WTO CASE REVIEW 2003*

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

The WTO reports we discuss are available on the web site of the WTO, www.wto.org. The texts of the WTO agreements we discuss are available on this web site, and published in a variety of sources, including RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK (2nd ed. 2001) [hereinafter "Handbook"]. We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

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PART ONE: INTRODUCTION

Two thousand three (2003) by any reasonable assessment was a disastrous year for the World Trade Organization. The Doha Development Round[1] suffered a major setback when the Cancun, Mexico, ministerial abruptly terminated a day early, unable to reach agreement on phasing out of agricultural export and other subsidies, including: cotton; agricultural market access; reduction of industrial tariffs; and treatment of the "Singapore Issues" (competition, investment, transparency in government procurement, trade facilitation). Brazil, India, and Egypt created the loosely knit "Group of 20" developing nations with a strong interest in agricultural subsidies and market access, which focused on real and legitimate issues but, for some, recalled the controversies reflected in the U.N. General Assembly during the debates on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States.[2] All of the major players–the United States, the European Union (EU)[3], the Group of 20–explicitly or implicitly blamed each other for the failure to carry the negotiations forward.[4] When meaningful negotiations will resume is anyone's guess at this writing (April 2004).[5] Neither the United States, embroiled in presidential election year politics, nor the European Union, facing a change in Commission membership and expansion by ten member states later this year, appears to be in a good position to make the kinds of

1. The "Doha Development Round" or "Doha Development Agenda" refers to the current series of global international trade negotiations, initiated by the members of the WTO in November 2001, in Qatar. World Trade Organization, *Negotiations, Implementation, and Development: The Doha Agenda*, *at* www.wto.org (last visited Apr. 22, 2004).

2. *See* Elihu Lauterpacht, *International Law and Private Foreign Investment,* 4 IND. J. GLOBAL LEGAL STUD. 259, 264-65 (1997); Brower & Tepe, *The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?,* 9 INT'L LAW. 295 (1975).

3. The European Union (EU) is commonly referred to as the European Communities (EC) in proceedings before the Dispute Settlement Body of the World Trade Organization.

4. *See Cancun Demise Over Singapore Issues Allows U.S. to Avoid Blame,* INSIDE U.S. TRADE, Sept. 19, 2003, at 1, *at* www.insidetrade.com; *WTO: Canadian Trade Minister Blames Cancun Flop on WTO Members' Lack of Ambition,* 20 Int'l Trade Rep. (BNA), No. 38, at 1596 (Sept. 25, 2003) (quoting Canadian Trade Minister Pierre Pettigrew as citing to a lack of ambition on the part of developing countries to open their markets to non-agricultural trade, as well as a lack of ambition by the United States and the EU on agricultural trade); Ed Taylor, *WTO: Brazilian Officials Praise, Defend Leading Role in Cancun Ministerial Talks,* 20 Int'l Trade Rep. (BNA), No. 38, at 1596 (Sept. 25, 2003); E.U. Trade Commissioner Pascal Lamy, Result of the WTO Ministerial Conference in Cancun, Speech before the Plenary Session on the Ministerial Conference of the WTO in Cancun (Sept. 24, 2003) (on file with author) (discussing the roles of Europe, the United States, the G-21 and the African/least developed countries); *Aldonas Says Lack of Early EU Singapore Deal Aided WTO Collapse,* INSIDE U.S. TRADE, Sept. 19, 2003, at 1, *at* www.insidetrade.com (quoting Commerce Undersecretary Grant Aldonas over the EU's reluctance to compromise on the four Singapore issues).

5. *See* Gary G. Yerkey, *Developing Countries Cool to U.S.-EU Plan For Early WTO Ministerial to Spur U.S. Trade Talks*, 21 Int'l Trade Rep. (BNA), No. 300 (Feb. 19, 2004).

concessions on agriculture that would be necessary to move the negotiations forward. Although United States Trade Representative (USTR). Ambassador Zoellick made extensive proposals in January 2004 designed to get the discussions moving again, in part by offering the possibility of a date certain to end agricultural export subsidies, it is uncertain whether this initiative will have any positive effect in the near term.[6]

I. DEVELOPMENTS IN THE APPELLATE BODY

In contrast, in most respects 2003 was a quiet and almost routine year for the Appellate Body. The strength of the Appellate Body was well illustrated by the fact that it was business as usual during this period of uncertainty. The WTO's Dispute Settlement Body (DSB)[7] adopted five new Appellate Body reports, just as it did in 2002,[8] for a grand total of 54 "original" panel reports (excluding Article 21.5 compliance panels) through October 2003, representing a 74% appeal rate over the entire period.[9] Un-appealed panel reports were adopted by the DSB in an additional three cases.[10] The total consultations requested under the DSU since January 1, 1995, reached 302 by late October 2003.[11] Activity before the DSB, the panels and the Appellate Body appears relatively steady. Requests for consultations have ranged from a high of 50 in 1997 to a low of 23 in 2001, with 25 in 2003.[12] In short, it was another busy year.

James Bacchus, the only remaining original member of the Appellate Body, retired in December after eight years of service, and was replaced (without controversy) by a Columbia University law professor, Merit E. Janow (the first woman to serve on the Appellate Body).[13] A total of fourteen individuals have now

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6. Letter from Robert B. Zoellick, USTR, to WTO Minister (Jan. 11, 2004), *available at* http://www.ustr.gov (on file with author); *see also* Daniel Pruzin & Christopher S. Rugaber, *U.S. Outlines Ideas to Revive Doha Round; Trading Partners Give Cautious Welcome,* 21 Int'l Trade Rep. (BNA), No. 3, at 82 (Jan. 15, 2004).

7. The Dispute Settlement Body is created by article 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization. World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 2, *at* http://www.wto.org/english/tratop_e/dispu_e/2 (last visited Apr. 22, 2004) [hereinafter *DSU*]; Marrakesh Agreement Establishing the World Trade Organization [hereinafter Marrakesh Agreement], Annex 2, *at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

8. *See DSU*, *supra* note 7, art. 21.5.

9. WTO Secretariat, *Statistical Information on Recourse to WTO Dispute Settlement Procedures (1 January 1995-31 October 2003)* (Dec. 11, 2003), at 6, *available at* http://www.wto.org.

10. *Id.* at 55.

11. *Id*. at 1.

12. *Id.* at 10.

13. *See* World Trade Organization, *Dispute Settlement: Appellate Body Members*, *at* http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Apr. 22,

served or are serving on the Appellate Body, two each from Egypt, Japan, and the United States, and one each from Australia, Brazil, Germany, India, Italy, New Zealand, the Philippines, and Uruguay.[14] Reform of the DSU is, of course, dependent on a successful conclusion of the Doha Development Round, but delays have not slowed the proposals for DSU reform, including a lengthy analysis of problems facing the DSB submitted by Mexico.[15]

In terms of process, the Appellate Body didn't make a great deal of progress in shortening its decisions – *U.S. Steel Safeguards* required 172 pages – but it continued its relatively recent and helpful practice of including a Table of Cases cited in this Report and in *U.S. Steel Safeguards* at least, a table of abbreviations. Perhaps only common law lawyers such as the authors would see the user-friendly table of cases as a further acknowledgment of the importance of precedent and case law for the Appellate Body and within the DSU system. Relatively minor changes were also made to the "Working Procedures" in May 2003.[16]

II. COMPLIANCE PROBLEMS

Probably the most significant problem facing the DSB is the inability or failure of the United States to comply with several key decisions in which United States laws or practices have been determined to be inconsistent with WTO obligations. These included the "Continued Dumping and Subsidy Offset Act of 2000," typically referred to as the "Byrd Amendment,"[17] which provides for the redistribution of antidumping and countervailing duties collected by the Customs Service to the U.S. industries that suffered "material injury;"[18] the Foreign Sales

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2004).

14. *Id.*

15. World Trade Organization, *Comparative Chart of the Chairman's Text and the Diagnosis of the Problems Affecting the DSU; Working Document for the DSU Negotiations by Mexico* (Dec. 8, 2003), *available at* http://www.wto.org.

16. World Trade Organization, *Working Procedures for Appellate Review,* WTO Doc. WT/AB/WP/7 at 1, *available at* http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (May 1, 2003) [hereinafter *Working Procedures*].

17. After its legislative sponsor, Senator Robert Byrd (D-W.Va.). The Byrd Amendment is an addition to Title VII of the United States Tariff Act of 1930. Byrd Amendment, Pub. L. No. 106-387, 114 Stat. 1549 (2000) (codified at 19 U.S.C. § 1675c (2000)). Section 1675c is entitled the "Continued Dumping and Subsidy Act." In 2001, the United States Customs Service (now formally called the "U.S. Customs and Border Protection") promulgated regulations implementing this Section. *See* Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 19 C.F.R. §§ 159.61-159.64 (Sept. 21, 2001). Interestingly, the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-387, is not a trade bill, but rather a bill dealing with agriculture and agriculture-related issues.

18. *But see* WTO Report of the Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R (Jan. 16 2003), *adopted* Jan. 27,

Corporation, which has been held to constitute an illegal export subsidy;[19] the 1916 Antidumping Act;[20] and the so-called "Havana Club" dispute involving the ownership of a trademark that in the past has been applied to Cuban rum.[21]

All of these require the enactment of legislation, which has proven difficult in several respects. President George W. Bush tried to obtain legislation proposing repeal of the Byrd Amendment in the federal budget bill for fiscal year 2004, and then again in the budget bill for fiscal year 2005.[22] The President's first attempt was met with a stern letter from 70 senators telling him "diplomatically" to back off. Not surprisingly, the Senate bill to repeal the Byrd Amendment[23] was never debated in the Senate, and the United States missed the deadline of December 27, 2003 for compliance with the Appellate Body's Report. In January 2004, eight senators wrote to their colleagues in the House of Representatives exhorting them not to rescind the Amendment, and instead to push for changes in WTO rules that would allow for offset payments.

The official Bush Administration position remained one of commitment to repeal. But that position hardly deterred the successful complainants in the WTO action from obtaining authorization to retaliate against the United States because of its compliance failure. The Administration thus faced two battles – in Congress, to secure repeal, and in the WTO, on the appropriate amount of retaliation. The

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2003, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *Byrd Amendment* Appellate Body Report].

19. WTO Appellate Body Report, *United States - Tax Treatment for "Foreign Sales Corporations"*, WTO Doc. WT/DS108/AB/R, ¶ 65 (Feb. 24, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm.

20. *See* Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1, 44-52 (2001) [hereinafter *WTO Case Review 2000*] (discussing WTO Appellate Body Report, *United States – Antidumping Act of 1916*, WTO Doc. WT/DS136/AB/R (Aug. 28, 2000), *adopted* Sep. 26, 2000, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm); 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 (2001).

21. *See* WTO Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998,* WTO Doc. WT/DS176/AB/R (Jan. 2, 2002), *adopted* Feb. 1, 2002, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm. *See WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143, 198-221 (2003) [hereinafter *WTO Case Review 2002*].

22. *See* Rossella Brevetti, *Bush Administration Proposes Repeal of Byrd Amendment in FY 2005 Budget*, 21 Int'l Trade Rep. (BNA), No. 6, at 222 (Feb. 5, 2004) [hereinafter *Bush Administration Proposes Repeal*]; Daniel Pruzin, *U.S. Initiates WTO Arbitration on Byrd Sanctions, Hits Out at Trading Partners*, 21 Int'l Trade Rep. (BNA) No. 5, at 204 (Jan. 29, 2004).

23. Trade Readjustment and Development Enhancement for America's Communities Act of 2003, S.1299, 108th Cong. (2003) (sponsored by Senators Olympia Snowe (R-Maine) and Lisa Murkowski (R-Alaska)).

complainants argued that they should be entitled to retaliatory payments equal to whatever the United States disbursed as offset payments. They estimated the amount at $245 million for 2003, and as much as $1.7 billion for 2004 (the increase being due largely to cash deposit collections from the Canadian softwood lumber case). The Administration projected offset disbursements of $293 million in 2004 and $885 million in 2005. However, the differences in estimates masked the real battle in the WTO.

In January 2004, the United States sought arbitration regarding whether the complainants had a right to impose retaliation. The United States argued that the offset disbursements had no negative impact on their trade with the United States. The United States noted that under Article 22.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*Dispute Settlement Understanding*," or "*DS*"), the right to retaliate "shall be equivalent to the level of nullification or impairment" of benefits associated with the offending measure. If there was no nullification or impairment of benefits, then there could be no retaliation. The Byrd Amendment remains popular with many in Congress, and some members have urged continued negotiations – unrealistic as that may be – in lieu of repeal.[24] On January 26, 2004, several WTO members asked the DSB to authorize sanctions in the form of higher tariffs applicable to selected U.S. products, equivalent to the annual offset payments authorized under the U.S. legislation (currently about $700 million), noting that the reasonable period for implementation had expired December 27, 2003, without Congressional action.[25]

The Bush Administration has been a bit more successful in working toward repeal of the Antidumping Act of 1916, almost three years after the DSB decision. In January 2004, the Judiciary Committee in the House of Representatives voted in favor of repeal.[26] However, the European Communities (EC) had expressed concern that at least one bill pending in Congress to repeal the Act would not affect pending cases, a result that would, in the EC's view, be inconsistent with the views of the Panel and Appellate Body.[27]

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24. *See* Letter from Senators DeWine, Byrd, Craig, Rockefeller, Santorum, Daschle, Specter, and Lincoln to Colleagues, Jan. 22, 2004 (on file with author) (writing to advise of "continued and exceptionally strong Congressional support for the [Byrd Amendment]"). On April 27, 2004, the U.S. formally proposed to the Doha negotiating group on WTO rules, a "negotiation of the right of members to distribute monies collected from antidumping and countervailing duties" to affected firms. *See* Danial Pruzin, *U.S. Signals Intent to Reverse Byrd Amendment Ruling in WTO Talks*, 21 Int'l Trade Rep. (BNA) 749 (Apr. 29, 2004).

