of an average of current lowest prices found in *all* markets of concern. As a result, the process of selecting the reference price is not transparent, and it is not predictable for traders.[237]

In brief, the additional specific duty applicable to a shipment depended on the difference between the lower band and the reference price. However, the manner in which Chile set the reference price was neither transparent nor predictable.

As for price transmission, the Appellate Body focused on the contrast between how Chile calculated the upper and lower threshold of its Price Band System, as well as the reference prices. Chile did not adjust reference prices for import costs, and thus did not convert them from an f.o.b. to a c.i.f. basis. Yet, it did so for the upper and lower bands. As mentioned earlier, c.i.f. prices are higher than lower f.o.b. prices, a point the Appellate Body observed in its opinion.[238] Quite correctly, the Appellate Body continued to explain that Chile's comparison of (1) the lower f.o.b. reference price with (2) a higher c.i.f. price band surely inflated the specific duties Chile applied. After all, the amount of the specific duty equaled the difference between (1) and (2), and the gap was artificially large because of the comparison of an f.o.b. with a c.i.f. price. Because of this incongruity, and in particular because of how Chile set reference prices, the Appellate Body felt Chile's Price Band System impeded the transmission of international price developments to Chile's markets, especially in comparison with an ordinary customs duty.

Step Five in the analogical reasoning analysis involved coming to terms with the differences between Chile's Price Band System, on one hand, and variable import levies and minimum import prices, on the other hand. In other words, in Step Five the Appellate Body admitted the analogies were not perfect, thereby acknowledging that Chile's System was not identical to the two prohibited categories. The differences are summarized in the Table below. Unfortunately, the Appellate Body did not construct a tabular reference. Had it done so, its opinion would have been considerably more accessible to more readers. Furthermore, it would have dispelled the impression that perhaps some of the Appellate Body members did not feel entirely comfortable with some of the facts of the System, nor with the paradigms to which the System had to be compared, namely variable import levies and minimum import prices.

As the Table below indicates, Chile, in its Price Band System, did not derive a reference price from actual transaction values. Rather, Chile computed reference prices using the lowest prices on world markets (or at least those overseas markets of concern to Chile). In contrast, in a paradigmatic minimum import price scheme, the

237. *Id.* ¶ 249.
238. *See id.* ¶ 250.

transaction value of a shipment would be gauged in relation to a specified minimum import price. The government of the importing country would impose an additional duty if the transaction value were below the minimum price. In brief, in Chile's System, a reference price depended on world market prices, whereas in a minimum import price scheme, transaction values of actual shipments mattered. Thus, Chile's System was not identical to a minimum import price scheme.

However, Chile's System bore some resemblance to a variable import levy scheme. In the paradigmatic levy scheme, two values would be compared: (1) a threshold, a minimum import entry price, that would be linked to the domestic market, or set by the government at above the domestic market price; and (2) a reference price, which typically would be the lowest world market offer price. If the world market price fell below the threshold, then the importing government would impose a fiscal charge on imports, regardless of the transaction value of the shipments, in order to prevent entry of the imports at a price below the threshold. Chile's reference prices corresponded to reference prices in the paradigmatic scheme, because both depended on data from overseas markets.

This resemblance, however, also revealed a distinction. Chile's Price Band System differed from a variable import levy in that Chile computed the lower threshold of the Band using world market price data, not data on domestic market prices. In the paradigmatic variable import levy (as well as in a minimum import price scheme), the floor price typically would be derived from or linked to the relevant domestic market price. Often, it would be set above that price (as the Panel explained in its rendition of the terms). Consequently, the domestic and international markets would be effectively connected. In contrast, as Chile argued in its attack on the Panel's analogy, price bands in its System varied according to world prices, not domestic or target prices. Therefore, Chile argued, its System disconnects price movements in domestic markets from fluctuations in international markets.

Chile failed to persuade the Appellate Body. The Appellate Body tracked the work of the Panel, and concluded that the lower threshold in Chile's Price Band System did not entirely disconnect the Chilean and world markets. Frequently, the lower threshold of the System equaled or exceeded the domestic price, principally because of two factors: (1) the way Chile computed the threshold (specifically, its conversion of monthly f.o.b. world-market prices to a c.i.f. basis); and (2) correlation between domestic and world prices.[239] Put simply, the Appellate Body held that even though Chile computed the lower band from world market prices, that band operated like a substitute for domestic target prices. In turn, the Panel was correct to view the threshold as a characteristic of the System similar to a variable import levy or minimum import price.

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239. *See id.* ¶ 244.

TABLE:

ANALOGIZING CHILE'S PRICE BAND SYSTEM TO A VARIABLE IMPORT LEVY AND A MINIMUM IMPORT PRICE

	Chile's Price Band System	***Variable Import Levy Scheme***	***Minimum Import Price Scheme***
What two prices are compared?	Chile compares: (1) "lower band," also called the "lower threshold" with (2) "reference price."	The importing country compares: (1) "threshold price," also called the "minimum import entry price," with (2) "reference price," also called the "price reference," or "border price."	The importing country compares: (1) "minimum import price" with (2) actual price of an individual shipment.
What data are used to calculate the lower price (which establishes the minimum price at which a shipment can enter)?	Each year, Chile calculates the lower band using five-year average monthly prices from **world** markets. Chile does not use price data from domestic markets.	The importing country links the threshold price to its **domestic** market, and may set the threshold above domestic market prices. The importing country does not use price data from world markets.	Same as a variable import levy scheme.

	Chile's Price Band System	***Variable Import Levy Scheme***	***Minimum Import Price Scheme***
What data are used to calculate the second price (which is gauged against the minimum price)?	Each week, Chile calculates the reference price using data from **foreign markets of concern** to Chile. The reference price applies to all products within the same category, regardless of origin or transaction value.	The importing country examines world market prices, and sets the reference price at the lowest **world** market price.	No reference price is calculated. Rather, the importing country compares the price of each shipment to the minimum entry price. The price of each shipment is the actual transaction value of the shipment.
What protection is imposed, in addition to the MFN tariff?	Chile applies an additional duty. The amount of the specific duty (in U.S. dollars per unit) equals the difference between the lower band and the reference price. This amount is multiplied by the number of units in a shipment, yielding the additional specific duty. The additional specific duty brings the price of the imported shipment up to the lower band.	The importing country applies a fiscal charge if the reference price is below the threshold price. In practice, the charge is imposed if prevailing world market prices are low relative to the threshold, because the reference price depends on world market price data. The fiscal charge brings the price of the imported shipment up to the "threshold price."	The importing country applies an additional charge if the transaction value is below the minimum import price. The additional charge brings the transaction value up to the minimum import price.

	Chile's Price Band System	***Variable Import Levy Scheme***	***Minimum Import Price Scheme***
What are the effects of the additional protection?	Imports are not permitted entry at a price below the lower band. Chile's domestic market is insulated from external price variations. Transmission of international prices into Chile is impeded.	Imports are not permitted entry at a price below the threshold price. The domestic market of the importing country is insulated from external price variations. Transmission of international prices into the domestic market is impeded.	Imports are not permitted entry at a price below the minimum import price. The domestic market of the importing country is insulated from external price variations. Transmission of international prices into the domestic market is impeded.

Finally, the Appellate Body scrutinized the Panel's discussion and analysis of Step Six. In this Step, the Appellate Body weighed the significance of the distinctions that the Appellate Body and the Panel had identified in the previous Step. The Appellate Body found that these distinctions were more or less insignificant. The differences between Chile's Price Band System and the paradigmatic variable import levy or minimum import price did not matter. The Appellate Body not only concluded that the System was similar to the variable import levy and minimum import price categories, but also held that the System fit within the category of a "similar border measure":

> [A]lthough there are some dissimilarities between Chile's price band system and the features of "minimum import prices" and "variable import levies" we have identified earlier, the way Chile's system is designed, and the way it operates in its overall nature, are sufficiently "similar" to the features of both of those two categories of prohibited measures to make Chile's price band system–in its particular features–a "similar border measure" within the meaning of footnote 1 to Article 4:2.[240]

240. *Id.* ¶ 252.

In brief, Chile's System need not be identical in order to be considered "similar" to two of the categories in the footnote, and the System certainly fit within the language of "similar border measure." Therefore, the System was prohibited by Article 4:2 of the *Agriculture Agreement*.[241]

With this finding, the third thrust–parry combination failed. Chile made one last effort before going down. Surely, the fact that the total amount of the duties it could levy as a result of its Price Band System was capped at 31.5 percent *ad valorem*, the bound rate in its Schedule, mattered? In other words, Chile hoped the existence of a cap in its System would differentiate it enough from a variable import levy and a minimum import price schemes as to rescue the System from condemnation. The Appellate Body easily extinguished this hope.[242] Nothing in the *Agreement on Agriculture*, either in Article 4:2 itself, in the context of Article 4:2 (the Attachment to Annex 5, called "Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex"), or other relevant contexts (especially *GATT* Articles II:1(b) and XI:1), suggests a cap would render legal an otherwise prohibited non-tariff barrier.

Like many last-gasp efforts, Chile's lacked logic, and the Appellate Body did not hesitate to highlight three fatal flaws. First, the cap did nothing to enhance the transparency or predictability of the Price Band System. Second, while the cap reduced the extent of trade distortions by limiting the fluctuations of duties, it did not eliminate those distortions. Consequently, with or without the cap, the System was incongruous with the object and purpose of Article 4:2 of the *Agriculture Agreement*, namely to increase market access for farm products. Third, if a cap mattered, then the rule of Article 4:2 could be easily circumvented. A WTO Member could sanctify a variable import levy or minimum import price scheme by putting a limit on the *ad valorem* tariff rate applicable under the scheme. Why would the Uruguay Round negotiators, on the one hand, obligate countries to convert non-tariff barriers to ordinary customs duties, and bind those duties, but, on the other hand, allow countries to maintain non-tariff measures and additional duties via these measures? Logically, the availability of the second option would undermine the incentive for a country to take the first option. That is, the Appellate Body rhetorically inquired, why would a WTO Member convert a non-tariff measure, if it could keep the measure and simply bind the tariff-equivalent associated with the measure? The match was over.

Commentary:

1. Sophisticated Argumentation from the Third World

Chile's three thrusts on appeal, and the Appellate Body's parries, ought to suggest something about Third World participation in *DSU* proceedings. It was

241. *See Price Band* Appellate Body Report, *supra* note 265, ¶ 243.
242. *See id.* ¶¶ 253-262.

Argentina, not a developed country, or much less a hegemonic trading power, that brought this case against Chile. The fact that two Latin American countries used peaceful legal argumentation in accordance with the rules of the *DSU*, itself makes *Price Band* a noteworthy case. To critics who view the WTO adjudicatory system as nearly inaccessible to less developed countries, this case ought to give some pause. Lest there be any doubt about the sophistication of the practice level, it is worth perusing paragraph 4.11 of the Panel Report.