25. *See* WTO News: 2004, Dispute Settlement Body, *at* http://www.wto.org (Jan. 26, 2004) (referring the matter to arbitration); John D. McKinnon & Neil King Jr., *EU Set to Impose Trade Sanctions If U.S. Fails to Act*, WALL ST. J., Jan. 26, 2004, at A-4 (discussing proposed retaliation for both the Byrd Amendment and the FSC).

26. *See* Rossella Brevetti, *House Judiciary Committee Approves Bill to Repeal 1916 Antidumping Act*, 21 Int'l Trade Rep. (BNA) 229 (Feb. 5, 2004) (also reporting the House bill was introduced on March 4, 2003, and similar legislation is pending in the Senate).

27. The United States had promised that the repeal would apply to pending cases as well as any future cases.

In February 2004, a WTO arbitration panel rejected the EC's proposed retaliation against the United States for failing to repeal the 1916 Act.[28] As more evidence of the seemingly endless tit-for-tat immaturity infecting trans-Atlantic trade relations, the EC proposed to adopt a regulation mimicking the 1916 Act. Under the proposal, the EC would impose treble damages against American companies dumping in the EC if specific intent requirements analogous to the 1916 Act criteria were proven. The United States countered that this level of suspension, or retaliation, would exceed the level of nullification or impairment, i.e., of harm to the EC from the 1916 Act, because there have been no final judgments against EC companies under the Act and settlements in such cases have been kept confidential. The arbitration panel generally agreed with the United States, though it held open the possibility of future retaliation by the EC, equal to the sum of any final judgments and publicized settlements (but excluding legal fees).[29] Interestingly, in December 2003, the first successful prosecution under the 1916 Act occurred. In December 2003, a United States District Court for the Northern District of Iowa ruled that an exporter of printing presses from Japan, TKS, Ltd., had violated the 1916 Act, and ordered it to pay over $31 million in damages (i.e., treble the $10.5 million in damages, as called for under the Act) to its American competitor, Goss International.[30] The ruling is on appeal.[31]

On December 8, 2003, the EC, observing that the DSB had authorized the imposition of countermeasures up to a level of $4.043 billion in May 2003 for the United States' failure to repeal the Foreign Sales Corporation (FSC)/ Extraterritorial Income Exclusion (ETI) provisions, authorized the suspension of various tariff concessions with regard to the United States as of March 1, 2004, "until such time as the WTO inconsistent measure has been removed."[32] The EC countermeasures are the imposition of 5% of the $4 billion as of March 1, 2004, to increase 1% for each succeeding month for a year, if the FSC/ETI legislation is not repealed by the end of 2004.[33] Repeal had not occurred as of April 2004. For whatever reason, the Japanese Government, which was the Complaining Member in *Antidumping Act of 1916,* has not yet sought compensation, even though the defendant in the Goss International

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28. *See* Press Release, Office of the United States Trade Representative, Statement of Richard Mills, USTR Spokesman, Regarding the 1916 Act Arbitration Award (Feb. 24, 2004), *at* www.ustr.gov.

29. *See* Frances Williams, *WTO Allows Trade Sanctions on U.S.*, FIN. TIMES, Feb. 25, 2004, at 3 (summarizing the ruling).

30. *See* Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd., 294 F. Supp. 2d 1027 (N.D. Iowa, Dec. 3, 2003); *Federal Jury Awards U.S. Firm Damages Under 1916 Dumping Act*, 20 Int'l Trade Rep. (BNA), No. 5, 2072 (Dec. 18, 2003).

31. *See* Tobias Buck & Frances Williams, *Brussels Awaits WTO Dumping Ruling*, FIN. TIMES, Feb. 24, 2004, at 6.

32. Council Regulation (EC) No. 2193/2003, OFFICIAL J. OF THE EUR. UNION, Dec. 17, 2003.

33. *See EU Begins to Phase in Sanctions As Concerns Raised About U.S. Bills,* 21 Int'l Trade Rep. (BNA), No. 10, at 382 (Mar. 4, 2004).

litigation is Japanese.

The "reasonable period of time" for the Havana Club legislation again was extended by mutual agreement of the United States and the E.U. on December 31, 2003.[34] Of course, the United States isn't the only WTO Member with a compliance problem. The Appellate Body report in *EC-Hormones* was adopted in February 1998, but the EC has not complied, some six years later.[35] The United States and Canada were authorized to suspend concessions in the amount of $116.8 million (U.S.) and $11.3 million (C.D.N.), and both Members did so. In November 2003, the EC alleged that a new directive regarding the prohibition on the use of stock-farming of certain hormones eliminated the legal basis for sanctions and demanded that they be discontinued.[36] Both the United States and Canada disagreed, and the sanctions remain in force.[37]

III. GREATER CONTROVERSY FOR THE APPELLATE BODY IN 2004?

One does not require a crystal ball to predict that 2004 will be a year of greater controversy for the Appellate Body and DSB. For reasons noted earlier, few observers anticipate significant progress toward the conclusion of the Doha Development Round during 2004. January 1, 2004, saw the expiration of the "peace clause" in the Agreement on Agriculture,[38] which under certain conditions precluded the use of the Subsidies and Countervailing Measures Agreement against agricultural subsidies. However, Brazil requested consultations with the United States in September 2002 regarding prohibited and actionable subsidies of cotton; although a Panel was established in March 2003, the Panel has indicated that it will not be able to provide its final report until April or May 2004.[39] The interaction of the Agreement on Agriculture and the SCM Agreement is complicated and uncertain.[40]

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34. *See* WTO, *Update of WTO Dispute Settlement Cases*, WTO Doc. WTO/DS/OV/20, at 170 (Mar. 26, 2004), *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations [hereinafter *WTO Update*].

35. *See* WTO Appellate Body Report, *Hormones: European Communities – Measures Affecting Meat and Meat Products,* WTO Doc. WT/DS26/AB/R (Jan. 16, 1998), *adopted* Feb. 13, 1998, *available at* http://www.worldtradelaw.net/reports/wtoab/ec-hormones(ab).pdf [hereinafter *EC-Hormones*].

36. *See WTO Update, supra* note 34, at 137.

37. *Id.* at 137-138.

38. Agreement on Agriculture, art. 13 ("Due Restraint"), *at* http://www.wto.org (n.d.).

39. Communication from the Chairman of the Panel, United States - Subsidies on Upland Cotton, WT/DS267 (Nov. 19, 2003); *see WTO Update, supra* note 34, at 43-44. Press reports at the end of April suggested that the interim panel report circulated on a confidential basis to the parties resulted in a victory for Brazil. *See Brazil Wins Key Points in Interim WTO Panel on U.S. Cotton Subsidies*, INSIDE U.S. TRADE, Apr. 30, 2004. The U.S. will appeal.

40. *See* Richard H. Steinberg & Timothy E. Josling, *When the Peace Ends: The Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge*, 6 J. INT'L ECON.

United States – Upland Cotton and perhaps other agricultural cases will provide a major challenge for the Appellate Body and, perhaps, for the WTO system itself.

Another problem facing the Appellate Body in particular is the inability of the Ministerial Conference or the General Counsel to exercise its "exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[41] Even though it is technically possible to adopt such "interpretations" by a three-fourths vote rather than by consensus, no interpretation has been adopted in the nine-year history of the WTO. In this time of contentiousness among the Members regarding the Doha Development Round and otherwise, no change is likely in the foreseeable future.

This leaves the Appellate Body in a difficult position, because it is not authorized to adopt interpretations; all it can properly do is "clarify the existing provisions of those [WTO] agreements in accordance with customary rules of public international law."[42] Moreover, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[43] At the same time, the Appellate Body must decide five to ten cases a year, often matters of first impression under the General Agreement on Tariffs and Trade 1994 (GATT) and the other WTO agreements. While the Members, including but not limited to the United States, and more than a few authors, have criticized the Appellate Body for going beyond its limited mandate, they (the Members, not the authors) have been woefully negligent in dealing with interpretive problems, such as the relationship between Article XIX of GATT ("unforeseen developments") and a Safeguards Agreement that makes absolutely no mention of the concept.[44] Similar or more serious problems are likely to arise when the Agreement on Agriculture and the SCM Agreement clash later in 2004. Hopefully, the Members, when they criticize the Appellate Body for exceeding its mandate, will occasionally look at their collective selves in the mirror!

L. 369 (2003).

41. Marrakesh Agreement, Art. IX(2), *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 273 (2d ed. 2001).

42. *DSU*, *supra* note 7, art. 3.2; Marrakesh Agreement, Annex 2.

43. *DSU*, *supra* note 7, art. 3.3.

44. *See generally* WTO Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/AB/R (Oct. 9, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *U.S.-Steel Safeguards* Appellate Body Report].

PART TWO: DISCUSSION OF THE 2003 CASE LAW

I. TRADE REMEDIES

A. Antidumping, Countervailing Duties and the Byrd Amendment

Citation

United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R (issued January 16, 2003, adopted January 27, 2003) (joint complaint by Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Korea, and Thailand, and joint complaint by Canada and Mexico).

Facts[45]

From its inception, the Byrd Amendment[46] generated heated rhetoric, even from *The Economist*, which wrote:

> Could Robert Byrd be taking lessons from Ariel Sharon? Only days after Mr. Sharon inflamed Israeli-Palestinian tensions, the cantankerous former majority leader of the Senate pushed through a piece of legislation that could torpedo the fragile transatlantic détente on trade. Mr. Byrd has become something of a loose cannon in the Senate of late, but little could compare with his latest antics.[47]

Not surprisingly, even the way in which the Byrd Amendment came about was controversial – it was an attachment to an $80 billion agriculture appropriations bill.[48] That bill, the Agriculture, Rural Development, Food and Drug Administration,

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45. *Byrd Amendment* Appellate Body Report, *supra* note 18 (discussing the joint complaint by Australia, Brazil, Chile, European Communities, India, Indonesia, Japan, Korea, and Thailand, and the joint complaint by Canada and Mexico). This discussion is drawn from the World Trade Organization. World Trade Organization, *Update of WTO Dispute Settlement Cases*, WTO Doc. WT/DS/OV/16, at 115-17 (Oct. 17, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations [hereinafter *WTO Update*]; WTO Report of the Panel, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/R, ¶¶ 1.1-2.7 (Sept. 16, 2002), *adopted* Jan. 8 2003, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *Byrd Amendment* Panel Report].

46. *See supra* note 17.

47. *For the Byrds*, ECONOMIST, Oct. 21, 2000, at 88.

48. Edward Alden & Guy de Jonquières, *Dumping Move Attracts EU Ire*, FIN. TIMES, Oct. 10, 2000, at 4 (mentioning the spending bill).

and Related Agencies Appropriations Act for FY 2001, extended the dairy price support program and provided for direct market loss payments to American farmers, funded the export loan program of the Commodity Credit Corporation, and eased sanctions on food and medicine for Cuba, Libya, North Korea, and Sudan (and codified restrictions on travel to Cuba).[49] By tossing the Byrd Amendment into a bill of this nature, the likelihood of a Presidential veto was reduced.

The provision was opposed not only from the Clinton Administration, which explained that the ideas contained in the Byrd Amendment had been considered and rejected by Congress during the debate over approval of the Uruguay Round agreements, but also from the National Taxpayers Union, which was concerned that American companies might engage in "bounty hunting" at government expense (i.e., they might file "frivolous" trade remedy actions because they have nothing to lose).[50] The incentive would be particularly strong for small companies, which typically feel stymied from using trade remedies because of the high legal costs in bringing a case.[51] In turn, the basic tests used in antidumping ("AD") and countervailing duty ("CVD") cases to ensure a domestic industry supports a petition – the 25 % and 50 % tests[52] – would be adulterated by this incentive, as companies registered support in the hopes of receiving payments in a successful case.

What exactly does the Byrd Amendment say? It applies to all AD duty and CVD orders issued in the United States on or after October 1, 2000. The essence of the Amendment is that it gives the duties collected in these trade remedy cases "to the companies that the duties are designed to protect."[53] The key part of the Amendment states:

> Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921, shall be distributed on an annual basis under this section [Section 754, 19 U.S.C. 1675c] to the affected domestic producers for qualifying expenditures. Such distribution shall be known as "the continued dumping and subsidy offset."[54]

In turn, the definition of "affected domestic producers" divides the universe

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49. *See President Signs Controversial Agriculture Appropriations Bill*, 17 Int'l Trade Rep. (BNA), No. 43, at 1687 (Nov. 2, 2000) (reporting the appropriations value as $78 billion).

50. *For the Byrds*, *supra* note 47, at 89.

51. *See* Alden, *supra* note 48, at 4 (mentioning these costs).

52. RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 858 (2d ed. 2001) (explaining the tests for standing to file a petition). In brief, at least 25% of total production of the like product of the domestic industry and more than 50% of domestic like product production expressing a view (either support for or opposition to) the petition must support the petition.

53. *For the Byrds*, *supra* note 47, at 89.