In that passage, the Panel recounts Argentina's claim, which Argentine counsel demonstrated mathematically, that whenever the reference price computed by Chilean customs authorities fell below a certain level, Chile's effective applied tariff would rise above its bound rate. The Panel explained Argentina's formula as follows:

> Argentina argues that its analysis shows that, when the c.i.f. [cost, insurance, and freight] import price and the f.o.b. [free on board] reference price for a given shipment are below the price band floor beyond a point X (the "break even point"), the result of applying the variable specific duty is to exceed the WTO bound ceiling. In other words, Argentina explains, in order to demonstrate that the bound rate has been exceeded, the specific duty must be converted into an *ad valorem* tariff, for which purpose the c.i.f. import price appearing in the invoices is used. Argentina argues that, at least in circumstances in which the reference price and the c.i.f. invoice price are below the break even point, the bound tariff (31.5 percent) will be exceeded by the sum of the general tariff (8 percent) and the specific price band tariff converted into an *ad valorem* rate.[243]

The point of quoting this passage is not to urge that the case is incomprehensible, or that the Panel Report was unnecessarily complicated. Neither inference would be correct.

Rather, the point is to appreciate that some developing countries are engaged in high-level, reasoned argumentation at the WTO. True, in the *Price Band* case, the complainant and respondent were advanced developing countries, not lesser developed countries. However, would that make them, in the *DSU* context, role models? Consider, especially, the difficult economic and political circumstances facing Argentina during the pendency of the case. Argentina had plenty of excuses not to develop good legal arguments, but it persisted and prevailed, despite its circumstances.[244] Interestingly, in addition to the United States, EC, Japan, and

243. *Price Band* Panel Report, *supra* note 165, ¶ 4.11 (footnotes omitted).

244. *See* Alan Beattie, *Argentine "Blackmail": As the IMF Prepares a $6 billion Debt Roll-Over, Doubts About the Fund's Credibility Resurface*, FIN. TIMES (LONDON), Jan. 21, 2003, at 17 (recounting Argentina's woes between December 1999 and January 2003); David

Australia, a number of Third World countries participated in *Price Band* as third parties: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, and Venezuela. Are the *DSU* rules per se to be blamed for the absence of all other agricultural-exporting poor countries?

2. Policy and Details

That issue aside, it is the facts and the wider context in which they are set that heighten the appeal of the *Price Band* case. As suggested by the above discussion, the case integrates two important areas of international trade law: (1) the fundamental *GATT* obligation on tariff bindings, contained in Article II:1; and (2) the limitation on import barriers that must be converted to ordinary customs duties, contained in Article 4:2 of the WTO *Agreement on Agriculture*. To be sure, the first area of law proved to be considerably less important in the appellate outcome than the second area. The in-depth discussion by the Appellate Body of Article 4:2, especially of the categories in Footnote 1, usefully highlighted the ways in which an importing country can, and cannot, protect its farmers. The facts in *Price Band* are connected to a larger policy debate about farm trade liberalization. To what extent, and over what period, and using what methodologies, should WTO Members have to open up their agricultural markets?

Despite the strong push from technology, there is nothing inevitable neither about trade liberalization, nor about global integration more generally. Both depend on a political will to freedom in the economic arena.[245] As for the debate about liberalization of global farm trade, it occurs at two levels: grand policy reform and technical legal provisions. At the grand level, there are apologisms like the one given (in English) by the French Minister of Agriculture, Hervé Gaymard, at a conference in Oxford, England, in January 2003. Minister Gaymard set forth four reasons why "France will protect its farmers from free trade."[246]

First, agriculture is a special sector, because it is part of a country's culture. Farm products are not like manufactured goods. People rooted in the land–farmers–cannot move easily to a different sector in the same way that many industrial or

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Haskel, *Argentina Asks U.S. to Grant GSP Treatment for 112 New Products*, 19 Int'l Trade Rep. (BNA), No. 49, at 2136 (Dec. 12, 2002) (reporting that "[c]risis-stricken Argentina has formally requested the Office of the U.S. Trade Representative to add 112 new items to the United States' Generalized System of Preferences program granting duty-free entry to the eligible developing countries.").

245. *See* Martin Wolf, *An Unfinished Revolution*, FIN. TIMES SPECIAL REPORT–THE WORLD: 2003, Jan. 23, 2003, at III (stating "globalization is not irresistible," and that "[i]ntegration is driven by two distinct forces: advances in technology and decisions to liberalize," and citing limitations on the flows of capital and the free movement of persons as examples of decisions not to liberalize).

246. *Quoted in The Case for the Defense*, ECONOMIST, Jan. 11, 2003, at 42. The arguments of Mr. Gaymard (recounted above) are set out in this article.

service-sector workers can shift between jobs and cities. Second, barriers to agricultural trade (such as those in the EU's CAP) are not the source of all farm trade evil. They cause neither disease (like mad-cow disease) nor pollution. Rather, depending on the nature of the barriers (*e.g.*, if they are for sanitary and phytosanitary purposes), appropriate measures guard against such evils. Third, barriers to agricultural trade are not as costly as their critics suggest. The CAP accounts for one percent of the EU's public spending (at least Mr. Gaymard said so)[247] and food accounts for just sixteen percent of the average EU family budget (down from fifty percent when the CAP was introduced forty years ago). Fourth, protective measures (like the CAP) are not entirely to blame for the plight of Third World farmers. These farmers rely too heavily on cash crops (for example, coffee and cocoa) and thereby increase their risk by exacerbating their exposure to collapses in export prices (which has occurred in the world coffee market). They also lack access to credit and to the best farming technologies. Moreover, developed countries, like those in the EU, offer tariff-free, quota-free access to many lesser-developed countries (albeit in the EU's case with lengthy phase-in periods for bananas, rice, and sugar).

Are all of these grand policy arguments made by Minister Gaymard, one of the world's most prominent apologists for farm subsidies, explicitly at play in the *Price Band* case? Do they excuse the failure of the WTO negotiators to meet the deadline for agreement on a framework for future agricultural subsidies negotiations,[248] perhaps jeopardizing the future of the Doha Round. Of course not, and the case did not involve the EU and its CAP. But that is not the point. Instead, the point is to appreciate the existence of a connection between the two levels of debate. After all, major policies are made operational through technical legal rules. This link is worth keeping in mind when studying Chile's barriers to farm imports, or any other country's agricultural trade barriers. Chile tried to protect its farmers through a rather complex mechanism, the Price Band System. Chile did so to protect its farmers against free trade in certain products. Argentina cast itself in a role that it does not always play, especially not of late, namely pushing for freer trade.

To be sure, a full exploration of the link between the details of the case and global farm trade liberalization is for another place. But, it is not for another time. Minister Gaymard's arguments, and rebuttals to them, are not one-off statements. The grand policy debate, particularly legal rules, and links between the two levels are being discussed now, and with some urgency. The discussions are part of the agenda built into the WTO *Agreement on Agriculture*, and equally part of the Doha Round of multilateral trade negotiations. During the next few years leading up to the next WTO Ministerial Conference, these discussions are sure to intensify.

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247. Actually around 50% of the EU's EUR90 billion budget is spent on farm subsidies. *ODJ EU: Revised WTO Ag Reform Plans Still Show "Severe Imbalances,"* DOW JONES COMMODITIES SERVICE, March 19, 2003.

248. *WTO Members Miss Deadline; Future Work Program Awaits TNC Decision*, INSIDE U.S. TRADE, April 2, 2003.

3. *Contra* Judicial Activism

There can be no doubt that the Appellate Body was aware of the possibility of being accused of that "sin" (if it be called that). It methodically circumscribed the scope of application of its ruling in the context of weighing matters under Article 4:2 of the *Agreement on Agriculture*, by stating the following:

> We emphasize that we have been asked, in this appeal, to examine the measure before us–Chile's price band system–for its consistency with certain of Chile's WTO obligations. We have not been asked to examine any other measure of any other WTO Member. Therefore, *we need not, and do not, offer any view on the consistency with WTO obligations of price band systems in general, or the consistency with WTO obligations of any specific price band system that may be applied by any other Member.*[249]

This statement must have been quite comforting to Argentina, which has a price band system for sugar imports, as well as to several other WTO Members with price band-type barriers.[250] Moreover, the Appellate Body's reversal of the Panel's ruling on the *DSU* Article 11 point was more than just a warning about activism to the *Price Band* Panel or to future panels. It was a deliberate strike against activism, a severance of the part of the Panel Report it found to be excessive. That strike left collateral benefits. The Appellate Body vaulted the other holdings and rationale in its, and the Panel's, opinions that were properly within their subject matter jurisdiction.

The Appellate Body conceded that the terms of reference for the *Price Band* Panel referred generally to *GATT* Article II, without distinguishing among its seven paragraphs or eight sub-paragraphs, much less between the first and second sentence of paragraph 1(b). However, there is more to defining "the matter before" a panel than merely using the terms of reference. As Chile rightly pointed out, it is necessary to consider whether a party actually raises a claim under a specific provision. In making this point, Chile cited to the Appellate Body's own jurisprudence. In *Certain EC Products*, the Appellate Body explained that "the fact that a claim of inconsistency with" a provision (in that case, *DSU* Article 23:2(a)) is properly within a Panel's terms of reference does not mean that the claim was actually made.[251] In *Price Band*, the Appellate Body scrutinized Argentina's submissions to the Panel. Argentina, said the Appellate Body, simply had not articulated a claim under the second sentence of Article II:1(b).

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249. *Price Band* Appellate Body Report, *supra* note 265, ¶ 203 (emphasis added).

250. Pruzin, *WTO Appellate Body Upholds Panel Finding Against Chilean "Price Band," supra* note 167.

251. *Price Band* Appellate Body Report, *supra* note 165, ¶ 152 (*quoting* Report of the Appellate Body, *United States–Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, ¶ 112 (Dec. 11, 2001)).

In other words, it was not right for the Panel to make Argentina's case for it by finding *sua sponte* a different basis for its claim. What lawyer, even one inclined toward judicial activism, can argue with that? Surely, an excellent way to undermine the capacity of developing countries to argue cases, and to call the legitimacy of the WTO adjudicatory process into question, is to make panel proceedings an un-level playing field (any more than they already are). What international trade lawyer could take seriously a panel process in which panelists help developing countries with their arguments if and when they stumble through them? What developing country attorney could emerge from that experience with any self-respect? If Argentina believed it needed help in drafting its pleadings, then it had various alternatives to which it could have turned–private sector lawyers, non-governmental organizations, the Geneva-based Advisory Centre on WTO Law, and (of course!) unbiased law professors. Now, the entire international trade bar in Argentina, and other developing countries, is on notice from the best teacher of all, experience, that a claim not made expressly and emphatically, with an unequivocal link between the factual predicate and the rule allegedly violated, is not made at all.

These observations might appear to sit rather uneasily with the first comment about the *Price Band* case, namely, legal argumentation. It would be wrong to infer that Chile, but not Argentina, offered sophisticated arguments. (Only a thorough analysis that probably would be subject to endless controversy could shed more light than now falls on the relative sophistication of the arguments.) As just one illustration of the earnest intellectual battle Argentina put up, consider how it urged the Appellate Body to uphold the Panel's behavior under *DSU* Article 11. Like Chile, Argentina had a case of its own to cite in its favor–*Beef Hormones*.[252] Therefore, Argentina compelled the Appellate Body to wrestle with one of its own precedents, explaining why *Certain EC Products*, but not *Beef Hormones*, was the "right" one to apply to the facts of *Price Band*.