54. Continued Dumping and Subsidy Act (Byrd Amendment), Pub. L. No. 106-387, 114 Stat. 1549 (2000) (codified at 19 U.S.C. § 1675c(a) (2000)) (emphasis added).

into entities "for" and "against" the petition and shows a distinct preference for the former category. The definition encompasses essentially any successful petitioner or supporter of a successful petitioner. It obviously excludes opponents of the petition, but also goes on to cut out successor entities related to any opponent of the initial AD or CVD investigation:

> [An "affected domestic producer" is] a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that –
>
> (A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.
>
> *Companies, businesses, or persons* that have ceased the production of the product covered by the order or finding or *who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer*.[55]

What are the "qualifying expenditures" on which an "affected domestic producer" can spend the offset? The Byrd Amendment allows for ten uses of the offset: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) technology; (6) employee health care benefits (if they are paid for by the employer); (7) employee pension benefits (again, if they are paid for by the employer); (8) environmental equipment, training, or technology; (9) raw materials and other inputs; and (10) working capital or other funds necessary to maintain production.[56]

In practice, the offset is collected (like any other AD duty or CVD) by the Customs and Border Protection (the new name for the United States Customs Service following its placement under the Department of Homeland Security). However, unlike the logistics in pre-Byrd Amendment AD or CVD practice, the Customs Service deposits the offset into a special account held at the United States Department of the Treasury. As of October 2000, when the Byrd Amendment was enacted, one report stated the Treasury Department collects about $40 million annually in ADs and CVDs, though a different report put the figure at $125 million.[57] The Customs

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55. *Id*. § 1675c(b)(1) (emphasis added).

56. *See id*. § 1675c(b)(4) (listing the "qualifying expenditure[s]" in items (A)-(J)).

57. *See* Sebastian Mallaby, *Byrd Poison*, WASH. POST, Oct. 23, 2000, at A-23 (mentioning the $125 million statistic); Alden, *supra* note 48, at 4 (mentioning the $40 million

Service also receives from the United States International Trade Commission (USITC) a list of "affected domestic producers," in connection with each AD or CVD order, who are eligible to receive the offset.[58]

Upon certification by the Commerce Department, an affected domestic producer is eligible to receive the offset for a qualifying expenditure incurred since the AD or CVD order was issued. The Customs Service then disburses the offset amount to that producer. The Customs Service makes the distributions from all assessed ADs and CVDs (including interest earned thereon) collected during the preceding fiscal year, and does so within 60 days of the beginning of the subsequent fiscal year. If the sum total of certified claims equals or is less than the total amount of offset available, then each affected domestic producer with a certified claim is paid in full. If the sum of certified claims exceeds the total available offset, then each claimant is paid a *pro rata* amount calculated on the basis of its claim. Shortly after an AD or CVD order is terminated, and all merchandise subject to the order has been liquidated and duties assessed have been collected, the special account into which offset monies had been deposited is also terminated.

Put succinctly, one way to characterize the Byrd Amendment is as a "victim's compensation fund" for petitioners in AD or CVD cases who have proved themselves to have been materially injured by dumping or subsidization (or threatened with material injury). The Amendment channels duties collected in these cases to the victims – the "affected domestic producers" of dumped or subsidized imports. The victims then may spend the funds on programs that might help them recover from these unfairly traded imports. Characterized in this noble-sounding manner, how could the Congress reject the idea? The measure passed the House of Representatives on October 11, 2000, and the Senate on October 18.[59] Not wanting to delay the rest of the legislation to which the Byrd Amendment was attached (including essential spending), President Clinton signed the Amendment into law on October 28, 2000.[60] As he told reporters, "I decided on balance this bill advances the interests of the American people . . . . That's why I signed it, and that's how progress is made, when we work together and have honorable compromise. No one gets everything he or she wants."[61]

Of course, the noble characterization was not the one adopted by most of America's trading partners, and even by many American observers, and the President's pragmatic justification was unpersuasive to them. Member after Member of the WTO accused the United States of flagrantly violating its multilateral trade law commitments, particularly under the GATT and Uruguay Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement," or "AD Agreement"), and/or the SCM Agreement.

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statistic).

58. *See* 19 U.S.C. § 1675c(d)(1).

59. Rossella Brevetti et al., *EU, Japan Weighing WTO Challenge to Byrd Amendment Dumping Provision*, 17 Int'l Trade Rep. (BNA), No. 43, at 1682 (Nov. 2, 2000).

60. *For the Byrds*, *supra* note 47, at 89.

61. Brevetti, *supra* note 59, at 1682 (quoting President Bill Clinton).

The spokesman for the EU, Anthony Gooch, said "[i]t isn't just a U.S.-EU problem but a rest-of-the world trading problem . . . . The U.S. will have problems with everyone."[62] The Japanese Vice Minister of International Trade, Katsusada Hirose, offered the same point: "This is a problem of concern to many countries around the world, not just Japan alone."[63]

In brief, the critics charged the WTO agreements already set ADs and CVDs to offset unfair foreign pricing and subsidization, respectively, and "handing them [the duties] over as subsidies to domestic firms adds a second layer of protection."[64] In other words, the EC and many other WTO Members accused the United States of concocting "a double protection for domestic U.S. industry."[65] They urged that "WTO rules allow only for governments to impose tariffs against dumped [or illegally subsidized] products, not to pass those monies on to domestic competitors."[66] One American observer added:

> The most charitable view of Byrd's law is that it is simple pork, provided for the benefit of the steel industry in his native West Virginia [a major user of AD and CVD law]. . . .Protectionists in the Senate have been pushing cash prizes for years, but the idea was always defeated on the merits. For one thing, the scheme may well be illegal under World Trade Organization rules; and if it isn't, other countries will copy the idea to keep out U.S. products. For another, the whole body of anti-dumping law penalizes U.S. firms that depend on competitive imports. There is not much sense protecting steel when steel-using industries – cars, industrial machinery, construction and so on – employ many times as many workers.[67]

Fortunately, the controversy did not descend to the level of other WTO Members unilaterally enacting Byrd Amendment analogs. However, when the

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62. *Id*.

63. *Id*.

64. *For the Byrds*, *supra* note 47, at 89.

65. Guenter Burghardt, Ambassador from the European Union to the United States, *quoted in* Alden, *supra* note 48, at 4. *See also* Daniel Pruzin, *WTO Members Denounce Adoption of Byrd Amendment by United States*, 17 Int'l Trade Rep. (BNA), No. 44, at 1699 (Nov. 9, 2000) (reporting on the opposition from Australia, Brazil, Canada, Chile, India, Mexico, New Zealand, South Africa, and South Korea, and the Brazilian characterization of the offset as "triple protection" – targeted companies pay, American firms profit, and American firms receive an unfair subsidy to the detriment of foreign competitors).

66. Alden, *supra* note 48, at 4 (mentioning this statistic).

67. Mallaby, *supra* note 57, at A23. Not surprisingly, among the American groups opposed to the Byrd Amendment, and vowing to help seek its repeal, were the Consuming Industries Trade Action Coalition and the National Foreign Trade Council. *See* Gary G. Yerkey et al., *EU Could Move Against "Byrd Amendment" in WTO as Early as this Week, Official Says*, 17 Int'l Trade Rep. (BNA), No. 42 at 1626 (Oct. 26, 2000).

consultation phase of WTO dispute proceedings failed, eleven Members eagerly filed actions against the United States in two joint complaints, filed in July and August, 2001. Even formation of a panel was difficult. The WTO Director-General stepped in to determine its composition, at the request of the complaints, pursuant to Article 8.7 of the DSU.

Major Substantive Issues on Appeal[68]

The Panel, established in October 2001, took until the following September to issue its report. When it did, the United States was faced with a stark choice: repeal the Byrd Amendment, as the Panel recommended, or appeal. The Panel held the Amendment violated Articles 5.4, 18.1, and 18.4 of the AD Agreement, Articles 11.4, 32.1, and 32.5 of the SCM Agreement, and Articles VI.1-2 of *GATT*.[69] The United States took little time in making its choice: in October 2002, it chose to fight on. What were the grounds for the appeal? The United States argued the Panel had erred in all of these holdings.

Specifically, the United States argued the Byrd Amendment is a permissible, specific action against dumping or subsidization, and thus, is consistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. Both provisions deal with the range (or lack thereof) of permissible remedies. Article 18.1 of the AD Agreement states simply: "No *specific* action *against* dumping of exports from another [WTO] Member can be taken except *in accordance with* the provisions of GATT 1994, as interpreted by this Agreement (emphasis added). A footnote to the provision clarifies that Article 18.1 does not preclude action under other relevant WTO agreements. Article 32.1 of the SCM Agreement is nearly a verbatim text: "No *specific* action *against* a subsidy of another [WTO] Member can be taken except *in accordance with* the provisions of GATT 1994, as interpreted by this Agreement" (emphasis added). A footnote nearly identical to that for Article 18.1 follows this provision.

Moreover, because the Byrd Amendment is consistent with these provisions, the United States argued on appeal it does not run afoul of Article 18.4 of the AD Agreement, nor of Article 32.5 of the SCM Agreement. These provisions amount to guarantees provided by each WTO Member that its laws comply with the respective accords. Article 18.4 of the AD Agreement says: "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, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question." In parallel fashion, Article 32.5 of the

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68. This discussion is drawn from the World Trade Organization. *WTO Update*, *supra* note 45, at 115-17; *Byrd Amendment* Panel Report, *supra* note 45, ¶¶ 1.1-2.7.

69. The Panel also ruled the Byrd Amendment violated Article XVI.4 of the Uruguay Round Agreement Establishing the World Trade Organization (WTO Agreement) and agreed it nullifies or impairs benefits accruing to the complaints under the relevant agreements.

SCM Agreement says: "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, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question."

Holdings and Rationale[70]

1. The Overall Result

The Appellate Body rejected all of the arguments central to the American appeal. The United States was successful in only one substantive aspect of its appeal – namely, that the Byrd Amendment itself was consistent with Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.[71] The Appellate Body upheld the finding of the Panel, namely, that the Byrd Amendment creates a non-permissible specific action against dumping and subsidization, in violation of Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement, respectively. The Appellate Body's recommendation, as usual, was couched in the polite diplomatic phrases of public international law jargon. It requested that the United States bring the Byrd Amendment into conformity with WTO obligations. However, from an American perspective, in practice what that recommendation really said – and indeed, could only say, given the nature of the Byrd Amendment – was to repeal the law.

The Appellate Body based its reasoning on a straightforward interpretation of the ordinary meaning of the words in Articles 18.1 and 32.1 of the AD and SCM Agreements, respectively. Two words in particular are important: "specific" and "against." The Appellate Body interpreted these words as preconditions for the application of the Articles to an AD or CVD measure. That is, it said a measure must be "specific" to dumping or subsidization, and it must be directed "against" dumping or subsidization. Otherwise, the measure is not governed by the rules of Article 18.1

70. *WTO Update*, *supra* note 45, at 115-17; *Byrd Amendment* Appellate Body Report, *supra* note 18, ¶¶ 224-74, 318.

71. Consequently, the Appellate Body agreed with the United States it had acted in good faith with respect to its commitments under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement, and reversed the Panel's finding to the contrary. *See Byrd Amendment* Appellate Body Report, *supra* 18, ¶¶ 223(b), 275-99, 318(d)-(e).

In brief, Article 5:4 forbids the initiation of an AD investigation unless the authorities first determine the petition is supported by or on behalf of a domestic industry producing a product like that of the allegedly dumped merchandise. In making this determination, Article 5:4 obligates the authorities to make use of the 50% and 25% tests, i.e., to check if the petition is supported by domestic like product producers whose collective output (1) is more than 50% of total production of the like product made by domestic firms expressing a view about the petition (either support or opposition), and (2) is 25% or more of total output of the like product by the entire domestic industry. Article 11:4 has the same requirements for CVD investigations.

or 32.1. Assuming both conditions precedent exist, then the measure falls within the disciplines of these Articles. In that event, the measure is to be analyzed under them, which means it must be asked whether the measure was taken in accordance with the provisions of GATT 1994, as those provisions are amplified by the AD and SCM Agreements. Only if the scrutinized measure is not taken in accordance with these provisions does it run afoul of Article 18.1 or 32.1. In brief, the Appellate Body interpreted these Articles as creating a two-step test: (1) is a measure subject to discipline under them, which is to say, is the measure a specific action against dumping or subsidization; and if so, then (2) is the measure consistent with the GATT, AD Agreement, and SCM Agreement?

2. "Specific" Measure? – The Constituent Elements Test

In the first step of the test, the Appellate Body rested on its own precedent -- the *United States – 1916 Act* case.[72] The Appellate Body quoted from its earlier report:

> [T]he ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping.' 'Specific action against dumping' of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of 'dumping' are present.[73]

In the earlier case, the United States unsuccessfully argued that its Antidumping Act of 1916 did not fall within the scope of GATT Article VI, because it was aimed at predatory pricing, not dumping. The Appellate Body rejected this argument, holding that the 1916 Act was "specific action against dumping." It reasoned that the constituent elements of dumping were built into the essential elements for civil and criminal liability under the 1916 Act, and the way in which the Act is worded made it clear that liability could occur only if the constituent elements were present.

In the Byrd Amendment case, the Appellate Body simply applied the "constituent elements" test. The Appellate Body held that a remedial measure may be imposed only when the constituent elements of dumping or a subsidy are present in a "specific action" in response to dumping within the meaning of Article 18.1 of the AD Agreement, or in a "specific action" in response to subsidization within the meaning of Article 32.1 of the SCM Agreement. What are those constituent elements? They are, as the Appellate Body reminded in its Byrd Amendment report,

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72. Our *WTO Case Review 2000* discusses this case. *See WTO Case Review 2000*, *supra* note 20, at 44.