Argentina argued that even if neither it nor Chile had advanced an argument about the second sentence of *GATT* Article II:1(b), "the Panel would have had the *right*, indeed the *duty*, to develop its own legal reasoning to support the proper resolution of Argentina's claim."[253] Argentina cited language from the Appellate Body's decision in *Beef Hormones*, to the effect that "nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties, or to develop its own legal reasoning, to support its own findings and conclusions on the matter under its consideration."[254] In *Price Band*, the Appellate Body agreed this language meant a panel is free to develop its own legal reasoning in the context of a claim before the panel. Yet, Argentina's citation to this passage begged one question, namely, whether the matter (the consistency of Chile's Price Band System with the second sentence of *GATT* Article II:1(b)) was before the lower tribunal. In other

252. *See* Report of the Appellate Body, *European Communities–Measures Concerning Meat and Meat Hormones*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

253. *Price Band* Appellate Body Report, *supra* note 165, ¶ 166.

254. *Id.* ¶ 166 (*quoting* EC–*Beef Hormones*, ¶ 156).

words, the Appellate Body concluded that the precedent was inapposite to the case at bar, because in the precedent-setting case, there was no doubt about whether "the matter" was properly "under consideration" by the Panel.

4. Some High Marks for Writing Style

The battle of the precedents on the *DSU* Article 11 issue had an institutional, and potentially systemic, benefit. When two sides in a case offer well-reasoned positions, with case law to buttress them, there is always the possibility the adjudicator will improve in its performance, owing to the exposure to good counsel and argumentation. That possibility seems to have been realized in *Price Band*.

While a thorough literary analysis of the Appellate Body's Report is for another time and place, there are more than a few flashes of high-quality writing in the Report. Consider just one instance: the way in which the Appellate Body rejected Argentina's use of the *Beef Hormones* case:

> 167. [T]he situation in this appeal is altogether different. No claim was properly made by Argentina under the *second* sentence of Article II:1(b). No legal arguments were advanced by Argentina under the *second* sentence of Article II:1(b). Therefore, those rulings have no relevance to the situation here.
>
> 168. Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a "right" nor a "duty" to develop its own legal reasoning to support a claim under the second sentence. The Panel was not entitled to make a claim for Argentina, or to develop its own legal reasoning on a provision that was not at issue.[255]

What do we read in these two critical paragraphs? This is prose to be lauded for its clarity and forcefulness. No, the entire Report may not qualify as a literary masterpiece, and the quality of the writing in Appellate Body reports remains somewhat uneven, but there certainly is ample evidence of a positive evolution from 1996, when the Appellate Body first started producing an institutional product.

In paragraphs 167 and 168 (and, for that matter, a few other parts of its Report), the Appellate Body for the most part eschews the boring, fuzzy, and drawn out language found in some of its early opinions, and that resonates throughout the annals of the International Court of Justice. Rather, in *Price Band*, we see an

255. *Id.* ¶¶ 167-168.

Appellate Body more confident of itself,[256] of its authority in the minds of the complainant and respondent, and of its role in the development of the international rule of law in trade relations. The Appellate Body should be applauded for the greater clarity of its reports,[257] and encouraged to continue to produce readable, as well as well-reasoned decisions. Those who make a practice of reading and studying the reports, whether government officials, international trade lawyers, or even academics, will welcome this evolution in writing style, as exemplified by *Price Bands*. Keep it up, Appellate Body!

IV. OTHER WTO AGREEMENTS: TECHNICAL BARRIERS TO TRADE

Citation

European Communities–Trade Description of Sardines, WT/DS231/AB/R (adopted October 23, 2002) (complaint by Peru, with Canada, Chile, Ecuador, United States, and Venezuela as Third Participants).[258]

Explanation

1. Facts: Conflict Between International and National (EC) Standards

EC–Sardines is only the second Appellate Body Decision, after *EC–Asbestos*[259] to interpret key provisions of the *WTO Agreement on Technical Barriers to Trade* (*TBT Agreement*),[260] in this instance Article 2.4. The basic facts are quite simple. In summary, the EU had enacted Council Regulation (EEC) No. 2136/89 which entered into force in 1990 (EC Regulation). Article 2 of the EC Regulation provides:

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256. Evidence of that confidence exists, for example, in the use of the same construction in two successive sentences ("No claim . . . . No legal arguments . . . ."), a powerful rhetorical device, which the Appellate Body adroitly reinforces with similar construction in the third sentence ("Therefore, . . . no relevance . . . .").

257. *EC–Sardines, infra* note 258, is another very readable report.

258. Report of the Appellate Body, *European Communities–Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC–Sardines* Appellate Body Report]; Report of the Panel, *European Communities–Trade Description of Sardines*, WT/DS231/R/Corr.1 (June 10, 2002) [hereinafter *EC–Sardines* Panel Report].

259. Report of the Appellate Body, *European Communities–Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135/AB/R (Mar. 12, 2001); *see WTO Case Review 2001*, *supra* note 1, at 505.

260. *Reprinted in* HANDBOOK, *supra* note 27, at 364.

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
>
> - They must be covered by CN codes 1604 13 10 and ex 1604 20 50;
> - *They must be prepared exclusively from fish of the species "Sardina pilchardus Walbaum"*;
> - They must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
> - They must be sterilized by appropriate treatment. (emphasis added)

Thus, the EC Regulation permitted the labeling and marketing as "sardines" within the European Union nations *only* of fish of the species *Sardinia pilchardus Walbaum*. No other variety of sardines could be marketed using the word "sardines." It is hardly coincidental that the *Sardinia pilchardus* variety of sardines is found mostly off the coasts of the Eastern North Atlantic and in the Mediterranean and Black Seas, and is commonly harvested by Spanish and Portuguese fishermen.

This regulation was enacted notwithstanding the existence of an international standard promulgated by the Codex Alimentarius Commission known as "Codex Stan 94-1981, Rev.1-1995." Section 6 of Codex Stan 94 provides in pertinent part:

> 6. LABELLING
>
> In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following special provisions apply:
>
> 6.1 NAME OF THE FOOD
> The name of the product shall be:
>
> 6.1.1 (i) *"Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or*
>
> (ii) *"X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.*
>
> 6.1.2 The name of the packing medium shall form part of the name of the food.

> 6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.
>
> 6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer.

Thus, while the S*ardinia pilchardus* species could be marketed using the name "sardines" alone, some twenty other species, including the *Sardinops sagax* variety normally harvested from the Pacific Ocean off the coast of Peru and Ecuador could be named and marketed using the formula "X Sardines" (*e.g.,* "Peruvian Sardines" or "Pacific Sardines" or "sardines - *Sardinops sagax*") where *X* was a country, geographic area, species name, or common name of the species.[261]

The "legitimate objectives" of the EC regulation are said to be market transparency, consumer protection, and fair competition. However, the underlying purpose of the EC Regulation appears to have been to permit EC sardines to be marketed as such, while other species imported from outside the EC, such as *Sardinops sagax* harvested off the coast of Peru, could not use the word "sardines" as part of their names and labeling for marketing purposes within the EC. Peru had sold its fish as "Pacific Sardines" in Germany; when the European Commission objected on the basis of the EC Regulation, Peru sought consultations; when the consultations failed, Peru brought an action before the Dispute Settlement Body.

Peru characterized the EC Regulation as an unnecessary obstacle to international trade and inconsistent with various provisions of the *TBT Agreement,* as well as with Articles I, III and XI:1 of *GATT.* However, the panel and Appellate Body decisions are essentially limited to the consistency of the EC Regulation with Article 2.4 of the *TBT Agreement*, due to "judicial economy" considerations by both bodies. The EC appealed on a number of grounds, all relating to the Panel's interpretation of Article 2.4.

Notwithstanding the obviously protectionist nature of the EC Regulation, various important issues relating to the scope and interpretation of Article 2.4 of the *TBT Agreement* were discussed and decided by the Panel and Appellate Body. The language of Article 2.4 itself suggests a provision open to extensive analysis:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except where such international standards or relevant parts would be an ineffective or inappropriate means of the fulfilment of the legitimate objectives pursued, for instance

261. *EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 6.

> because of fundamental climatic or geographical factors or fundamental technological problems. (Emphasis supplied.)

The obligation set forth in the provision appears simple enough: if there is a relevant international standard, such as the Codex Stan 94, it must be used by members in formulating their national technical regulations–such as Council Regulation (EEC) No. 2136/89–unless the exceptions apply. Failure to do so is a violation of the *TBT Agreement*. Presumably, this obligation to use international standards reflects the dichotomy between a Member's legitimate need for standards and the desirability of using such standards to protect domestic industry.[262] The requirement that Members use international standards unless one of the exceptions in Article 2.4 applies is presumably founded on the belief that members who use international standards as a basis for their national regulations are less likely to discriminate in favor of domestic producers and against foreign producers. Arguably, the EC Regulation is a textbook example of the kind of situation.

In addition, the Appellate Body was forced to consider a series of procedural issues, including, but not limited to, its position on the admissibility of *amicus curiae* briefs, the propriety of non-Parties and non-Third Participants to file briefs and/or attend the oral hearing, and the locus of the burden of introducing certain elements of proof. In addition, the Appellate Body and the Parties spent what seems to these observers to be an inordinate amount of time and ink on a relatively innocuous issue, namely whether Appellant could withdraw and re-file its notice of appeal.

2. Issues Raised on Appeal[263]

This appeal, like many others, raises both procedural and substantive issues, with the line between the two less than distinct in a number of instances. The grouping here reflects the Appellate Body Report. The less significant questions are given very brief treatment in this review. The issues as set out by the Appellate Body as procedural are:

> a. Whether the appeal should be inadmissible because the notice of appeal was withdrawn conditionally on June 25, 2002 and re-

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> 262. The TBT Agreement explicitly recognizes that government and the private sector have a legitimate need for standards and procedures for assessing product conformity with standards. The Agreement's provisions are designed to preserve the ability of governments and the private sector to act in this area while guarding against the unjustified use of these types of measures to protect a domestic industry.

Uruguay Round Agreements Act, Statement of Administrative Action 121, H.R. 103-316, 103rd Cong. vol. 1 (1994).

263. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 135 (supplemented by other portions of the *EC–Sardines* Appellate Body Report).

filed on June 28, 2002 (in both instances well within the 60 day period for appeal under *DSU* rules); and

b. Whether *amicus curiae* briefs filed by Morocco (a Member but not a Third Participant) and a private individual are admissible and whether they assist the Appellate Body in the appeal.

In this appeal, there is just one substantive issue, with multiple parts, relating to whether the EC has acted inconsistently with Article 2.4 of the TBT Agreement:

a. Whether the EC Regulation is a "technical regulation" under Annex I of the *TBT Agreement;*

b. Whether the *TBT Agreement* applies to measures which were existing as of January 1, 1995, such as the EC Regulation;

c. Whether Codex Stan 94 (relating to sardines) is a "relevant international standard" under Article 2.4 of the *TBT Agreement*;

d. Whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation, as that language is used in Article 2.4;

e. Whether the "ineffective or inappropriateness" exceptions to the requirement for the use of international standards in Article 2.4 apply to the EC Regulation (including the burden of proof in invoking the exception);

f. Whether the Panel erred in making a determination that the EC Regulation is trade-restrictive (since the determination was made only under Article 2.4 of the *TBT Agreement*);

g. Whether the Panel made "an objective assessment of the facts of the case" as required by Article 11 of the *DSU;* and

h. Whether the Appellate Body should complete the analysis under Articles 2.1 or 2.2 of the TBT Agreement, or under Article III:4 of *GATT 1994*, if the EC Regulation is found consistent with Article 2.4 of the TBT *Agreement*.

3. Arguments of the Parties[264]

In general, all Third [party] Participants support Peru, with the minor exceptions and additions noted below. Morocco, whose *amicus curiae* brief was accepted by the Appellate Body, supports the EC.

a. Withdrawal/Re-filing of Notice of Appeal

The EC argues that the question of the withdrawal of the original notice of appeal of June 25, 2002, conditioned on its right to re-file, and its re-filing three days later is now "moot and settled." The EC notes that it re-filed the notice in order to respond to Peru's objections to the initial notice, providing additional information on the issues being appealed, and explicitly conditioned its withdrawal on the re-filing. In doing so, it acted expeditiously and did not harm Peru's rights of defense in any way.

Peru views the second notice as a "second appeal" that is inconsistent with *DSU* rules. According to Peru, a notice of appeal can be withdrawn and resubmitted without the consent of the Appellee. While Rule 30 of the Working Procedures permits withdrawal of an appeal at any time, there is no authorization for attaching conditions on withdrawal. Peru argued that permitting such actions creates "immense potential for abuse and disorder in appellate review procedures" (although Peru does not allege any prejudice in the instant case). The EC has tried to create a new and "fundamental procedural right" on an *ad hoc* basis.

b. Rules Applicable to *Amicus Curiae* Briefs

Peru furthermore objects to the two *amicus curiae* briefs, submitted by Morocco and by an unidentified private individual. Non-Member submissions are welcome if they are attached to a submission of a Member that is a party to the proceedings, but only WTO members can make independent submissions to panels and the Appellate Body. According to Peru, other WTO Members–such as Morocco–are welcome to participate as Third Participants. If they decide not to do so, they should not be permitted to submit *amicus curiae* briefs, as this allows the Member impermissibly to circumvent the *DSU.* Canada would also require other Members seeking to assert their rights to reserve their third party rights at the outset of the proceedings.

264. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 22-133.

c. Characterization of the EC Regulation as a "Technical Regulation"

The EC acknowledges that this is a technical regulation under the *TBT Agreement*, as it lays down "product characteristics." However, it does not "relate to" the Pacific species, *Sardinops sagax*, because it specifies product characteristics and labeling requirements only for the Atlantic species, *Sardinia pilchardus*; therefore it does not apply to an "identifiable product" other than *Sardinia pilchardus.* Moreover, a name, as opposed to a label, is not a product characteristic for purposes of defining a "technical regulation." Peru, of course, disagrees. The EC Regulation is a technical regulation because it "applies to identifiable products and lays down characteristics for products marketed as sardines" as well as because compliance is mandatory. A regulation that mandates application of a certain name for marketing purposes comes within this definition. Ecuador notes that Codex Stan 94 allows Members to provide a precise trade description for preserved sardines, thereby promoting market transparency, consumer protection, and fair competition.

The United States argues that there is no need for Peru to prove that the EC Regulation is an explicit technical regulation for *Sardinops sagax* (the Pacific/Peruvian species). The EC Regulation is open to challenge by another Member, particularly when the EC Regulation precludes labeling of that species as "sardines." Nor is there any reasonable distinction between labeling and naming requirements as a method of identifying a product.

d. Retroactivity of Article 2.4

The EC objects to the Panel's finding that Article 2.4 of the *TBT Agreement* applies to technical regulations prepared and adopted before the *TBT Agreement* entered into force on January 1, 1995. According to the EC, the WTO Members have no obligation to "reassess existing technical regulations in the light of the adoption of new international standards." Article 2.4 applies to preparation and adoption of technical regulations, but not to their "maintenance." If Article 2.4 were intended to cover application of measures as well as their preparation and adoption, it would have said so. Also, under the *Vienna Convention on the Law of Treaties*, Article 28, treaties are not generally applicable to acts that took place, or situations that "ceased to exist" before the treaty came into effect. The drafters of Article 2.4 could not have intended that existing technical standards would become inconsistent with Article 2.4 once completion of an international draft standard became imminent.

According to Peru, there is no distinction in Article 2.4 between adoption and maintenance of technical regulations, and their maintenance. Article 2.4 applies whenever technical regulations are required, when they are necessary and not simply when new regulations are desired. Canada points out that as of January 1, 1995, the EC was required to ensure the conformity of its existing technical regulations with its obligations under the *TBT Agreement* and other WTO Agreements. The EC simply failed to comply.

e. Codex Stan 94 as a "Relevant International Standard"

According to the EC, Codex Stan 94 is not a "relevant international standard" because that term applies only to standards adopted by consensus, and the Panel failed to verify that Codex Stan 94 was in fact adopted by consensus. Moreover, Codex Stan 94 is not relevant because its coverage is different from the EC Regulation. The EC Regulation, Article 2, is only a naming requirement for preserved sardines, while Codex Stan 94 is also "a naming option for preserved 'sardine-type' products the common name of the species alone, without the word 'sardine.' " Peru disagrees. The TBT Agreement also covers international standards not based on consensus, as the last two sentences of Annex 1.2 indicate. The report of the Codex Commission indicates that Codex Stan 94 was adopted by a consensus vote. Moreover, the meaning of Codex Stan 94 is clear. The language of Codex Stan 94, particularly the French and Spanish versions, which differ by a comma from the English version, make it clear that the meaning of *X* in "X sardines" is defined by the following language. According to Peru, the Codex standard is like municipal law in that it must be treated as a fact to be ascertained by an international tribunal.

The United States agrees with the EC that an international standard under Article 2.4 must be based on consensus. However, this does not change the result, because there is no evidence before the Panel that Codex Stan 94 was *not* adopted by consensus. The Codex Stan 94, the United States points out, cannot be used "as a basis for" the EC Regulation because the EC Regulation violates and contradicts Codex Stan 94.

f. Codex Stan 94 "As a Basis For" the EC Regulation

According to the EC, the Panel further erred by considering Codex Stan 94 was not used "as a basis for" the EC Regulation, as specified in Article 2.4. "As a basis for" is not the same as "conform" or "comply with" as the Panel concluded. To meet the "as a basis for" requirement, it was only necessary to show that there was a "rational relationship" between Codex Stan 94 and the EC Regulation, not that Codex Stan 94 was the "principal constituent or fundamental principle" for the EC Regulation. Given that in accordance with its "legitimate objectives" the EC Regulation reserves "sardines" for *Sardinia pilchardus*, there is a substantial relationship between the two documents, demonstrating that Codex Stan 94 was used "as a basis for" the EC Regulation.

Peru, of course, agreed with the Panel's finding. There is no "rational and substantive relationship" between Codex Stan 94, which defines the use of "sardines" with a country, geographical area, species or common name, and the EC Regulation, which prohibits such usage.

g. The "Ineffectiveness or Inappropriateness" Exception

The EC argues that the Panel erred by imposing on the EC the burden of proving that Codex Stan 94 was an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" under Article 2.4 of the TBT Agreement. Rather, the burden should have been on Peru. Moreover, the "ineffectiveness or appropriateness" exception applies. The only objective of the EC Regulation is to lay down marketing standards for *Sardina pilchardus* (the Atlantic, Spanish/Portuguese species). The EC has no objectives with regard to preserved *Sardinops sagax* (the Pacific/Peruvian species). In the EC's view, even though European consumers may not agree on what constitutes a sardine, "there may still be a possibility of confusion and the need for measures to improve market transparency, protect consumers, and maintain product diversity" which justify treating Codex Stan 94 as "ineffective or inappropriate" as a basis for the EC Regulation.

For Peru, the Panel properly imposed the burden of proof on the EC. Since the EC was asserting its position as an affirmative defense, it was responsible for proving that Codex Stan 94 was an inappropriate or ineffective basis for the EC Regulation. However, even if Peru had the burden of proof, it met that burden by presenting to the Panel sufficient evidence to show that the Codex Stan 94 is not "ineffective or inappropriate."

h. Objectivity of Certain Facts Assessed by the Panel

The EC contends that the Panel erred in its treatment of certain factual information. First, the Panel improperly relied on Spanish and French dictionaries showing that the term "sardine" is not commonly limited to *Sardina pilchardus*. Secondly, they should not have treated a letter from the United Kingdom Consumers' Association (attached to the Peruvian brief) as evidence because it was prejudiced and reflected an incorrect appreciation of UK law. Also, the Panel disregarded evidence submitted by the EC concerning the actual names applied to "sardine-like" products in the European Union countries, and failed to seek information from the Codex Commission regarding the "meaning, status and validity of Codex Stan 94." According to Peru, the Panel was right in all respects, and the panel acted within its discretion concerning the various evidence that had been proffered.

i. "Trade Restrictiveness" and Completing the Analysis

The EC contends that it was inappropriate for the Panel to qualify the EC Regulation as trade-restrictive. The EC does not believe that the EC Regulation is trade-restrictive, and in any event, trade-restrictiveness is not relevant to the Article 2.4 analysis. Nor, as the Panel decided on grounds of judicial economy not to consider Peru's other claims [including possible violation of Article III of the *GATT* or of Articles 2.1 and 2.2 of the *TBT Agreement*] there was no need for this finding. Moreover, it would be inappropriate for the Appellate Body to complete the legal analysis with regard to these other possible violations, since there are insufficient undisputed facts on the record to resolve these completely different, "complex issues of law." Peru recognizes that the Panel statements were not necessary, but asserts that they were accurate. Should the Appellate Body reverse the Panel and determine that the EC Regulation was consistent with Article 2.4 of the *TBT Agreement*, it could appropriately examine Peru's claims under other provisions of the *TBT Agreement* and *GATT*. Peru asked the Panel to include the necessary evidence on these other legal provisions in the Panel report, in order for the Appellate Body to complete an analysis if necessary.