73. *United States –1916 Act*, ¶ 122, *quoted in Byrd Amendment* Appellate Body Report, *supra* note 18, ¶ 238 (emphasis original).

none other than the requirements for commencing an AD investigation set forth in Article VI.1 of *GATT* and elaborated on in Article 2 of the AD Agreement, and for commencing a CVD investigation set forth in Article 1 of the SCM Agreement.

Did the Appellate Body introduce any innovations with respect to the "constituent elements" test that it had established in the 1916 Act case? The answer is "yes." It introduced three innovations, though the first "innovation" was hardly much of one. First, noting the nearly identical language in Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement, the Appellate Body said the test applies to both texts.

Second, the Appellate Body squarely rejected the American argument that under the "constituent elements" test, the elements of dumping or subsidization had to be mentioned in the statute being challenged. The United States urged, unsuccessfully, that a trade remedy could not be aimed specifically against dumping or subsidization unless the constituent elements of dumping or subsidization were among the essential components of the remedy. The Appellate Body found the American interpretation and application of the *1916 Act* case too narrow. Rather, the Appellate Body explained that its *1916 Act* precedent does not require a statute to refer explicitly to the elements of dumping or subsidization, nor does it require those elements to be essential components in the statute, for that statute to be "specific" to dumping or subsidization. Rather, what matters is the strength of the link, or degree of correlation, between the remedy and dumping or subsidization.

The question of linkage leads to the third noteworthy innovation in the Appellate Body's Byrd Amendment holding. It amplified the "constituent elements" test by clarifying that the connection between (1) the elements of dumping or subsidization and (2) the application of the measure, must be strong. As the Appellate Body put it, so long as the measure is "inextricably linked to" or has "a strong correlation with" the constituent elements of dumping or a subsidy, then it is a "specific action" subject to the discipline of these Articles. In the *1916 Act* case, the remedy could be applied only in an instance of conduct that includes the constituent elements of dumping – hence, the link was strong. A strong link can occur whether the constituent elements are expressly or implicitly referred to in a statute. The Appellate Body added that even if it were to put some stock in the narrow interpretation urged by the United States – namely, that an express link must be found in the statute – that interpretation would not help the American case. The Byrd Amendment clearly implies the presence of the constituent elements of dumping by expressly referring to duties assessed pursuant to an AD or CVD order.

Why, then, did the Appellate Body conclude that the Byrd Amendment, itself, creates a "specific" action aimed at dumping or subsidization? Put directly, because "offset payments are *inextricably linked to*, and *strongly correlated with*, a determination of dumping, as defined in Article VI.1 of the GATT 1994 and in the Anti-Dumping Agreement, or a determination of a subsidy, as defined in the SCM Agreement" (emphasis added by the Appellate Body).[74] Indeed, the Appellate Body

74. *Byrd Amendment* Appellate Body Report, *supra* note 18, at 242. The Appellate Body

had no trouble applying its "constituent elements" test to the Amendment. Offset payments could be made only after AD or CVD duties had been collected, these duties could be collected only pursuant to an AD or CVD order, and an order could be imposed only following a determination of dumping as defined in GATT and the AD Agreement or subsidization as defined in the SCM Agreement. What more clear, direct, and unavoidable connection between dumping or subsidization, on the one hand, and offset payments on the other hand, could possibly exist?[75]

3. "Against" Dumping or Subsidization?: The Adverse Bearing Test

Of course, as indicated earlier, there are two conditions precedent in Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement – a measure must be both "specific" to dumping or subsidization and "against" dumping or subsidization. In the *1916 Act* case, the Appellate Body did not have to opine on the word "against," but in the *Byrd Amendment* case it could not avoid interpreting what the word means. The United States constructed a hypothetical scenario in which it decides to spend Byrd Amendment funds to cover international emergency relief. It argued that if spending the offset on a foreign relief project were impermissible under Article 18.1 and Article 32.1, then any expenditure of duties collected in dumping or subsidy cases would be illegal under WTO obligations. At first glance, the argument sounds like a scary slippery slope, in that the United States is challenging the Appellate Body not to overreach and regulate every expenditure of collected duties. However, the Appellate Body stood its ground, pointing out a fatal flaw in the American argument: spending money for international emergency assistance would not be "against" dumping or subsidization. Indeed, that expenditure would have no effect at all on the unfair trade practice. That is, the American argument ignored the second condition precedent.

How, then, did the Appellate Body analyze the word "against?" The Panel defined "against" as "adverse bearing," and held that duties collected in an AD or CVD case are "against" dumping or subsidization if they have a direct or indirect "adverse bearing on dumping or subsidization," even if the remedy does not apply

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ought to have used the disjunctive ("or"), not the conjunctive ("and"), because an inextricable link surely would mean a strong correlation, but not *vice versa*.

75. The Appellate Body also rejected the American argument that footnote 24 of the AD Agreement, and footnote 56 of the SCM Agreement, permit (respectively) dumping and subsidy remedies that are not "specific actions" within the meaning of Article 18.1 of the AD Agreement or Article 32.1 of the SCM Agreement. In other words, urged the United States, the footnotes authorize any measure that is not a "specific action" within the ambit of those Articles. The Appellate Body said the American argument essentially treated the footnotes as primary textual provisions, and accorded the Articles a residual status. In truth, the footnotes are accessory, and are designed to clarify the Articles. The clarification is simply that if an action is not "specific" under Article 18.1 or 32.1, under the constituent elements test from the *1916 Act* case, but is related to dumping or subsidization, then these Articles do not prohibit the action. *See Byrd Amendment* Appellate Body Report, supra note 18, ¶¶ 260-62.

directly to the imported good or to the entity responsible for that good. In effect, the Panel likened "against" to a burdensome effect on dumping or subsidization. The United States called for a more rigorous definition than what the Panel offered, saying "against" means the remedy must come into contact with the wrongful act or wrongdoer, and pointing to the New Shorter Oxford English Dictionary (OED) definition of "against," which lists "in contact with" as a meaning. Even more specifically, the United States argued that the word "against" means active, hostile opposition, and presumes that the remedy operates directly on the imported dumped or subsidized merchandise, or the entity responsible for that merchandise.

The United States was right to turn to the favorite lexicographic source for the meaning of "against." It might well have expected a more favorable ruling from the Appellate Body on this issue, as the Appellate Body on countless previous occasions had looked to the OED. Not so, however, as the Appellate Body (amazingly, perhaps) said "[i]t should be remembered that dictionaries are *important guides to*, *not dispositive statements* of, definitions of words appearing in agreements and legal documents" (emphasis added by Appellate Body).[76] Fair enough, but was the Appellate Body then guilty of cafeteria plan lexicography, using the OED in cases in which it found that dictionary helpful to the result it sought?

Leaving that uncertainty aside, the Appellate Body opined that "in contact with" refers to physical contact between two objects (i.e., tangible things touching one another). That context is entirely irrelevant to duties imposed in an AD or CVD case. In turn, the American view that the duties must have direct contact with imported merchandise or the entity responsible for that merchandise is unsustainable. The Appellate Body put the OED aside, turned to the Vienna Convention on the Law of Treaties, and looked at the text of Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. Its textual analysis uncovered no express requirement in either provision that a dumping or subsidy measure act directly against the imported merchandise, or the producers or importers of the merchandise.

Likewise, reasoned the Appellate Body, the object and purpose of these provisions do not support the incorporation into them, through the term "against," of a requirement that a dumping or subsidy remedy must come into direct contact with imported merchandise or the entity responsible for the merchandise. Both provisions are designed to circumscribe the range of actions a WTO Member can take unilaterally to counteract dumping or subsidization. Under the American interpretation, any measure not coming into direct contact with the imported merchandise or responsible entity would not be subject to the discipline of Article 18.1 or Article 32.1. In other words, WTO Members would be free to apply indirect measures against dumping and subsidization – and that freedom would undermine the object and purpose of these provisions.

What, then, does "against" mean? The Appellate Body upheld the Panel's definition. The word meant an AD or CVD measure has an adverse bearing on the practice of dumping or subsidization, in the sense of dissuading these practices, or

76. *Byrd Amendment* Appellate Body Report, *supra* note 18, ¶ 248.

creating an incentive to terminate them. In design and structure, the Byrd Amendment, said the Appellate Body, has exactly these effects.

Why? First, because the Amendment compels a transfer of financial resources from a producer or exporter of dumped or subsidized merchandise to the domestic competitor of that merchandise. The offset payments come from AD duties and CVDs ultimately paid by foreign producers and exporters. The offset is paid to "affected domestic producers" (i.e., competitors of the foreign entities that petitioned for relief or supported the petition). Second, the offset must be spent on a "qualifying expenditure," which is related to the production of the same product that is the subject of the AD or CVD order (i.e., the like domestic product). Third, the affected domestic producers are free to spend the offset on their production of a like product as they deem appropriate, which means they may use the funds to improve their competitive position relative to their foreign competitors whose products are subject to an AD or CVD order.

The Appellate Body inferred from these three facts about the operation of the Byrd Amendment that the offset has an adverse bearing on foreign producers and exporters of subject merchandise. Because producers in the United States of a like product compete with these foreign entities, and because the producers in the United States not only are eligible for the offset, but also can use it to bolster their competitive position, the foreign entities have an incentive not to engage in the practices of dumping or subsidization, and to terminate these practices. What more obvious illustration could there be of a measure "against" dumping or subsidies?

Having held the Byrd Amendment to be a "specific" action "against" dumping and subsidization, the Appellate Body needed to address one final substantive point: did it run afoul of the discipline of Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement? That discipline is contained in the language of these Articles, namely, that a measure "be taken in accordance with the provisions of GATT 1994, as interpreted by" the AD or SCM Agreement. Obviously, there was always the chance that the American legislation was both subject to and satisfied the discipline, by being consistent with GATT 1994. Of course, that was not the final outcome in the case.

With respect to AD actions, the Appellate Body found the Byrd Amendment inconsistent with GATT 1994. Indeed, the Appellate Body needed only two paragraphs to explain why. First, the Appellate Body reminded the United States that the reference in Article 18.1 of the AD Agreement to "GATT 1994" was to Article VI.2 of GATT, which authorizes a WTO Member to levy an AD dumping up to the amount of the dumping margin. The Appellate Body cited its report in the *1916 Act* case for the proposition that "GATT 1994" in Article 18.1 means Article VI.2. Second, the Appellate Body pointed out that the Byrd Amendment offset was not a definitive or provisional duty, nor was it a price undertaking. Here, too, the Appellate Body cited its *1916 Act* Report, in which it had held that GATT Article VI.2, when read in conjunction with the AD Agreement, limits the permissible remedies against dumping to a definitive AD duty, a provisional measure, and a price undertaking.

With respect to CVD actions, the Appellate Body could not rely on the *1916 Act* precedent, because that case involved a dumping statute. The United States said the reference in Article 32.1 of the SCM Agreement to GATT 1994 was to GATT Article VI.3, which authorizes imposition of a duty up to the amount of the estimated subsidy granted. The Appellate Body agreed with this point. Yet, it disagreed with the broader proposition put forth by the United States that GATT Article VI.3, when read in conjunction with the SCM Agreement, does not limit the permissible remedies for a subsidy to just one kind of measure – a CVD.

The American argument has a sound textual basis. In the AD Agreement, Article 1 refers to antidumping "measures." That, said the United States, is a generic term encompassing all remedies against dumping – not just an AD duty, a provisional measure, or a price undertaking. In contrast, Article 10 of the SCM Agreement refers to countervailing "duties." The term "duty" captures a CVD, and a provisional measure or price undertaking – but, nothing more, unlike the broader term "measure." Therefore, urged the United States, while the AD Agreement governs all measures against dumping, the SCM Agreement governs only duties against subsidization.

The Appellate Body was not persuaded. It turned again to its *1916 Act* Report, plucking language from it to the effect that its decision in that case was based not on any one provision in the AD Agreement, but the AD Agreement as a whole. Then, the Appellate Body reminded the United States of the identical terminology and structure in Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. In a paragraph that is nothing short of judicial interpretation to fill a void from the Uruguay Round, the Appellate Body stated:

> Article VI of the GATT 1994 and the Anti-Dumping Agreement identify three responses to dumping, namely, definitive anti-dumping duties, provisional measures and price undertakings. No other response is envisaged in the text of Article VI of the GATT 1994, or the text of the Anti-Dumping Agreement. Therefore, to be in accordance with Article VI of the GATT 1994, as interpreted by the Anti-Dumping Agreement, a response to dumping must be in one of these three forms. *We confirmed this in U.S. –1916 Act. We fail to see why similar reasoning should not apply to subsidization.* The GATT 1994 and the SCM Agreement provide four responses to a countervailable subsidy: (I) definitive countervailing duties; (ii) provisional measures; (iii) price undertakings; and (iv) multilaterally-sanctioned countermeasures under the dispute settlement system. No other response to subsidization is envisaged in the text of the GATT 1994, or in the text of the SCM Agreement. Therefore, to be "in accordance with the GATT 1994, as interpreted by" the SCM Agreement, a response to subsidization must be in one of

those four forms.[77]

The italicized sentences articulate the two crucial steps in the reasoning of Appellate Body. In the first sentence, the Appellate Body explains its precedent from an AD case. In the second sentence, the Appellate Body extends this precedent to CVD cases. Skillful as the American textual argument was, it was insufficient to overcome these steps.

The Appellate Body then took the third and final step. It applied this reasoning to the facts of the Byrd Amendment in a straightforward matter. The offset was not a definitive CVD, a provisional measure, or a price undertaking. Therefore, the offset was not a permissible remedy. Lest there be any doubt about these steps, the Appellate Body added a point about statutory construction and the untoward consequence of the American argument.

The Appellate Body said the American argument would render ineffective Article 32.1 of the SCM Agreement. Why? The United States defined Article VI.3 of GATT and Part V of the SCM Agreement (which encompasses Articles 10-23 and, ironically, is entitled "Countervailing Measures") to cover only countervailing "duties." Were that so, then Article 32.1 would be redundant, because it would not provide any additional discipline beyond Article VI.3 or Part V. The American argument also would render Article 32.1 inutile, because any specific action against subsidization, other than a duty, would not violate Article 32.1. In other words, it would be impossible to find a violation of Article 32.1 in cases of remedies aside from a CVD.

The "bottom line," therefore, according to the Appellate Body, is that GATT Article VI.3 and the SCM Agreement encompass all measures taken against subsidization, just as GATT Article VI.2 and the AD Agreement cover all measures against dumping. The two schemes are symmetrical and comprehensive in the discipline they impose on remedies against unfair trade practices.

Commentary

Why Litigate This Case?

Why did the United States bother to argue that the Byrd Amendment was not a "specific action" that was "against" dumping? Indubitably, it was aware of the "constituent elements" test from its loss in the *1916 Act* case. If a statute (the 1916 Act) aimed at predatory dumping qualified as a measure against dumping, then *a fortiori*, the Byrd Amendment does too, because it is set squarely within the principal American AD (and CVD) statute, which makes no pretense of targeting predatory pricing or any other bad behavior. Put bluntly, why did the United States not heed the advice, reported in November 2000, that it was unlikely to win the case in light of

77. *Byrd Amendment* Appellate Body Report, *supra* note 18, ¶ 269 (emphasis added).

the 1916 Act precedent?[78]

One answer is the United States adheres to the view that nothing the Appellate Body decides has any precedential value beyond the case in which it renders the decision. So, why not re-litigate the same questions, however self-evident the answers may be, and however helpful it might be to the WTO to conserve judicial resources for questions for first impression? A second answer, suggested by the Appellate Body in its Report, is the United States wanted to make a distinction between a statute that refers expressly to the constituent elements of dumping or subsidization (like the 1916 Act) and one that does not do so (like the Byrd Amendment).[79] As discussed above, the Appellate Body found this distinction too fine for its liking.

A third answer is that there were aspects of the Panel's reasoning the United States wanted to challenge and, it hoped, persuade the Appellate Body to overturn. If that is an, or the, answer, then perhaps the United States cannot be faulted for litigating the case. On one key point, the Appellate Body did side with the United States.

The Panel had found the Byrd Amendment creates a financial incentive for a domestic producer to file, or support, an AD or CVD petition. In turn, this incentive likely will lead to more such petitions. The United States disagreed with the Panel's reasoning, finding it overly broad, and arguing it is not a permissible ground to conclude the Amendment is "against" dumping or a subsidy. The Appellate Body agreed with the United States. The basic logic of both the Appellate Body and the United States is that a measure must not be held to be "against" dumping simply because it facilitates or induces the exercise of a right that is consistent with WTO obligations. Why not? One response, in support of the Panel, would be that the Byrd Amendment is analogous to a lottery. Producers in the United States have an incentive to file petitions, in the hope they might "win the lottery," meaning that they get a pay out if their petition is successful. In turn, the greater the number of petitions filed, the greater the disincentive to engage in dumping or receive a subsidy – generally speaking, and in respect of any particular class of foreign merchandise. However, a contrary response is that the better analogy is not to a lottery but to a victim's compensation fund. As Senator Max Baucus (D-Mont.) put it: the Byrd amendment is "good, common-sense trade policy. It simply states that the duties collected on unfairly traded imports should be redistributed to the industries injured by those imports. It is now benefiting industries in all 50 states."[80]

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78. In November 2000, the *International Trade Reporter* wrote: "Trade officials said it was *highly doubtful* that the Byrd amendment would survive a formal dispute challenge at the WTO, noting that the trade body *ruled earlier this year against the U.S. 1916 Antidumping Act* because it went beyond Antidumping Agreement provisions limiting penalties in dumping cases to the imposition of antidumping duties (emphasis added)." Pruzin, *supra* note 65, at 1700.

79. *See Byrd Amendment* Appellate Body Report, *supra* note 18, ¶¶ 243-44 (discussing this argument).

80. *Bush Administration Proposes Repeal*, *supra* note 22, at 222.

In other words, not unlike some successful criminal prosecutions or tort claims, in an AD or CVD case the Byrd Amendment simply calls for channeling funds to the "victims" of dumping or subsidization – the petitioners.

In its Report, the Appellate Body clearly indicated its appreciation for this characterization. It asked the following hypothetical question: would a legal aid program designed to help small domestic producers in AD or CVD investigations be a measure "against" dumping? The answer should be "no." Yet, under the Panel's reasoning, the answer would be "yes," because the Panel would view legal aid as a financial incentive likely to result in a greater number of petitions, investigations, and orders. In sum, the Appellate Body agreed with the United States that whether a dumping or subsidy remedy creates an incentive to file a petition is not, itself, an appropriate basis on which to conclude the remedy is "against" dumping.

Is there another explanation for why the United States fought the Byrd Amendment case? Perhaps WTO Members understand in advance that they will lose a case such as this one, but fight it anyway. Indeed, perhaps they hope to exhaust WTO adjudicatory procedures and suffer defeat. Member governments, and their supporters in congress or parliament, can use the consequent Appellate Body Report as a hammer with which to hit recalcitrant, protectionist legislators. That would imply the Appellate Body is not just an end in itself but also a means toward achieving freer trade.

To be sure, that appreciation must have been little comfort to the United States. It still had an international legal obligation to repeal the Byrd Amendment (or otherwise meet the Appellate Body's recommendation), as discussed in the Introduction, *infra.*

B. Antidumping Duties and Brazil

Citation

European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R (issued July 22, 2003, adopted August 18, 2003) (complaint by Brazil).

Facts[81]

In December 2000, Brazil challenged the imposition by the EC of AD duties on its exports of malleable cast iron tube and pipe fittings. The petitioner in the case had been the "Defense Committee of Malleable Cast Iron Pipe Fittings Industry of

81. *See WTO Update*, *supra* note 45, at 117-18; WTO Report of the Panel, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc. WT/DS219/R, ¶¶ 1.1-2.7 (July 3, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm [hereinafter *Brazil Cast Iron Tube* Panel Report].

the European Union," which consisted of six producers from Austria, Germany, Italy, Spain, and the United Kingdom representing 100% of the EC industry. The EC's investigation covered malleable cast iron tube or pipe fittings from one Brazilian producer-exporter, Industria de Fundição Tupy Ltda. (known as "Tupy"), along with those products originating in China, Croatia, the Czech Republic, Japan, South Korea, Thailand, and Yugoslavia. Tupy runs the largest foundry in Latin America.[82]

For both the dumping margin and injury determination, the period of investigation ("POI") was April 1, 1998 to March 31, 1999. Interestingly, the EC examined data from January 1, 1995 to March 31,1999 to analyze trends in injury. Also, significantly, Brazil officially devalued its currency, the Real, in January 1999 by 42 %. In February 2000, the EC imposed provisional AD duties on Tupy's cast iron tube or pipe fittings, and in August 2000, the EC adopted a definitive AD order with a duty rate for this merchandise of 34.8 %. Before the EC imposed AD duties, Brazil exported about $12 million worth of malleable cast iron tube and pipe fittings to the EC, but the market "essentially dried up" because of the duties.[83]

Brazil alleged that the EC had violated the first seven Articles in the AD Agreement, along with Articles 9, 11, 12, and 15, and GATT Article VI. Conceptually, the alleged violations pertained to an improper establishment of the facts, and an evaluation of the facts that was not unbiased or objective, with respect to all three parts of any AD investigation – the determination of a dumping margin, injury, and causation. Brazil also alleged that the EC made an erroneous finding with respect to community interest. The contestants spent most of 2001 and 2002 trying to settle the case, and considered the possibility of Tupy accepting minimum price undertakings.[84] But consultations failed and in July 2002, the DSB established a Panel to adjudicate the case.

Major Substantive Issues on Appeal[85]

In March 2003, the Panel ruled against Brazil on all of its claims, save for two. First, the Panel held that the EC violated Article 2.4.2 of the AD Agreement by "zeroing" negative dumping margins in the dumping margin determination. This holding was a direct application of a recent precedent set by the Appellate Body in

82. *See* Daniel Pruzin, *Brazil Restarts WTO Case Against EU Dumping Duties on Pipe Fittings*, 19 Int'l Trade Rep. (BNA), No. 15, at 673 (Apr. 11, 2002).

83. Daniel Pruzin, *Brazil, EU Suspend WTO Proceedings Over Iron Products Antidumping Dispute*, 19 Int'l Trade Rep. (BNA), No. 4, at 135 (Jan. 24, 2002).

84. *See* Pruzin, *supra* note 82, at 673 (Apr. 11, 2002) (discussing unsuccessful settlement negotiations).

85. *See WTO Update*, *supra* note 45, at 117-18; *Brazil Cast Iron Tube* Panel Report, *supra* note 81, at ¶¶ 1.1-2.7; WTO Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WTO Doc. WT/DS219/R, ¶¶ 64, 196 (July 22, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members2_e.htm [hereinafter *Brazil Cast Iron Tube* Appellate Body Report].

the *EC – Bed Linens* case.[86] Second, the Panel agreed with Brazil that, in the injury determination, the EC had not explained the lack of significance of certain injury factors set forth in Article 3.4 of the AD Agreement. That lack of transparency violated Article 12.2, which not only mandates public notice of all preliminary and final AD determinations, but also demands sufficient detail in the notice of the findings and conclusions reached on all material issues of fact and law. That lack of transparency also violated Article 12.2.2, which calls for an explanation of the basis for AD determinations, and in particular, of the reasons for accepting or rejecting claims or arguments made by importers or exporters.

Brazil appealed the adverse Panel rulings, raising seven issues encompassing both the dumping margin and injury determination phases of the case. On six of these issues, which raised questions under GATT Article VI.2, and Articles 1, 2, 3.1-5, and 17.6(I) of the AD Agreement, Brazil lost. The only issue on which Brazil prevailed concerned whether the EC acted inconsistently with Articles 6.2 and 6.4 of the AD Agreement, by failing to disclose to interested parties during the AD investigation the information on injury factors listed in Article 3.4 of the Agreement. Article 6.2 requires an investigating authority to give a respondent a full opportunity to defend its interests. Article 6.4 requires an investigating authority to provide interested parties with all non-confidential information in a timely fashion that is relevant to the case and is used by the authority in the investigation. The Panel held that the EC did not violate Articles 6.2 and 6.4, but the Appellate Body reversed.[87] Only to that extent, then, did the Appellate Body recommend to the EC that it bring its AD measure into compliance with the Agreement.

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86. The *EC - Bed Linens* case, and the practice of zeroing, are discussed in our *WTO Case Review 2001*. Raj Bhala & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 466, 518-40 (2002) [hereinafter *WTO Case Review 2001*]. *See also Brazil Cast Iron Tube* Panel Report, *supra* note 81, at 62 ¶ 7.211.

87. *See Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶¶ 64(e), 134-50, 196(e). The Appellate Body's discussion of this issue, which to a considerable degree is in the context of a particular exhibit in the case (known as "Exhibit EC-12"), is not treated further above. On a related issue – whether Exhibit EC-12 was properly before the Panel to assess the EC's injury determination under the factors listed in Article 3.4 of the AD Agreement – the Panel held in favor of the EC (i.e., that the Exhibit was properly before it). This issue also is not treated further above. *See id.* ¶¶ 64(d), 119-33, 196(d). In brief, the issue on which Brazil prevailed at the appellate stage concerned Articles 6.2 and 6.4 of the AD Agreement. Article 6.2 is a due process type of provision, stating "all interested parties shall have a full opportunity for the defense of their interests." It requires AD authorities to provide opportunities for these parties to meet with one another to present and rebut views, contains protections for confidentiality, and precludes drawing an adverse inference against a party if it is absent from a particular meeting. Article 6:4 also contains a due process protection, namely, that each interested parties must have a timely opportunity to see all non-confidential information relevant to the presentation of its case, if that information is used by the authority in the AD investigation. The Appellate Body agreed with Brazil the EC had violated Articles 6.2 and 6.4 of the AD Agreement by not disclosing to interested parties during the AD investigation certain data on the condition of the domestic industry. *Id*.

The six issues Brazil appealed and lost amounted to five conceptual questions:

> (a) *Impact of Currency Devaluation*. Did the EC act consistently with GATT Article VI.2, and Articles 1 and 2.4.2 of the AD Agreement, when it imposed AD duties after the devaluation of the Brazilian currency, the Real?[88]
>
> (b) *Calculating Constructed Value from Low-Volume Sales*. In the dumping margin determination, specifically, the calculation of Normal Value, did the EC act consistently with Article 2.2.2 of the Agreement when it included actual data from low-volume sales to obtain amounts for administrative, selling and general ("SG&A") expenses, and profits?[89]
>
> (c) *Cumulation without a Country-Specific Analysis*. In the injury determination, did the EC act consistently with Article 3.3 of the Agreement in cumulatively assessing the effects of dumped imports from several countries, including Brazil, without analyzing the volume and prices of dumped imports from Brazil individually under Article 3.2?[90]
>
> (d) *Explicit Analysis of Injury Factors*. In the injury determination, did the EC act consistently with Article 3.4 of the Agreement in its investigation of a particular injury factor, growth?[91]
>
> (e) *Causation, Known Factors, and Attribution*. Regarding causation, was the EC complying with Article 3.5 of the Agreement in assessing the causal relationship between dumped imports and injury, specifically, by (1) ruling that the difference in the cost of production between a Brazilian exporter and the EC was not a known factor (aside from dumped imports that were injuring the EC industry); (2) not examining the collective impact of other known causal factors, and (3) not attributing injuries caused by those other known factors to dumped imports?[92]

On all these questions, the Panel found the EC not to have committed any violations, and the Appellate Body upheld the Panel finding. In other words, on the major substantive conceptual challenges posed by Brazil's appeal, the EC prevailed.