Rationale and Holdings

<u>1. Procedural Issue No. 1: Admissibility of the EC's Appeal</u>[265]

The essence of Peru's argument is that because the EC, after withdrawing its original appeal three days after its initial filing on June 25, 2002, expressed intentions to re-file, and subsequently re-filed the appeal on June 28, 2002, is not controlling and that the EC has effectively lost its right to appeal. Rule 30(1) of the *Working Procedures for Appellate Review* provides that "[a]t any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB." As the Appellate Body notes, the appellant's right to withdraw appears to be "unfettered." There is no deadline for withdrawal, no reason need be provided, and no notice to other participants is required. According to the Appellate Body, there is nothing in Rule 30(1) prohibiting the attachment of conditions to a withdrawal, or, for that matter, explicitly permitting conditions. Rather, the rule is silent. However, in two prior cases, notices of appeal were withdrawn subject to the condition that new notices would be filed.[266]

Why does the discussion not end with these precedents? Because, Appellate Body opines, citing *DSU,* Article 3.7, "the *Working Procedures* must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the *DSU* and as a means of ensuring

265. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 135-152.
266. *See id.* ¶ 138.

that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute." Nevertheless, in the view of the Appellate Body, conditional withdrawals are permitted unless they undermine the "fair, prompt and effective resolution of trade disputes"[267] or evidence a lack of good faith by the Member attaching the condition.

Here, neither limitation is evident. According to the Appellate Body, attachment of the condition "was not unreasonable under the circumstances," because the re-filing "arose as a response to the Request for Preliminary Ruling filed by Peru." The re-filing did not "in any way obstruct or diminish Peru's rights." The reason for the re-filing was to "remedy the difficulty perceived by Peru [in the EC's initial notice of appeal] rather than to delay the proceedings further by contesting the allegations of insufficiency." In addition, the EC acted promptly, re-filing the notice only three days after the original filing, and well before either Party filed any submissions.

The Appellate Body agrees with Peru "that there may be situations where the withdrawal of an appeal on condition of re-filing a new notice, and the filing thereafter of a new notice, could be abusive and disruptive." Also, the re-filing might be designed to circumvent the requirement of *DSU*, Article 16.4, that appeals be filed within sixty days of the filing of panel reports. (In this case, the panel report was circulated on May 29, 2002, and the notice of appeal was re-filed approximately thirty days later.) However, in all those cases, the Appellate Body would have the right to reject the condition and the new filing. In any event, this is not such a case.

Furthermore, given the fact that the re-filed notice of appeal contains no new grounds of appeal, the Appellate Body does not accept Peru's contention that the EC has "in fact appealed 'twice.' " Similarly, the Appellate Body believes that "Peru has been accorded the full measure of its due process rights," and asserts that its decision in favor of the EC simply upholds the existing right to withdraw and appeal, rather than creating any new substantive rights.

2. Procedural Issue No. 2: *Amicus Curiae* Briefs and non-Party, non-Third Participant Intervention[268]

Although the only issues regarding participation formally under appeal relate to *amicus curiae* briefs, an additional question was resolved in the course of this proceeding. Colombia, although not a Third Participant, had requested an opportunity to appear at the oral hearing. The Appellate Body indicated to the Parties that it was inclined to permit Colombia to appear as a "passive observer." Both EC and Ecuador opposed, arguing that that the only proper status for Colombia was as that of a Third Participant. The Appellate Body nevertheless permitted Colombia to

267. Report of the Appellate Body, *United States Tax Treatment of "Foreign Sales Corporations,"* WT/DS108/AB/R, ¶ 166 (Mar. 20, 2000).

268. *See EC–Sardine* Appellate Body Report, *supra* note 258, ¶¶ 153-170.

attend as a passive observer, presumably because the time limit for requesting Third Participant status had expired.[269]

The Parties and Third Participants are in disagreement regarding *amicus curiae* briefs, as WTO Members have been for many years.[270] Here, Morocco and a private citizen have both submitted *amicus curiae* briefs. Peru believes that *amicus curiae* briefs should be admitted only if attached to a Member's submission (a position perhaps dictated in part by Peru's attachment to its Panel submission of a letter from the United Kingdom Consumer's Association). The EC would leave discretion on such briefs to the Appellate Body. Canada suggests that the briefs be rejected because they are not pertinent; a Member can participate by right only as a Party or Third Participant, not as *amicus curiae.* Chile and Ecuador would reject both briefs because, in their view, the *DSU* does not permit any participation by *amici*. The United States believes the Appellate Body has authority to accept the briefs, but opines that they should not be considered because they are not pertinent or useful.

The Appellate Body begins its discussion with a review of its past practice regarding *amicus curiae* briefs, particularly its admission of three *amicus curiae* briefs attached as exhibits to the United States' submission in *US–Shrimp*.[271] In that case, "[w]e concluded that those briefs formed part of the appellant's submission, and observed that it is for a participant in an appeal to determine for itself what to include in its submission."[272] The same approach, the Appellate Body notes, was followed in *Thailand–H-Beams* and *US–Shrimp (Article 21.5–Malaysia).*[273] Subsequently, *amicus curiae* briefs submitted by private individuals or organizations, separately from participants' submissions, were accepted (in *EC–Asbestos, Thailand–H-Beams* and *United States–Imposition of Countervailing Duties on Certain Hot–Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US–Lead and Bismuth II).*[274]

Thus, says the Appellate Body categorically, "[w]e have the authority to accept *amicus curiae* briefs." In *US–Lead and Bismuth II*, the Appellate Body observes, the Appellate Body held that it:

> [H]as broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreement. Therefore, we are of the opinion that as long as we act

269. *See id*. ¶ 18.

270. *See, e.g., WTO Case Review 2001*, *supra* note 1, at 509-10, 516 (discussing the procedures used for *amicus curiae* briefs).

271. Report of the Appellate Body,*United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ 50 (Nov. 6, 1998).

272. *See id*. ¶ 91.

273. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 156, nn. 56-57.

274. Report of the Appellate Body, *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).

> consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.[275]

In this finding, a distinction was drawn between parties and third parties who have a legal *right* to participate and non-Member individuals and organizations, which do not have a legal right to participate. Thus, "[t]he Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations not Members of the WTO."[276] Moreover, the Appellate Body notes here, "participation by private individuals and organizations is dependent on our permitting such participation if we find it useful to do so."

With regard to the brief submitted in the instant appeal by the private individual, the Appellate Body concludes that the Appellate Body has the authority to accept it, but also finds that "the brief submitted by a private individual does not assist us in this appeal."

The *amicus curiae* brief submitted by Morocco raises somewhat different issues. The EC believes such briefs should be treated in the same manner as *amicus curiae* briefs submitted by private individuals. Peru, on the other hand, believes that acceptance of Member submissions as *amicus curiae* briefs would circumvent the *DSU* rules on third party participation in dispute settlement proceedings, specifically Articles 10.2 and 17.4 of the *DSU*. These articles provide as follows:

> 10.2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report…
>
> 17.4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.[277]

Peru argued that since Morocco did not act in accordance with these provisions, it cannot be given an opportunity to be heard.

The Appellate Body disagrees. It notes that "neither the DSU or the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs

275. *Id.* ¶ 39 n.58.
276. *Id.* ¶ 41.
277. HANDBOOK, *supra* note 27, at 602, 610, 614-15.

[from sources other than participants or third participants]."[278] The question is whether the "explicit right" for WTO Members under Articles 10.2 and 17.4, "which is not accorded to non-Members, justifies treating WTO Members differently from non-Members in the exercise of our authority to receive *amicus curiae* briefs. We do not believe that it does." The Appellate Body also refuses to draw any "negative inference [from Articles 10.2 and 17.4] such that Members may participate pursuant to those rules, or not at all."

Also, according to the Appellate Body,

> The fact that Morocco, as a sovereign State, has chosen not to exercise its *right* to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our *legal authority* under the DSU and our *Working Procedures* to accept and consider the *amicus curiae* brief submitted by Morocco.

However, "we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis."

In the final analysis, the Appellate Body finds that Morocco's brief "does not assist us in this appeal." According to the Appellate Body, it contains "mostly factual information" and suggests that "the measure at issue in this appeal is consistent with relevant international standards," but fails to elaborate on or provide source for this position.

3. The EC Regulation as a "Technical Regulation" under the *TBT Agreement*[279]

The single substantive issue in this case, whether the EC Regulation on sardines conflicts with the EC's obligations under Article 2.4 of the *TBT Agreement*, is divided by the Parties and the Appellate Body into a series of constituent parts, based on the language of Article 2.4:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except where such international standards or relevant parts would be an ineffective or inappropriate means of the fulfillment of the legitimate objectives pursued, for instance

278. *EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 39.
279. *See id.*¶¶ 171-195.

> because of fundamental climatic or geographical factors or fundamental technological problems.

Because this is only the second Appellate Body Report to interpret the *TBT Agreement*, after *EC–Asbestos*, some of the questions addressed here by the Appellate Body are questions of first impression.

The Appellate Body reiterates that "whether a measure is a 'technical regulation' is a threshold issue. If the measure before us is not a 'technical regulation', then it does not fall within the scope of the *TBT Agreement*." The relevant definition is found in Annex 1.1 of the *TBT Agreement*:

> 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.

The Appellate Body notes that in *EC–Asbestos*, it set out three criteria for a document to be a technical regulation:

> First, the document must apply to an identifiable product or group of products. The identifiable product or group of products need not, however, be expressly identified in the document. Second, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic; or they may be related to the product. They may be prescribed or imposed in either a positive or negative form. Third, compliance with the product characteristics must be mandatory.[280]

While the EC contends that the EC Regulation is a "technical regulation" only for preserved *Sardinia pilchardus* (the Atlantic sardine variety), because *Sardinops sagax* (the Pacific sardine variety) is not an identifiable product under the EC Regulation, the Appellate Body disagrees. Relying on *EC–Asbestos*, the Appellate Body notes that "a product does not necessarily have to be mentioned *explicitly* in a document for that product to be an identifiable product. *Identifiable* does not mean expressly identified." Here, as the Panel correctly found, the identified product is "preserved sardines," as is clear from "a plain reading of the EC Regulation itself." Moreover, the EC Regulation is "applicable to a range of *identifiable* products beyond *Sardinia pilchardus*. This is because preserved products made, for example, of *Sardinops sagax* are, by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the

280. *EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 176.

term 'sardines.' " Therefore, the EC contention that *Sardinops sagax* is not an identifiable product under the EC Regulation is rejected.

According to the EC, the EC Regulation does not lay down product characteristics because it is simply a naming rule. Wrong, says the Appellate Body. The Panel found that there is no meaningful distinction between "naming" and "labeling" requirements under the EC Regulation.[281] Furthermore, the Appellate Body notes that, based on its Report in *EC–Asbestos*, "product characteristics include not only 'features and qualities intrinsic to the product,' but also those that are related to it, such as 'means of identification.' " In any event, a distinction between naming and labeling is irrelevant here, according to the Appellate Body:

> [T]he EC Regulation expressly identifies a product, namely preserved sardines. Further, Article 2 of the EC Regulation provides that to be marketed as "preserved sardines," products must be prepared exclusively from fish of the species *Sardina pilchardus.* We are of the view that this requirement–to be prepared exclusively from fish of the species *Sardinia pilchardus*–is a product characteristic "intrinsic to" preserved sardines that is laid down by the EC Regulation.

Since there is no disagreement that the EC Regulation is mandatory, the EC Regulation meets the three criteria for "technical regulation" set out in *EC–Asbestos*.