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88. *See id*. ¶¶ 64(a), 196(a).
89. *See id.* ¶¶ 64(b), 196(b).
90. *See id.* ¶¶ 64(c), 196(c).
91. *See id*. ¶¶ 64(f), 196(f).
92. *See id*. ¶¶ 64(g), 196(g).

Holdings and Rationale

1. Textual Background[93]

To understand these conceptual questions, and why Brazil was unsuccessful in its appeal of them, a succinct summary of the intricate AD provisions they involve is useful. Article 1 of the AD Agreement contains the unsurprising, basic principle that an AD measure may be applied only in conformity with GATT Article VI and the rules of the Agreement. Article 2 contains those rules as regards the dumping margin calculation, and Article 3 sets forth the rules on the injury determination.

Article 2.1 of the AD Agreement explains that merchandise is "dumped" if it is sold in an importing country at an Export (or Constructed Export) Price that is less than its Normal Value. In turn, Normal Value is the "price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country," also called the foreign like product. However, at times the price of the foreign like product is not comparable with Export Price (or, if sales to the importing country are to an affiliate of the exporter, the Constructed Export Price). Indeed, there are instances in which Normal Value cannot be calculated from sales in the exporting country, for example, because the market in that country is not viable. Therefore, Article 2.2 of the AD Agreement provides alternative bases for deriving Normal Value, and states:

> When there are no sales of the like product in the *ordinary course of trade* in the domestic market of the exporting country or when, because of the particularly market situation or the *low volume of the sales* in the domestic market of the exporting country [footnote omitted], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[94]

In other words, if (1) there are no ordinary course sales of the foreign like product; (2) there are such sales, but they are incomparable to sales in the importing country

93. *See WTO Update*, *supra* note 45, at 117-18; *Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶¶ 64-118.

94. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf. The omitted footnote sets forth the test for home market viability as sales of 5% or more in the exporting country in comparison with sales of the subject merchandise in the importing country (i.e., the exporter's home market sales are at least 5% as large as its sales in the importing market) (emphasis added).

because of a particular market condition; or (3) there are such sales, but they are incomparable because of their low volume, then Article 2.2 mandates use of a proxy for Normal Value to compare with Export (or Constructed Export) Price. The proxies are sales of the foreign like product in an appropriate third country (i.e., Third Country Price), or Constructed Value (sometimes called "Constructed Normal Value," which is made up of the sum of the cost of production, SG&A expenses, and profits).

Article 2.2.2 of the AD Agreement focuses on the second proxy, Constructed Value. In its *chapeau*, it calls for use of actual data for the foreign like product on production and sales in the ordinary course of trade to determine the amounts for SG&A expenses and profits. It also explains (in item (I)) that if these data are unavailable, then data for the same general category of products as the foreign like product may be used. If those data are also unavailable, then Article 2.2.2 (in items (ii) and (iii)) permits use of weighted average amounts from foreign like product sales by other exporters under investigation, or any other reasonable method.

Article 2.4 of the AD Agreement elaborates on the context in which a comparison between Normal Value and Export Price is fair. The *chapeau* to this provision mandates that the comparison be fair, at the same level of trade (normally the ex-factory level), and with respect to contemporaneous sales. The *chapeau* also permits adjustments for differences affecting price comparison, such as differences in conditions and terms of sale, levels of trade, physical characteristics, quantities, taxation, or any other factor that might affect a fair comparison between Normal Value and Export Price. In cases in which Constructed Export Price has to be used in lieu of Export Price (because the sale transaction between exporter and importer is not an independent one), the *chapeau* encourages adjustments for costs (e.g., duties and taxes) incurred between importation and resale to an independent buyer in the importing country, and for profits accruing to the exporter or importer, and requires that the level of trade established for Normal Value be at the same level of trade as for Constructed Export Price. Finally, the *chapeau* instructs investigating authorities to tell parties what information they must produce to ensure a fair comparison, and admonishes the authorities not to impose an unreasonable burden of proof on the parties.

As for Article 2.4.2, it contains additional points about a fair comparison. In the first of its two sentences, this provision explains that in the usual case, a weighted average Normal Value is compared with a weighted average Export (or Constructed Export) Price, or an individual Normal Value is compared with an individual Export (or Constructed Export) Price on a transaction-to-transaction basis. However, the second sentence of Article 2.4.2 deals with unusual cases, where Export Prices during a POI fluctuate dramatically. An investigating authority is not supposed to compare a weighted average Normal Value with individual export transaction prices, unless it finds a pattern of Export Prices that differs significantly among purchasers, regions, or time periods. In a case in which an authority makes a comparison of a weighted average Normal Value with individual Export Prices, the authority must explain why

they cannot account for differences in the pattern of Export Prices using an average-to-average or transaction-to-transaction comparison.

Articles 3.1-3 of the AD Agreement cover the injury phase of an AD investigation. Article 3.1 explains that an injury determination, to be consistent with GATT Article VI, must be based on "positive evidence," and involve an "objective examination" of both "the volume of dumped imports and their effect on prices in the importing country," and "the consequent impact of these imports on domestic producers" of the like product. Article 3.2 explains that no single factor in an injury determination is dispositive, but clearly identifies the three key variables as: (1) volume (specifically, the volume of allegedly dumped imports, whether in absolute terms or production or consumption in the importing WTO Member); (2) price (specifically, the influence of the dumped imports on prices in the domestic market for like products, with respect to price undercutting, price depression, or price suppression); and (3) effects (specifically, the impact of the dumped imports on domestic producers of like products, where all relevant economic factors are to be studied, including ability to raise capital, capacity utilization, cash flow, domestic prices, employment, growth, inventories, magnitude of the dumping margin, market share, output, productivity, profits, return on investments, sales, and wages). Article 3.4 speaks directly to the third variable, providing a non-exclusive list of the fifteen potentially relevant factors and states that no one factor is decisive.

Article 3.3 permits an AD authority in the importing Member to cumulate (i.e., to assess cumulatively) the effects on these three variables of dumped imports from more than one Member that are simultaneously subject to investigation. It states:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

In other words, to cumulate, an investigating authority must ensure the dumping margin from each exporting Member is more than *de minimis* (i.e., 2% or more of the Export Price), the volume of dumped merchandise from each Member is more than negligible (i.e., 3% or more of imports of the like product in the importing Members), and the conditions of competition indicate cumulation is appropriate.[95] The authority also must check to be sure a cumulative assessment is justified by the

95. No special and differential treatment is offered under these rules. *See id*. art. 5.8.

conditions of competition among the dumped merchandise from different exporting Member, and between that merchandise and the like domestic product in the importing Member.

Article 3.5 deals with causation, essentially requiring an investigating authority to demonstrate "a causal relationship between the dumped imports and the injury to the domestic industry" on the basis of "an examination of all relevant evidence before the authorities." The third sentence of Article 3.5 tells the authority to "examine any *known factors* other than the dumped imports which at the same time are injuring the domestic industry" (emphasis added). This sentence also contains a non-attribution clause, whereby the authority is forbidden from attributing injuries caused by these other factors to the dumped imports. The fourth and final sentence identifies potential causal factors other than dumping that the authority may find relevant, such as changes in consumption patterns, competition between foreign and domestic producers, contraction in demand for the like product, export performance, productivity, restrictive trading practices, technology, and the volume and prices of non-dumped imports.

Finally, Article 17.6(I) concerns the standard of review to be exercised by a panel in assessing facts in an AD Agreement case. This provision requires a panel to "determine whether the authorities' establishment of the facts was *proper* and whether their evaluation of those facts was *unbiased* and *objective*" (emphasis added). If the authority satisfied these tests, then the panel must not overturn the evaluation by the authority, even if the panel itself might have reached a different conclusion. In brief, Article 17.6(I) embodies a standard of review akin to that articulated by the U.S. Supreme Court in *Chevron – Natural Resources Defense Council*, and the Appellate Body rejected Brazil's argument that the Panel had violated this standard by admitting a particular document (indexed in the case as "Exhibit EC-12") into evidence.[96]

2. Impact of Currency Devaluation[97]

As suggested above, the first of Brazil's five conceptual grounds for appeal involved GATT Article VI.2 and Articles 1 and 2.4.2 of the AD Agreement. Brazil faulted the EC for calculating the dumping margin using data from the entire one-year period of investigation (POI), including the time before the devaluation of the Brazilian Real. The POI was April 1, 1998 to March 31, 1999, and Brazil devalued the Real by 42% in January 1999. In calculating a 34.8% dumping margin, the EC used data from the entire year, comparing the weighted average of Normal Values with the weighted average of Export Prices. Brazil interpreted GATT Article VI.2

96. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). S*ee, e.g.,* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 147-56 (2d ed. 2001); The Scope and Depth of Judicial Review of Environmental Administrative Reaction, SA85 ALI B ABA 47 (1996); Antonin Scalia*, Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

97. *See Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶¶ 64-84, 196(a).

and Article 2.4.2 of the AD Agreement as compelling selection of a particular methodology for the calculation, and also as permitting comparison of Normal Value and Export Price on the basis of data from a subset of the POI. Brazil said the language of GATT Article VI.2 (namely, the introductory phrase " [i]n order to offset or prevent dumping") meant that an AD duty may be imposed only against, and in order to offset, present dumping. By looking at data from the entire POI, Brazil faulted the EC for not considering whether dumping existed in the present. Yet, the hefty currency devaluation eliminated dumping by the Brazilian exporter (i.e., there certainly was no dumping after January 1999).

What should the EC have done? Brazil argued that the EC was obligated to compare Normal Values with Export Prices solely from the post-devaluation period. The EC, according to Brazil, should have anticipated the level of AD duty strictly necessary to prevent future dumping by making a reasonable assumption for the future on the basis of data collected from the POI. In effect, Brazil inferred this general obligation – making a reasonable assumption about an AD duty needed to offset future dumping based on POI data – from the introductory phrase of GATT Article VI.2. Moreover, the EC should have realized that only Export Price data from the post-devaluation portion of the POI could form a basis for a reasonable assumption as to the level of duty necessary to prevent future dumping. Put simply, the EC should have used data from the last two months of the POI, following the devaluation, and thereby realized that there was no dumping at present to offset and no AD duty would be needed to prevent future dumping. Finally, Brazil deduced that the logical consequence of the EC violation of Article VI.2 was a violation of Article 1 of the AD Agreement, because this provision demands imposition of an AD measure only in conformity with Article VI.

As for Article 2.4.2 of the AD Agreement, Brazil agreed that the first sentence of that provision allows for either average-to-average or individual-to-individual comparisons; or, as the second sentence says, in unusual cases, a comparison of a weighted average Normal Value with individual Export Price transactions. Brazil urged that Article 2.4.2 compels selection of a methodology most appropriate to prevent future dumping. That is, the EC was supposed to choose the method that best accounts for the disappearance of any dumping that might have occurred after the devaluation of the Brazilian Real. Brazil said its case was an unusual one (falling under the second sentence of Article 2.4.2), in which the pattern of Export Prices differed significantly among time periods, and therefore, it was impossible to account for these differences using either of the denoted methodologies. For textual support, Brazil pointed to the words "differ significantly" (referring to the phrase in the second sentence describing "a pattern of export prices which differ significantly among different purchases, regions, or time periods"). Brazil interpreted "differ significantly" to mean that where Export Prices vary widely in a particular time period within a POI, the investigating authority must examine specific export transactions. In sum, Brazil said the EC should have done more than calculate Normal Value on the basis of a weighted average of data based on the entire POI. Rather, the EC should have compared this weighted average Normal Value

with prices of individual export transactions (i.e., individual Export Prices from the time within the POI after the devaluation of the Real), but not before then.

The Appellate Body disagreed completely with Brazil's GATT Article VI.2 argument, and held that the EC acted consistently with this provision (and, by implication, Article 1 of the AD Agreement). First, the Appellate Body characterized this argument as an effort to import into GATT Article VI.2, and, therefore, into Article 2.4.2 of the AD Agreement, a standard about a "reasonable assumption for the future." Yet, there was precious little reason for Brazil's argument. How could it be inferred from the purpose of GATT Article VI.2, which is that an AD duty is to offset or prevent dumping, that an investigating authority must select a particular methodology for comparing Normal Value and Export Price under Article 2.4.2 of the AD Agreement? Rather, said the Appellate Body, the statement of purpose means what it says: An AD duty should not be greater in amount than the dumping margin, as that would mean a duty more than offsetting or preventing dumping. In other words, the only obligation created by the opening phrase of GATT Article VI.2 is a limit (namely, the calculated dumping margin) on the amount of any AD measure. The precise rules for how to calculate a dumping margin are set out in Article 2 of the AD Agreement, which is the appropriate location because it is detailed and technical.

The Appellate Body also rejected a factual assumption underlying Brazil's GATT argument: that the 42% devaluation of the Real in January 1999 had eliminated the 34.8% dumping margin. The Appellate Body found no evidence to support this assumption and countered that the elimination of dumping is neither the inherent nor the automatic consequence of a steep devaluation. Many factors influence Normal Value and Export Price; most notably, the pricing behavior of producers, exporters, and importers. Only post-devaluation data would show whether they have responded to the devaluation by adjusting their prices.

Turning to the text of Article 2 of the Agreement, the Appellate Body observed that Brazil did not expressly accuse the EC of violating Article 2.4.2. Rather, Brazil challenged the Panel's interpretation of Article 2.4.2. Consequently, the Appellate Body did not render a decision as to whether the second sentence of Article 2.4.2 permits a comparison of Normal Value and Export Price based on data solely from a subset of the POI. Nonetheless, Brazil lost its interpretative argument about the second sentence. The Appellate Body declined to read this sentence, as Brazil did, as requiring the selection of a particular methodology. The Appellate Body faulted Brazil for not considering why the Uruguay Round negotiators provided a menu of methodological alternatives. Surely, if the negotiators had intended for an investigating authority to use a particular methodology in computing and comparing Normal Value and Export Price, then they would have said so in the text.

3. Calculating Constructed Value from Low-Volume Sales[98]

98. *See id*. ¶¶ 85-102, 196(b).

In the *Brazil Iron Tube* case, the EC relied on Constructed Value as a proxy for Normal Value. Brazil urged the Appellate Body to find that the EC violated Article 2.2.2 of the AD Agreement by relying in its analysis on Constructed Value rather than on home market cost data. Brazil pointed out that the EC had used actual data from low-volume sales to determine the amount of SG&A expenses and profits incurred by the Brazilian exporter in its home market. Brazil said use of these data was illegal under the *chapeau* to Article 2.2.2.

Specifically, in conducting the dumping margin determination, the EC found that the Normal Value of certain types of the foreign like product (i.e., the product produced and sold in Brazil, the exporter's home market, that was like the merchandise allegedly dumped in the EC) could not be based on their sales prices in the domestic market (i.e., Brazil). The reason for this conclusion enunciated by the EC was the low quantity of sales in that market of those types of the foreign like product. The EC found that these Brazilian sales in the home market were not in sufficient quantities to permit the prices in those transactions to be used as the basis for Normal Value. To reach this finding, the EC applied the standard home market viability rule that only sales in the exporting market (Brazil) of 5% or more of the total sales volume exported to the importing country (the EC) would be sufficiently representative to use as a basis for Normal Value. Thus, the EC resorted to a substitute for Normal Value for certain types of the foreign like product, instead using Constructed Value for them.

In any computation of Constructed Value, an investigating authority must use actual SG&A expense data and profit data from the exporter under investigation, because these are necessary elements in Constructed Value. Accordingly, the EC used data from the Brazilian exporter it investigated, to the extent that the data were from production and sales transactions in the ordinary course of trade. However, that meant that the EC relied on data for SG&A expenses and profit from sales transactions that the EC had ruled were insufficient in quantity to use as a basis for Normal Value. In other words, the EC used data from low volume sales to compute certain components in Constructed Value (SG&A expenses and profits), a proxy for Normal Value, even though the EC rejected those data for the purpose of calculating Normal Value. Therein lies the violation of Article 2.2.2 of the AD Agreement, according to Brazil. The *chapeau* of that provision precluded the EC from using the same data for Constructed Value that it had rejected for use in Normal Value.

This *chapeau* states simply that "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." The Panel interpreted these words to mean only data from production and sales not made in the ordinary course of trade had to be excluded in the calculation of Constructed Value. Because low volume sales are in the ordinary course of trade, the Panel reasoned, these sales had to be included among the actual data used for calculating Constructed Value. Brazil appealed against this interpretation, saying it equated "actual" data with "all" data. Brazil emphasized the

purpose of Article 2.2.2 of the AD Agreement, namely to reach a number for Constructed Value when Normal Value could not be calculated because of unrepresentative domestic sales prices. The logical inference from that purpose was that relying on data from previously excluded sales would yield a number for Constructed Value that is not representative (i.e., Constructed Value would be as unrepresentative as Normal Value would have been if Normal Value had been derived from those sales prices). In brief, Brazil said the Panel's interpretation rendered Article 2.2.2 a nullity.

Not so, claimed the EC. The *chapeau* of this sub-sub-paragraph (Article 2.2.2) plainly refers only to ordinary course sales, whereas the sub-paragraph (Article 2.2) mentions both ordinary course sales and low-volume sales. The EC inferred from this distinction that the omission of a reference to low-volume sales in Article 2.2.2 is meaningful; namely, low-volume sales must be included when calculating Constructed Value. Brazil's interpretation ignores the distinction and conflates ordinary course sales and low-volume sales, excluding low-volume sales under Article 2.2.2, because they are supposedly not in the ordinary course of business. If the drafters of the AD Agreement intended for them to be excluded, then they would have said so in Article 2.2.2. Moreover, urged the EC, using actual data from low-volume sales for Constructed Value, even when these data cannot be used for Normal Value, would not distort the calculation; that is, because low-volume sales are weighted differently in the computation of Constructed Value than they would be for Normal Value.

The Appellate Body agreed with the Panel's holding and the EC's rebuttal to the Brazilian argument. Examining the plain meaning of the text of Article 2.2.2, particularly the *chapeau*, the Appellate Body said that if actual data for SG&A expenses and for profits exist, then an investigating authority must use them in calculating Constructed Value. The options for this calculation contained in items (i)-(iii) (namely, use of actual SG&A and profit data for the same general category of products as the foreign like product, use of data from other exporters subject to investigation, or any other reasonable method, respectively) are unavailable if the actual data for the exporter in question exists. Brazil, according to the Appellate Body, was trying to avail itself of alternative methods for calculating Constructed Value by creating an exception, with no support in the text of Article 2.2.2, for data from low-volume sales.

4. Cumulation without a Country-Specific Analysis[99]

Brazil's third of five conceptual grounds for appeal concerned the EC's decision to cumulate the impact of dumped imports. In the injury determination, the EC cumulatively assessed the effects of dumped imports from several countries, including Brazil, without analyzing the volume and prices of dumped imports from Brazil individually under Article 3.2. Brazil argued that an individual assessment,

99. *See id*. ¶¶ 103-18, 196(c).

pursuant to Article 3.2 of the AD Agreement, was a prerequisite to cumulation under Article 3.3. That is, an investigating authority must conduct a country-specific analysis to identify the imports of a particular country as a likely source of negative effects on the domestic industry of the importing country. After all, without this analysis, the authority would be able to impose an AD duty on products from a country even if those products, in contrast to merchandise from other countries, are not causing injury to the domestic industry.

Brazil further argued that the EC wrongly cumulated import volumes and prices. Cumulation is supposed to entail an assessment of the effects of dumped imports, whereas the volumes and prices of dumped imports are not effects of those imports; rather, they are factors that may cause injury. In other words, Brazil distinguished between "factors" like volumes of dumped imports and prices in the importing country that cause "effects," and urged that factors themselves cannot be considered the effects of imports.

The EC's rebuttal was straightforward: nothing in the text of Article 3.3 requires a country-specific analysis before cumulation, and there is no distinction in that text between "factors" like volume and price and "effects" of dumped merchandise. This plain-meaning approach to the text, said the EC, was supported by the object and purpose of cumulation. It is designed to permit an investigating authority to impose an AD duty on dumped merchandise from several countries if they cause injury. The Appellate Body agreed with the EC, and thus also with the holding of the Panel. In brief, the Appellate Body ruled that Article 3.2 of the *AD Agreement* does not require an investigating authority to analyze the volume or effect of dumped imports on a country-by-country basis as a pre-condition to assessing cumulatively the injurious effects of the dumped imports under Article 3.3. In rendering this decision, the Appellate Body provided an edifying summary of the purpose of cumulation:

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the Anti-Dumping Agreement, the negotiators appear to have recognized that a domestic industry confronted with dumped

> imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. Consistent with the rationale behind cumulation, we consider that changes in import volumes from individual countries, and the effect of those country-specific volumes on prices in the importing country's market, are of little significance in determining whether injury is being caused to the domestic industry by the dumped imports as a whole.[100]

To be sure, the Appellate Body did not ground its holding on its view of the purpose of cumulation. Rather, it stressed the words of the AD Agreement itself as the basis for its decision. The Appellate Body read the plain language of Article 3.3 as containing three conditions before cumulation of the effects of imports from several countries is permissible: (1) the dumping margin from each individual country is not *de minimis*; (2) the volume of imports from each individual country is not negligible; and (3) cumulation is appropriate in light of the conditions of competition among the imported products and between the imported products and the like domestic product. No other conditions in the text are set out. The only kind of country-by-country import volume analysis required under Article 3.3 is to check that country-specific import volumes are not negligible. Similarly, nothing in the language of either Article 3.1 or 3.2 calls for a country-by-country analysis of import volumes or prices. Rather, those provisions refer solely to "dumped imports." Hence, concluded the Appellate Body, there were no textual grounds for Brazil's assertion that a country-specific analysis of the potential negative effects of volumes and prices of dumped imports is a prerequisite for a cumulative analysis of the effects of all dumped imports.

What about Brazil's corollary argument, distinguishing between "factors" (e.g., volume and price) and "effects" (i.e., of dumping)? The Appellate Body was mystified by it, finding the distinction far too fine and, significantly, without textual support. The Appellate Body found support in the AD Agreement for the contrary position. Article 3.5 articulates the "effects of dumping, as set forth in paragraphs 2 and 4." Indeed, throughout Article 3, the words "effects" and "factors" are used interchangeably.

5. Explicit Analysis of Injury Factors[101]

The EC admitted that Article 3.4 of the AD Agreement requires an

100. *Id*. ¶ 116 (emphasis original).
101. *See id*. ¶¶ 151-66, 196(f).

investigating authority to consider all fifteen injury factors listed in that provision, including the actual and potential negative effects of dumped imports on the growth of the importing country's domestic industry making a like product. The EC also admitted it lacked a separate record of evaluation of this variable (i.e., it had not made an explicit evaluation of growth). Yet, the EC implicitly checked growth and its consideration of this factor was implicit in its analysis of the other variables. For instance, the EC analyzed capacity utilization, employment, market share output, productivity, profit, return on investment, and sales, and that analysis touched on the performance and relative expansion and contraction of the domestic industry. In particular, the EC's order, whereby it imposed AD duties in the case, made express mention of negative trends with respect to these factors and therefore, by implication, to the lack of growth.

Brazil's appellate argument was, put candidly, simply was not good enough. Brazil read Article 3.4 to mandate an express evaluation, with a record to this effect, of each injury factor. Indeed, Brazil interpreted the mandate to mean an investigating authority must put each factor into context, weigh them against one another, and then draw appropriate overall conclusions. If it were good enough to deduce from the evaluation of other factors that one factor had been weighed, then, according to Brazil, the fundamental obligation to check all of the factors would become ineffectual. The EC's rebuttal was to recite the precedent in the *Thailand – H-Beams* case. In that case, the Appellate Body ruled that while an investigating authority must consider each economic factor, an investigating authority need not disclose or publish a finding on each variable.[102]

In *Iron Tube*, the Appellate Body agreed with the EC's rebuttal and the underlying Panel decision. The Appellate Body found support in the text of the AD Agreement for a distinction between the analysis of each injury factor and the manner in which the results of the analysis are set out in published documents. It held it unnecessary in every AD investigation to create a separate record of the evaluation of each injury factor listed in Article 3.4. In brief, while Article 3.4 identifies what factors an investigating authority must examine, it does not tell the authority how to report its examination of them. Article 3.1 does call for "positive evidence" and an "objective examination." Article 3.4 simply does not deal with the manner in which an authority publishes its results as to each criterion. In the *Iron Tube* case, the Appellate Body noted that it was reasonable for the Panel to conclude that the EC addressed the growth factor.[03]

6. Causation, Known Factors, and Attribution[103]

Did the EC commit two errors under Article 3.5 of the AD Agreement, as alleged by Brazil, concerning causation? First, Brazil challenged the EC's finding

102. *See WTO Case Review 2001*, *supra* note 86, at 541-54.

103. *See Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶¶ 167-95, 196(g).

103. *See Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶¶ 167-95, 196(g).

that the relatively higher cost of production of the domestic industry in the EC was not a known factor other than dumped imports. Brazil argued that the EC should have examined, as a known factor causing injury other than the dumped imports, the relative cost efficiency of the Brazilian exporter under investigation. Brazil offered evidence that its exporter made the so-called "black heart" fittings at a lower cost of production than the like product made by EC producers, which were "white heart fittings." In its causation analysis, the EC ought to have considered this cost of production difference, or comparative advantage, by engaging in a margins analysis. After all, the selling prices of the Brazilian and EC products reflected the difference in cost efficiency, thus a significant reason for injury to the EC's industry was not due to the effects of dumping.

The problem with Brazil's first challenge – from the EC's, Panel's, and Appellate Body's viewpoint – was that it neglected a key fact. Brazil had failed to mention the cost efficiency difference in the context of the EC's causation analysis. True, Brazil mentioned it in the context of the EC's dumping margin and injury determinations, and it is also true that Brazil believed that mentioning it in those contexts would make cost efficiency a known factor when the EC did its causation analysis. Yet, under Article 3.5, an investigating authority can limit its causation examination only to those factors raised by the complainant and respondent in the context of the causality analysis, presumably because only those factors are known to it. In other words, raising a factor (such as cost efficiency) in one investigation phase does not render it a known factor in another phase.