4. The Temporal Scope (Retroactivity) of Article 2.4[282]

The EC advanced several, largely technical, arguments designed to show that Article 2.4 obligations did not apply to regulations that were in existence at the time the *TBT Agreement* became effective (January 1, 1995). This assertion was based on the language of Article 2.4, which the EC contended made the provision applicable only to the preparation and adoption of technical regulations, not to their "maintenance." The Panel had rejected these arguments, and the Appellate Body concurred. It first noted that under Article 28 of the *Vienna Convention on the Law of Treaties*, "treaties generally do not apply retroactively." However, in the Appellate Body's view, the language of Article 2.4, particularly its use of the present tense and its beginning with the phrase, "where technical regulations are required," confirms that Article 2.4 establishes a "continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the *TBT Agreement* entered into force."

The Appellate Body notes that this conclusion is consistent with analogous language in the WTO *Agreement on the Application of Sanitary and Psytosanitary*

281. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.41.
282. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 196-216.

Measures (*SPS Agreement*), as interpreted in *EC–Hormones* by the Appellate Body.[283] Moreover, Article 2.4 is a "central provision" of the *TBT Agreement*, "and it cannot be assumed that such a central provision does not apply to existing measures." If, the Appellate Body concluded, the negotiators had wished to exempt "the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the *TBT Agreement*, they would have said so explicitly." However, the negotiators did not do so.

Nor is there any support for the EC position in the "context" of Article 2.4. As the Panel concluded, Article 2.5 of the *TBT Agreement* refers to the scenario when a technical regulation is "prepared, adopted or *applied*," again confirming that the Article 2.4 requirement applies to existing technical regulations.[284] Similarly, the Panel noted that Article 2.6 "stated that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either *adopted*, or expect to adopt technical regulations." Article 2.6 would, according to the Panel, be "redundant" if the "Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted."[285] The Appellate Body accepts the Panel's analysis.

The Appellate Body notes that Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* provides: "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements." According to the Appellate Body, "[t]his provision establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations and administrative procedures with the obligations in the covered agreements." Moreover, Appellate Body, states that "[i]n our view, excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the important role of international standards in furthering these objectives [efficiency of production and the conduct of international trade, transfer of technology to developing countries, as stated in the Preamble] of the *TBT Agreement*."

5. Codex Stan 94 as a "Relevant International Standard"[286]

Under Article 2.4 of the *TBT Agreement*, the obligation of a Member to use an international standard as the basis for its domestic technical regulations depends on the existence of a "relevant international standard." The Panel found that Codex Stan 94 is a relevant international standard. The EC disagrees, primarily on the

283. *EC–Hormones* Appellate Body Report, *supra* note 135, ¶ 128 n.17.
284. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.75.
285. *Id.* ¶ 7.76.
286. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 215-233.

grounds that only technical standards adopted by consensus meet that definition, and that the product coverage of Codex Stan 94 is different from that of the EC Regulation.

The Appellate Body begins its analysis by reviewing the definition of a "standard" as provided under Annex 1.2 and Annex I of the *TBT Agreement*:

> Standard
>
> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.[287]
>
> Explanatory note
>
> The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. *Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus* (emphasis added).

Since there is no disagreement that the Codex Commission is an international standards body, the only issue, the Appellate Body states, is one of approval, and that issue is addressed in the last two sentences (italics, above) of the Explanatory Note. For the Appellate Body, as for the Panel, this definition "supports the conclusion that consensus is not required for standards adopted by the international standardizing community." The term "document," the Appellate Body observes, necessarily has the same meaning in both the definition and the explanatory note. Hence, the reference in the final sentence of the Explanatory Note must be to standards in general, not only to those standards "adopted by entities *other than* international bodies, as the European Communities claims in its argument." The Appellate Body notes that in the ISO/IEC Guide, "General Terms and Their Definitions Concerning Standardization and Related Activities," consensus *is*

287. HANDBOOK, *supra* note 27, at 365, 381.

required. Had the negotiators believed that a consensus requirement was necessary for a document to be a standard under Annex 1.2 of the *TBT Agreement*, they presumably would have "said so explicitly."

The Appellate Body also notes that the EC did not provide the Panel with any evidence that Codex Stan 94 was *not* adopted by consensus. Thus, while it is up to the standards bodies to decide whether consensus should be required for adoption of their standards, the Appellate Body concludes that the "*TBT Agreement* does not require approval by consensus for standards adopted by a 'recognized body' of the international standardization community."

If the product coverage of the standard (Codex Stan 94) is different from that of the EC Regulation, then the standard cannot be a "relevant international standard" under Article 2.4, according to the EC. Here, however, the Appellate Body agrees with the Panel that the product coverage is *not* different. First, "even if we [the Appellate Body] accepted that the EC Regulation relates only to preserved *Sardinia pilchardus* . . . Codex Stan 94 also relates to preserved *Sardinia pilchardus.*" Moreover, the Appellate Body concluded earlier that the EC Regulation, although mentioning only *Sardinia pilchardus*, "has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*."[288]

Thus, Codex Stan 94 is a "relevant international standard" under Article 2.4 of the *TBT Agreement.*

6. Codex Stan 94 "As a Basis For" the EC Regulation[289]

Article 2.4 of the *TBT Agreement* requires Members to use "relevant international standards . . . as a basis for their technical regulations." The EC claims that Codex Stan 94 was in fact used as the basis for the EC Regulation. The Panel had begun its analysis by reviewing Codex Stan 94 which, as noted earlier, provided four alternatives for the labeling of sardines other than those of the *Sardinia pilchardus* species, permitting their marketing as "sardines" with four qualifiers relating to the name of the country, name of a geographic area, name of the species or or the common name of the species.[290] The Appellate Body, agreeing with the Panel (and Peru), further notes that the French version clarifies that "the common name of the species is *one* of the qualifiers that may be attached to the term 'sardines' when marketing preserved sardines." The Panel had concluded that, while Codex Stan 94 provided four alternatives for labeling species other than *Sardina pilchardus*, all permitting the use of the term "sardines" with one of the required qualifications, the EC Regulation was inconsistent. Under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when . . . combined with the name

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288. *See* discussion of whether the EC Regulation is a "technical regulation," *infra* part 3 of "Rationale and Holdings" section.

289. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 234-258.

290. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.103.

of a country, name of a geographic area, name of the species or the common name in accordance with the law and the custom of the country in which the product is sold."[291] Thus, Codex Stan 94 was not used as a basis for the EC Regulation.

The Appellate Body noted that in *EC–Hormones*, a similar issue had arisen with regard to the SPS Agreement; there, the Appellate Body had quoted a dictionary definition, "A thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."[292] In the instant case, the Panel was correct in relying on *EC–Hormones* in this respect and in referring to the dictionary again in concluding that "[t]he word 'basis' means 'the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge.' "[293] According to the Appellate Body, this analysis confirms that "there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other."

It is not sufficient, as the EC asserts, that there simply be a "rational relationship" between the international standard and the national regulation in order to meet the requirements of Article 2.4 of the *TBT Agreement*. At a minimum, according to the Appellate Body, "something cannot be considered a 'basis' for something else if the two are *contradictory*." If such a contradiction exists here, Codex Stan 94 cannot be said to have been used as "a basis for" the EC Regulation. That is the situation here. The Appellate Body observes:

> Article 2 of the EC Regulation governs the use of the term "sardines" for the identification and marketing of preserved fish products. Section 6.1.1(ii) of Codex Stan 94 also relates to the same subject . . . [T]he analysis must address *all* of the parts of Codex Stan 94 that relate to the use of the term 'sardines' for the identification and the marketing of preserved fish products, and not only to selected parts.

The Appellate Body is not persuaded by the EC's argument:

> That the EC Regulation does not relate to species other than *Sardinia pilchardus* is simply untenable. It is tantamount to saying that a regulation stipulating 16 years as the age at which one may obtain a driver's license, does not relate to persons that are under 16 years of age.

And, says the Appellate Body, there *is* a contradiction between Codex Stan 94 and the EC Regulation:

291. *Id*. ¶ 7.112.
292. *See EC–Hormones* Panel Report, *supra* note 135, ¶ 163 n.150.
293. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.110 n.90.

> The effect of Article 2 of the EC Regulations is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardinia pilchardus* to which Codex Stan 94 refers– including *Sardinops sagax*–from being identified and marketed under the appellation "sardines," even with one of the four qualifiers set out in the standard. Codex Stan 94, by contrast, permits the use of the term "sardines" with any one of the four qualifiers for the identification and marketing of preserved fish products prepared from 20 species of fish other than *Sardina pilchardus*. Thus, the EC Regulation is manifestly contradictory.

Accordingly, the Appellate Body holds that "Codex Stan 94 was not used 'as a basis for' the EC Regulation."

7. The "Ineffectiveness or Inappropriateness" of Codex Stan 94 (and the Burden of Proof)[294]

Under Article 2.4, a further grounds for not using an international standard as a basis for national technical regulations is when "such international standards or relevant parts would be an ineffective or appropriate means for the fulfillment of the legitimate objectives pursued . . . ."

Subsumed in this discussion is the question of which party bears the burden of proving that the exception applies or does not apply.

a. Burden of Proof

The Panel had decided that the burden of showing that the international standard was "ineffective" or "inappropriate" as the basis for the EC Regulation was on the EC, not Peru, thereby treating it as "the affirmative of a particular claim or defense."[295] This conclusion was based in part on the Panel's view that the complainant (Peru) was not in a position to "spell out" the "legitimate objectives" that the respondent Member was pursuing through its technical regulation, and that "the assessment of whether a relevant international standard is 'inappropriate' . . . may extend to considerations which are proper to the Member adopting or applying a technical regulation."[296]

The Appellate Body disagreed. It referred to the determination in *EC–Hormones* that the characterization of a treaty provision as an "exception" does not in itself place the burden of proof on the respondent member. In *EC–Hormones*, the

294. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 259-291.
295. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.50.
296. *Id*. ¶ 7.51.

Appellate Body interpreted the SPS Agreement as "requiring the complaining party to establish a *prima facie* case of inconsistency with a provision of the SPS Agreement . . . before the burden is taken on by the defending party." This rule is "not avoided simply by describing the same provision as an 'exception.' "[297] In the instant case, the Panel improperly decided that *EC–Hormones* "did not have a direct bearing." According to the Appellate Body, "there are strong conceptional similarities" between the cases and *EC–Hormones* should have been followed. Here, Peru must bear the burden of proving its claim: "This burden includes establishing that Codex Stan 94 has not been used 'as a basis for' the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfill the 'legitimate objectives' pursued by the European Communities through the EC Regulation."

The Appellate Body was similarly not persuaded that the complaining party will have difficulty obtaining the necessary information to establish a *prima facie* case: "The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations of the specific considerations that may be relevant to the assessment of their appropriateness." These include a compulsory mechanism under Article 2.5 of the *TBT Agreement*:

> A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4.

Despite Peru's expressed doubts about the efficacy of this mechanism, the Appellate Body is not persuaded. According to the Appellate Body, "We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention.*"

The Appellate Body also notes that, "information can be exchanged during the consultation phase, and additional information may well become available during the panel phase itself." Moreover, "[t]here is no requirement in the DSU or in *GATT* practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel."[298]

The Appellate Body recognizes that "[t]he degree of difficulty in substantiating a claim or defense may vary according to the facts of the case and the provision at issue." For example, says the Appellate Body, "it may be more difficult for a complainant to substantiate a claim of violation of Article III of the *GATT* 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying the measure." However, in such situations the claimant must

297. *EC–Hormones* Appellate Body Report, *supra* note 135, ¶ 104.
298. *EC–Bananas* Appellate Body Report, *supra* note 209, ¶ 145 n.203.

still prove his claim: "There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of the respective difficulties that may possibly be encountered by the complainant and the respondent . . . ."

b. Is Codex Stan 94 an Effective and Appropriate Means?

The phrase "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued . . . ." raises two issues, according to the Appellate Body, namely the meaning of "ineffective or inappropriate means" and of the term "legitimate objectives." As the panel stated:

> Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfillment of the legitimate objective pursued . . . . The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed (emphasis in original).[299]

The Appellate Body endorses this interpretation. The Panel, according to the Appellate Body, was also correct in concluding that "legitimate objectives" in Article 2.4 must be interpreted in the context of Article 2.2, which explicitly describes certain objectives, *e.g.,* "national security, requirements; the prevention of deceptive practices; protection of human health or safety; animal or plant life or health; or the environment," without limiting "legitimate objectives" to this list.

What are the stated EC objectives in enacting the EC Regulation? They are "market transparency, consumer protection, and fair competition." Based on the foregoing analysis, the Appellate Body concludes that "Codex Stan 94 would be *effective* if it had the capacity to accomplish all three of these objectives, and it would be *appropriate* if it were suitable for the fulfillment of all three of these objectives." In both instances, Peru had the burden of establishing at least a *prima facie* case. Did Peru satisfy this burden? Yes, says the Appellate Body, based on the Panel's findings of fact. The Panel made a factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus.*"[300] The Panel further considered Peru's contention that fish from the *Sardinops sagax* species bear a nomination distinct from the *Sardina pilchardus* species, and that "the

299. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.116.
300. *Id*. ¶ 7.137.

very purpose of the labeling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency."[301] Thus, the Panel's finding that Peru demonstrated that "Codex Stan 94 is not 'ineffective or inappropriate' to fulfil the 'legitimate objectives' of the EC Regulation" is upheld.

8. Objectivity of the Assessment of Certain Facts by the Panel[302]

The EC, as noted earlier, challenged certain factual assessments, which were crucial to the Panel's decision, as being inconsistent with the requirements of Article 11 of the *DSU*. These included the Panel's reliance on dictionary definitions of "sardines;" the Panel's handling of the letter from the United Kingdom Consumers Associations submitted by Peru; the Panel's rejection of letters from other European consumers' associations by the EC at the interim review stage; the Panel's disregard of evidence in the form of tins and labels of various preserved fish; and the Panel's failure of the Panel to ask the Codex Commission for its views. Article 11 (Function of Panels) provides:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including *an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (emphasis added)

The Appellate Body confirms that in all of these actions the Panel acted within its discretion, and thus did not act inconsistently with Article 11. As the Appellate Body observes,

> [T]he first three points raised by the European Communities relate to the task–which we have discussed earlier–of evaluating evidence adduced in connection with the Panel's inquiry into whether consumers in the European Union associate the term "sardines" exclusively with *Sardinia pilchardus*. As we have stated in several previous appeals, panels enjoy a discretion as the trier of facts; they enjoy a margin of discretion in assessing the value of the evidence,

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301. *Id*. ¶ 4.86.
302. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 292-303.

> and the weight to be ascribed to that evidence. We have also said that we will not "interfere lightly" with the Panel's appreciation of that evidence; we will not intervene solely because we might have reached a different factual finding from the one the Panel reached; we will intervene only if we are satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in appreciation of the evidence.[303]

The Appellate Body also explicitly affirms the Panel's decision not to consider the letters the EC submitted at the time of the interim review (when a draft of the report is circulated to the parties). As the Appellate Body observes, "[t]he interim review stage is not an appropriate time to introduce new evidence." It notes that under Article 15 of the *DSU*, a party is permitted to submit comments on the draft report, and to make requests "for the panel to review precise aspects of the interim report." According to the Appellate Body, "[a]t that time, the process is all but completed; it is only–in the words of Article 15–'precise aspects' of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence."

Finally, with regard to evidence, the Panel enjoys discretion "as to *whether or not* to seek information from external forces," in this case from the Codex Commission that had prepared and issued Codex Stan 94. It thus acted within the limits of Article 13.2 of the *DSU.*

9. [Naughty] References by the Panel to Trade-Restrictiveness[304]

The EC charged on appeal that the Panel had characterized the EC Regulation as "trade restrictive", even though this is not an issue in determining whether Article 2.4 of the *TBT Agreement* has been violated. However, the EC had also conceded that EC consumer expectations, regarding the labeling of only *Sardinia pilchardus* as "sardines," had likely been created by the EC Regulation. Consequently, the Panel observed that "[i]f we were to accept that a WTO Member can 'create' consumer expectations and thereafter find justification for the *trade-restrictive* measure which created those consumer expectations, we would be endorsing the permissibility of 'self-justifying' regulatory trade barriers."[305] (Note that the EC is not arguing against the accuracy of the characterization, just the appropriateness under the legal circumstances!) Here, the Appellate Body rejects the EC's assertion, concluding that the statement was simply made *in abstracto*.

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303. Report of the Appellate Body, *United States–Definitive Safeguards Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/AB/R (Dec. 22, 2000)); *EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 299 n.255 (citing, *inter alia*, Report of the Appellate Body, *Korea–Taxes on Alcoholic Beverages*, WT/DS75/AB/R (Jan. 18, 1999).

304. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 304-311.

305. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.127.

However, a second reference was inappropriate, because the Panel, exercising judicial economy, did not examine the allegations made by Peru that the EC Regulation violated other provisions of the *TBT Agreement* as well as Article III of *GATT*. Particularly, the Panel had stated that "in our examination of the EC Regulation, we were of the view that the EC Regulation was more trade-restrictive than the relevant international standard, Codex Stan 94."[306] This statement, and a similar one in footnote 35 of the Panel Report, "do contain determinations of the trade-restrictive nature of the EC Regulation" and should not have been made given the irrelevancy of the trade-restrictive issue to the determination under Article 2.4."

10. Completing the Legal Analysis[307]

Peru had also asked the Appellate Body to "complete the legal analysis" with regard to possible violations of Articles 2.2 and 2.1 of the *TBT Agreement* and Article III:4 of *GATT*, if the Appellate Body found the EC Regulation to be consistent with Article 2.4 of the *TBT Agreement*. Since the Appellate Body affirmed the Panel's determination that the EC Regulation *was* inconsistent with Article 2.4, it declined to make such additional findings. For the same reason, it concluded that the legal arguments in the *amicus curiae* brief submitted by Morocco "do not assist us in this appeal."

Commentary

1. The Waters on *Amicus Curiae* Briefs and Member Participation are Further Muddied

While its logic in determining under what conditions to admit *amicus curiae* briefs and allow non-Parties and non-Third Participants to participate in the proceedings may be questionable, there is no longer any doubt that the Appellate Body believes that it has and may use its discretion in deciding such issues, and that in all, or almost all, circumstances, the participation will be permitted. This is distinct from the question of whether the *amicus curiae* briefs, once filed, will be considered; the answer to this question will almost always be "no," unless these other submissions are attached to a Party's own submission. The idea of accepting (even if not considering) an *amicus curiae* brief by a private individual, while at the same time rejecting one from a Member (Morocco) that did not become a Third Participant in time, was probably a political impossibility, even if the result is arguably to circumvent the requirements of Articles 10.2 and 17.4 of the *DSU* regarding non-

306. *Id.* ¶ 6.11.
307. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶¶ 312-314.

Party Member participation. What *is* clear is that the Appellate Body considers itself to have broad discretion with regard to the treatment of *amicus curiae* briefs.

However, the Appellate Body's approach to *amicus curiae* briefs does not sit well with many developing country Members. Furthermore, even some developed country Members have questioned whether the Appellate Body has discretion to adopt the procedures followed in this case. At least a dozen Members, sitting as members of the Dispute Settlement Body adopting the Appellate Body report, reportedly criticized the acceptance of Morocco's brief, given that Morocco had not sought Third Participant rights in the proceeding.[308] The action was criticized, *inter alia*, for setting new rights and obligations for WTO Members in *DSU* proceedings, and prejudicing the ongoing negotiations for reform of the dispute settlement procedures. Other Members, such as India and Ecuador, renewed their prior opposition to the acceptance of *amicus curiae* briefs in general.[309] The change in the Appellate Body's working procedures to allow Members to present arguments in the oral hearing, even if no written briefs have been submitted, was welcomed by Japan, the EU, Canada, Mexico, and India, while some questioned the discretion of the Appellate Body to decide whether such requests should be accepted. The United States, which also supported the change in principle, suggested that it would have benefited from an additional review before the adoption.[310] In other words, the controversy over the Appellate Body's new rules and broad discretion regarding *amicus brief* and Member participation in the process is by no means over!

The practical decision to permit Colombia to attend the oral hearing as a "passive observer" further confuses the rules applicable to Member participation other than as Parties or Third Participant. However, it is difficult to see why any Member of the WTO and the DSB should be excluded from attending dispute settlement oral hearings, even if the public is excluded. Of course, if the DSU were more transparent in its operations, the Appellate Body would not have to bend the law in order to permit a Member to attend a hearing of an entity to which it belongs as a member!

2. Conditional Withdrawal of an Appeal is OK, Usually

Peru's almost frivolous argument, at least considering the facts of this case, that a withdrawal of a notice of appeal conditional on re-filing results in the loss of the Appellant's right of appeal is easily disposed of by the Appellate Body, probably with more sympathy than it deserves. The Appellate Body can envision circumstances where the re-filed notice of appeal might be rejected, for example, if it were to result in the disruption or delay of the appellate process or cause prejudice to

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308. Daniel Pruzin, *WTO Appellate Body Under Fire Again for Amicus Rulings in Dispute Proceedings*, 19 Int'l Trade Rep. (BNA), No. 43, at 1858 (Oct. 31, 2002).

309. *Id.*

310. *Id.*

the Appellant, but it finds no such circumstances here. The EC's filing, ironically, was designed to accommodate Peru's objection to the lack of information provided by the EC on various issues being appealed, and was made well within the sixty day limit provided for the filing of appeals. It is not clear why Peru felt it advisable to offer this argument, which clearly did not sit well with the Appellate Body.

3. Claimant has the Burden of Proof, Even if Respondent has the Information

The Appellate Body confirms its view that the burden of proof is on the claimant to make a *prima facie* case. The fact that it may be more difficult for the claimant than the respondent to meet this burden is essentially irrelevant, although, in the case of the *TBT Agreement*, there are specific provisions in Article 10 that effectively require a Member initiating a technical standard to explain the same to other Members upon the request. The result here is not a departure from prior practice in the Appellate Body or in other tribunals. However, it is not difficult to anticipate that in some cases, where key facts are difficult to adduce from available data by the claimant, and/or where the claimant has only limited resources for legal representation and investigation, this rule will work as a considerable hardship on some claimants. Those from developing nations, which are unlikely to have the "in-house" legal and investigative resources to pursue claims based on complex factual determination, are likely to be hit hardest.[311]

4. The *TBT Agreement* Applies to Pre-Existing Regulations, and Members Better Have a Good Reason *Not* to Use an International Standard

The detailed analysis of Article 2.4 of the *TBT Agreement* is ground-breaking, given that it is the first comprehensive Appellate Body analysis of the "fundamental" provision of the *TBT Agreement.*[312] The decision thus provides extensive and definitive guidance on the interpretation of most of the key phrases of Article 2.4, as well as the definition of what constitutes a "technical regulation" under Annex 1.1 of the *TBT Agreement*. Among the more significant aspects of the decision are the following:

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311. In the present case, significant in-kind legal resources were provide to Peru through the UK Consumers Association, who worked with a U.K. law firm, Clyde & Co., on a *pro bono* basis, to provide what became critical information regarding consumer expectations regarding labelling of "sardines." *See* Advisory Centre on WTO law, *available at* http://www.acwl.ch (last visited April 19, 2003).

312. In *EC–Asbestos*, the Appellate Body reversed a panel determination that the French regulation on asbestos was not a "technical regulation" under Annex 1.1 of the *TBT Agreement*, but did not pursue the analysis of whether the regulation was in conformity with Article 2.4. *See WTO Case Review 2001*, *supra* note 1, at 511.

> (i) Article 2.4 applies to technical regulations that were in existence as of January 1, 1995, when the *WTO Agreement* and the *TBT Agreement* became effective; those regulations are subject to the general requirement that Members' laws and regulations be in conformity with their WTO obligations, as provided in Article XVI:4 of the WTO Agreement.
>
> (ii) Where a relevant international standard, such as the Codex Stan 94, exists, the burden on the Member not using the international standard "as a basis for" the national standard (adopting a contrary standard) is relatively high, in terms of demonstrating that one of the exceptions, such as "ineffectiveness or inappropriateness," in Article 2.4 applies.

Perhaps it is just as well that in the first Article 2.4 case facing Appellate Body scrutiny, the facts demonstrated a blatant effort by a Member to use national standards to protect the local (fishing) industry. That made it easier for the Appellate Body to decisively reject challenges to the scope of Article 2.4 than might have otherwise been the case had the EC Regulation been less protectionist in its objective and result.

In January 2003, the European Union and Peru agreed that the EU would bring its regulations on the marketing of sardines into compliance with the WTO ruling by April 23, 2003.[313]

5. The Advisory Centre Debuts

Although not reflected in the Appellate Body Report itself, this was apparently the first completed Appellate Body proceeding in which lawyers represented the Claimant from the Advisory Centre for WTO Law (Advisory Centre). This autonomous, not-for-profit agency, led by the former head of the *GATT* Legal Division, Frieder Roessler, is designed to give developing country litigants, such as Peru, the necessary legal firepower to go against the "formidable legal services of the European Community" and of other major trading powers.[314] The Advisory Centre was created under an agreement opened for signature in 1999, and contemplates membership by both developed and developing country WTO members, with a sliding scale of membership contributions to the endowment fund and annual budget

313. *See* Daniel Pruzin, *EU, Peru Agree on Deadline to Implement Sardines Ruling*, 20 Int'l Trade Rep. (BNA), No. 2, at 74 (Jan. 9, 2003).

314. *See* Advisory Centre, *Bridges Between Trade and Sustainable Development*, Oct. 2002, at 1, *available at* http://www.acwl.ch (last visited April 19, 2003).

ranging from $1,000,000 for developed countries to $50,000 for lesser developed developing countries.[315]

The Advisory Centre acts in most respects as an expert trade law firm; according to the materials on its website, "[t]he Centre thus functions essentially as a law office specialised in WTO law."[316] However representation of member countries before the DSB is at much lower hourly rates ($100 per hour in the case of Peru in *EC–Sardines*) than would be the case if countries had instead retained a competent Washington, D.C. or European law firm. The basic hourly rate of $250 may be discounted by twenty percent to ninety percent, depending on the state of development of the member seeking legal assistance.[317]

The potential services are broader. According to the Centre:

> The Centre eventually could provide services to developing countries in a manner somewhat analogous to the way in which the European Commission's legal services division assists EC member states. It could develop a reservoir of WTO expertise into which developing countries could tap as needed. By working on WTO cases with the Centre's lawyers, national officials can develop their own internal resources.[318]

While the Centre's objectives clearly contemplate training and educational functions, it is apparent that Mr. Roessler intends to focus on its law firm-like tasks, in part to "avoid duplicating the work of others" in providing technical assistance. As he has stated,

> I believe that the Centre's comparative advantage will be its day-to-day involvement in WTO dispute settlement proceedings. Its niche may therefore very well be on-the-job training of interns as well as information sessions, circulars and seminars to disseminate the knowledge that the Centre acquires through its own practical experience.[319]

Striking a balance between operating as a law firm and providing training, particularly on-the-job training, for interns, and to a greater extent, for attorneys in trade ministries of developing countries, may be one of the Centre's greatest challenges. Few will question (the *Sardines* case is a good example) that Mr.

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315. *See Agreement Establishing the Advisory Centre on WTO Law*, at Annex I (Nov. 30, 1999), *available at* http://www.acwl.ch (last visited April 19, 2003).

316. *See Advisory Centre on WTO Law*, Introduction, at 3, *available at* http://www.acwl.ch (last visited April 19, 2003).

317. *See Advisory Centre Agreement*, *supra* note 315, Annexes II and III.

318. *Id.* at 2.

319. *See* Frieder Roessler, Speech Delivered on the Inauguration of the ACWL (Oct. 5, 2001), *available at* http://www.acwl.ch/news/InaugurationFR.htm (last visited April 19, 2003).

Roessler has few equals as a litigator before WTO panels and the Appellate Body. The question for some, in addition to the Centre's success before the WTO, will be whether the Centre can in fact assist national officials to "develop their own internal resources" in five to ten years, so that in the future, they will be able to rely less on the Centre or on private law firms for WTO litigation skills but rather focus on in-house expertise. This objective will be difficult and costly to achieve, but without performing a training function, the Centre will simply be a law firm, albeit with considerably lower hourly rates and an obvious not-for-profit agenda.

In any event, judging from these initial results, Mr. Roessler and the Centre could be a very significant force in leveling the litigation playing field for developing countries against the EC, United States and other trade giants before WTO panels and the Appellate Body.

6. Judicial Economy, Pleading Constraints, and *DSU* Reform

Peru in this action took a somewhat unusual approach in a case where arguably the EC Regulation violated not only Article 2.4 of the *TBT Agreement*, but also Article 2.2 of the *TBT Agreement* and Article III:4 of *GATT 1994.* Peru essentially asked the Panel to first examine the consistency of the EC Regulation with Article 2.4. Only if the Panel found the EC Regulation to be consistent with Article 2.4 would Article 2.2 be analyzed, and only if the EC Regulation were found to be consistent with Article 2.2 would its consistency under Article III:4 of *GATT 1994* be considered.[320] The Panel took this into consideration, found a violation of Article 2.4, and then exercised judicial economy in declining to evaluate the EC Regulation under Article 2.2 of the *TBT Agreement* or Article III:4 of *GATT 1994.*[321]

However, this put Peru in an awkward position when the European Communities appealed the Panel's finding under Article 2.4. Because the Panel had not issued determinations on Article 2.2 or Article III:4 (at Peru's suggestion), it became difficult to raise those issues before the Appellate Body. The best solution for Peru was to ask the Appellate Body to review Article 2.2 only in the event that it reversed the Panel on Article 2.4.[322] Since the Appellate Body affirmed the Panel on the inconsistency of the EC Regulation with Article 2.4, it was relatively easy for the Appellate Body to decline to "complete the legal analysis" regarding the other two provisions.

It is worth considering what might have happened in the event that the Appellate Body had reversed the Panel on Article 2.4. In an ideal world, the Appellate Body could have remanded the case to the Panel and asked the panel to

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320. *EC–Sardines* Panel Report, *supra* note 258, ¶ 7.147.

321. *Id.* ¶ 7.152.

322. *See infra* Part 10 of the "Rationale and Holdings" section of this review. Here, Peru did not ask for conditional review of the EC Regulation under Article III:4 of *GATT* 1994. *See EC–Sardines*, Appellate Body Report, *supra* note 258, ¶ 312.

make findings on the consistency of the EC Regulation with Article 2.2 of the *TBT Agreement* and/or Article III:4 of *GATT 1994.* However, the Appellate Body presently has authority only to "uphold, modify or reverse the legal findings and conclusions of the panel."[323] In other words, it cannot remand the case to the Panel. Moreover, the Appellate Body is limited to "issues of law covered in the panel report and legal interpretations developed by the panel,"[324] which makes it difficult to complete the analysis of a legal issue before the Appellate Body if the panel has not made a ruling or produced a full record. In this instance, for example, the EC argued that there were insufficient facts in the record for the Appellate Body to do so.[325]

Although the issue in this proceeding became moot, this is a potentially significant problem for Members pleading multiple-issue cases before panels and the Appellate Body. On one hand, all parties, and the *DSU* system in general, have an interest in keeping the number of issues before the panels and, especially on appeal, to a minimum, which makes the Peruvian (Roessler) approach laudable. Otherwise, the proceedings become enormously complex,[326] and the decisions unmanageably long. On the other hand, Members and their counsel run a calculated risk if they exercise judicial economy on their own, as Peru did in this proceeding at both the panel and Appellate Body levels.

Fortunately, when and if the WTO Members agree on a reform of the *DSU*, providing the Appellate Body with remand authority is likely to be included. For example, the EC has proposed that, in the event the panel report does "not contain sufficient factual findings so as to enable the Appellate Body to resolve the dispute, the Appellate Body shall explain in detail in its report the specific insufficiencies of the factual findings in order to allow any party to the dispute to request a remand of the matter or part thereof to the original panel."[327] In accordance with the EC proposal, a new article would also be added to the *DSU* to provide a "remand procedure."[328] Until that time, Members will need to be careful in deciding whether to plead multiple issues at the same time, consecutively, or in the alternative.

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323. *DSU* art. 17:13, *reprinted in* HANDBOOK, *supra* note 27.

324. *Id.*

325. *See EC–Sardines* Appellate Body Report, *supra* note 258, ¶ 312 (referring to the EC position at oral argument).

326. *See, e.g., United States-Section 211*, discussed *infra.*

327. Dispute Settlement Body, *Contribution of the European Communities and its Member States to the Improvement and Clarification of the WTO Dispute Settlement Understanding*, TN/DS/W/38, ¶¶ 20-21 (Jan. 23, 2003).

328. *Id.*