The Appellate Body admitted that the AD Agreement contained three ambiguities relevant to the case. First, it does not expressly state how a causal factor other than dumped imports becomes "known" or should become "known" to an investigating authority. Second, the text fails to tell parties the manner in which they must raise a factor to make it "known." Third, the Agreement does not define the degree to which a factor must be unrelated to the dumped imports, nor does it state whether the factor must be extrinsic to the exporter and the dumped product, in order to qualify as a factor other than dumped imports. No matter, however, said the Appellate Body. It did not feel any need to resolve these uncertainties.

That was because Brazil's challenge hinged on its factual pleading that its industry boasted relatively cheaper production costs. The EC rejected that contention, finding the cost differential minimal, and the Panel affirmed the EC's finding. As a factual matter, the Appellate Body could not pursue it. However, it did endorse the EC's legal interpretation and application of Article 3:5. Once the EC determined the allegation of a cost differential lacked foundation, there was no such factor for it to analyze in the context of causation, and the EC was under no obligation to examine the effects of this differential when analyzing causation.

Brazil's second challenge regarding causation was about the non-attribution obligation in Article 3.5. The basic duty is a prohibition against attributing to dumped imports the injuries plaguing the domestic industry simultaneously caused by known factors other than dumped imports. The duty is premised on the undisputed rationale that only by separating and distinguishing the injurious effects on the

domestic industry in the importing country of other factors from the effects of dumping is it possible to ascertain whether injury ascribed to dumped imports actually is caused by those imports.

However, from Brazil's perspective, the problem was not the obligation itself, but how the EC endeavored to meet it. The EC analyzed causal factors other than dumped imports on an individual basis, but did not consider the collective effects of these factors. In the case, those other factors were imports from third countries not subject to investigation, a decline in consumption in the EC, and substitution of products. The EC found the causal contribution to injury from two of these causal factors to be insignificant, and for one factor not sufficiently significant to break the causal link between dumped imports and injury. Consequently, the EC was wrong to decide not to attribute to dumped imports the injuries caused by factors other than dumping, and it was wrong to conclude dumped imports caused material injury to its domestic industry.

More specifically, Brazil interpreted Article 3.5 as calling for a two-step causation analysis. In step one, an investigating authority must separate and distinguish the injurious effects of other causal factors individually from the effects of dumped imports. The EC had done that without fault, but not taken the second step. In step two, the authority must also separate and distinguish the collective effects of the other causal factors from the effects of dumped imports. To perform that task, the authority must evaluate the collective effect of the other factors on the alleged causal link between dumped imports and injury. Why is step two needed in every AD investigation? According to Brazil, because only by separating the collective effects of causal factors other than dumped imports from the effects of dumped imports will it be clear the other factors are not a sufficient cause to break the causal link between dumped imports and injury. If the EC had looked at the collective effects of other causal factors, then it would have realized that those collective effects undermine the causal link between dumped imports and injury.

The Panel disagreed with this logic. It had confidence in the EC's causation methodology, saying that even though the EC analyzed each causal factor solely on an individual basis, that analysis ensured that the EC had not improperly attributed to dumped imports the effects of causal factors other than dumped imports. The EC, of course, defended its methodology on appeal, saying it was consistent with Article 3.5. It agreed with Brazil that Article 3.5 requires an investigating authority to separate and distinguish the injurious effects of various causal factors in order to ensure injuries caused by other factors are not attributed to dumped imports. But, it disagreed with Brazil on the necessity of a second step. The AD Agreement does not compel a particular methodology to fulfill the non-attribution obligation, and Brazil was trying to import one into the text of Article 3.5 without any textual basis for doing so.

The Appellate Body agreed with the EC. It held that the non-attribution obligation in Article 3.5 does not require an investigating authority, when engaged in a causation analysis, to examine the effects of other causal factors collectively after it has examined their effects individually. The Appellate Body cited its Report in the

Japan – Hot Rolled Steel case, in which it explained the non-attribution obligation entailed separating and distinguishing the effects of other causal factors from the effects of dumped imports, so that all of these effects are not lumped together and become indistinguishable.[104] The Appellate Body also cited its *Hot-Rolled Steel* Report for the proposition that the AD Agreement does not prescribe any methodology by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports. In brief, as long as the authority fulfils the non-attribution obligation, it is free to choose any methodology to inquire into a causal link between dumped imports and injury.

Notwithstanding the precedent, the Appellate Body faulted Brazil's proposed methodology. Step two was not needed in every case (i.e., it is not always necessary for an investigating authority to examine the collective effects of other causal factors on the domestic industry to be sure that injuries ascribed to dumped imports actually are caused by those imports rather than other factors). To be sure, in some cases a collective analysis may be needed, and the Appellate Body cited approvingly the Panel's suggestion that multiple insignificant factors could collectively constitute a significant cause of injury so as to sever the link between dumped imports and injury. However, whether the second step advocated by Brazil is needed will depend on the facts of each case.

Commentary

1. Vitiating Article 2.2.2 (Second Sentence)?

The argument made by Brazil under GATT Article VI.2 and Article 2.2.2 of the AD Agreement is not as weak as the Appellate Body Report seems to imply. In ruling against it, the Appellate Body said Brazil's fundamental point "that when a major change, such as in this case a steep and lasting devaluation, occurs at a late stage of the POI, the dumping margin determination should be confined to and based on the data following that major change" leads to "anomalous" results. The Appellate Body offered three hypothetical illustrations.[105]

First, suppose the major change occurs at the end of the POI. Then, Brazil's argument would imply the investigating authority would render a determination based on data from a highly attenuated period. Second, suppose the major change occurred after the end of the POI, but before a provisional (or preliminary) dumping margin determination by the authority (e.g., in the *Brazil Iron Tube* case, after April 1,1999, but before February 28, 2000). Brazil's argument would mean that the authority should ignore data from the entire POI, and redo the determination on the

104. *See WTO Case Review 2001*, *supra* note 86, at 554-606.

105. *See Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶¶ 78-79.

basis of data gathered from after the POI. Or it would mean changing the POI entirely. Third, the Appellate Body asked about a major official revaluation, or a dramatic market-driven appreciation, of the currency of the exporting country. These facts would be the opposite situation from what occurred in the case. Suppose the investigating authority found no dumping on the basis of data from the first three quarters of a year-long POI, but found that a revaluation or appreciation, which occurred in the last quarter of the POI, caused sales to be made at less than Normal Value. Then, applying Brazil's logic, the authority could render an affirmative dumping margin determination solely on data from the fourth quarter of the POI.

The Appellate Body said that the first hypothetical example demonstrates Brazil's argument could lead to the illogical result of making a dumping margin determination on little data from the tail end of the POI. The second hypothetical example shows the illogical possibility of basing the calculation on data from outside the POI, or on data from a newly established POI. The third illustration highlights the fact that Brazil's argument could be used against Brazil. A currency revaluation or appreciation would mean that prices in the Brazilian market, denominated in reals, translate into more euros (or dollars, depending on the currency of the importing country) after the exchange rate change than they did before the change. Consequently, Normal Value data would show higher values after, than before, the change. Because a positive dumping margin exists whenever Normal Value exceeds Export Price, the post-exchange rate change data likely would yield a positive dumping margin.

Everything the Appellate Body wrote in its Report on these points is correct. However, none of its comments addressed the central problem raised by Brazil: what qualifies as a major change under Article 2.2.2 of the AD Agreement? The Appellate Body's holding indicates that a large devaluation does not qualify, and thus does not trigger the average-to-individual methodology in the second sentence of this Article, and that in no event does Article 2.2.2 compel a particular methodology. However, it must be asked what kind of change would, in fact, qualify? As solid as the Appellate Body's legal analysis may be for excluding an event like the Real devaluation, its holding is risky as a practical matter. Does this holding essentially make the second sentence of the Article meaningless? The 42% devaluation inflicted a great deal of suffering in Brazil, and at least anecdotally, it has been said that half or more of Brazil's population faced food shortages and malnutrition. Surely a "major change" does not have to be a catastrophe, and yet the Appellate Body may have set the definition at that level, thus making the second sentence devoid of meaning in most situations.

Put differently, in ruling against Brazil, the Appellate Body made an underlying presumption; namely, that a POI, once established, is set in stone. Brazil's argument calls for more flexibility in a POI, not by shifting or stretching it, but by subdividing it when a major event occurs during the POI. In rejecting any such division of a POI, the Appellate Body saw not flexibility, but rather inconsistency, unreliability, and subjectivity. Did the Appellate Body simply trust the EC more than Brazil, when the EC urged that Brazil's argument would inject too

broad a judgmental role into the dumping margin determination?[106] If the parties had been reversed, with the EC as respondent, might the Appellate Body have been more comfortable with vesting the investigating authority with discretion to divide a POI?

To be sure, it is not fair to accuse the Appellate Body of favoring discretion when advocated by developed countries, but not when pushed for by developing countries. Moreover, to be fair to the Appellate Body, its observation that major events occurring at the end of a POI, or after a POI, can be accounted for in an administrative or sunset review of an AD order, is true. However, trade lawyers ought never to be willfully blind to a possible bias (perhaps unconscious or subconscious) that turns on the WTO Member making an argument. Further, while reviews of AD orders can evaluate the effect of major events, that is small comfort to the likes of the Brazilian exporter, which has labored for at least a year under an AD duty of 34.8%. At the very least, in rejecting Brazil's plea for flexibility, the Appellate Body may have vitiated the second sentence of Article 2.2.2 of the AD Agreement.

2. Skillful Argumentation under Article 2.2.2

Credit ought to be given to both Brazil and the EC for their arguments under Article 2.2.2 of the AD Agreement. This provision is technically complex, dealing with proxies for Normal Value in the dumping margin investigation. Lest it be said – and it often is – that developing countries lack the legal capacity to understand and argue about technical complexities, Brazil's performance is a counter-example. To be sure, Brazil and Burundi are different. However, the significant improvements in legal skills in one developing country may be a model for another. Indeed, India's advocacy in the *EC – Bed Linens* case is yet another example.[107]

As for the EC, it adroitly used a precedent created by the *Bed Linens* case to bolster its Article 2.2.2 argument in the *Iron Tube* case. Two points are fascinating about the EC's maneuver. First, the EC lost on the infamous "zeroing" issue in the *Bed Linens* case (to India), though the EC prevailed on other arguments. That defeat did not preclude the EC from learning by mining through the many arguments in the earlier case, and seeing what nuggets it could find for the later case. Second, the civil law traditions of many of the EC's constituent members might well have imposed a mindset against deploying a precedent. Evidently, the EC felt no such inhibition, and essentially argued like any good common law-trained group of lawyers would.

Thus, the Appellate Body cited approvingly to the discussion in the EC's appellate brief about the *Bed Linen* case.[108] In that case, the Appellate Body ruled that the phrase "actual amounts [of SG&A expenses and profits] incurred and realized" [by other exporters subject to investigation] in Article 2.2.2(ii) precludes exclusion of sales outside the ordinary course of trade (i.e., actual amounts derived

106. *See id*. ¶¶ 80-81.
107. *WTO Case Review 2001*, *supra* note 86, at 518-39 (discussing the case).
108. *See Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85, ¶ 100.

from non-ordinary course sales must be included in a weighted average calculation of Constructed Value under this provision). Why? The Appellate Body said the *chapeau* to Article 2.2.2 expressly excludes data from sales outside the ordinary course, but item (ii) contains no such exclusion. In *Bed Linens*, the Appellate Body held that " [t]he exclusion in the *chapeau* leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied."[109] It simply applied this holding in the *Cast Iron Tube* case, and admitted as much. If there is a criticism to be made, then it is neither against the argumentation by Brazil nor the EC. Rather, it is that the Appellate Body might have been somewhat more economical with words in coming to this finding.

3. Knowledge and Secretary Rumsfeld

Interestingly, and potentially significantly for future cases, the Appellate Body took issue with one aspect of the Panel's decision on causation. The Panel stated an alleged causal factor could be known for purposes of the dumping and injury determinations, but not for the causation determination. Obviously, Brazil thought this statement ludicrous. In contrast, the EC insisted on separate pleadings for each phase of the investigation (i.e., Brazil should have mentioned the cost differential factor in the causation phase, rather than presuming the EC knew of it from the other phases).

The Appellate Body agreed with Brazil, stating that a factor is either "known" to the investigating authority, or it is not "known:" it cannot be "known" in one stage of the investigation and unknown in a subsequent stage.[110] Unfortunately, the Appellate Body declined to pursue a deeper epistemological analysis. Might different parts of the EC's AD investigating authority know different things? Is actual knowledge required, or constructive knowledge enough? Worse yet, for the loyal readers of WTO publications, the Appellate Body missed a wonderful opportunity at injecting humor into its Report. The American Secretary of Defense, Donald Rumsfeld, has considerable appreciation for epistemological difficulties (and for humor), and offered this insight (albeit in the context of firing real weapons, not trade remedies):

> The message is that there are known knowns – there are things that we know that we know. There are known unknowns – that is to say, there are things that we now know we don't know. But there are also unknown unknowns – there are things we do not know we don't know. And each year we discover a few more of those unknown unknowns.[111]

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109. *Id*. ¶ 100 (quoting *EC - Bed Linens* Appellate Body Report, ¶¶ 33, 44).
110. *Id*. ¶ 178.
111. BBC Broadcasting House, *The Donald Rumsfeld Library of Quotations*, *at*

Apparently, at the time the Appellate Body drafted its Report, the Defense Secretary's insight was an unknown unknown. Or, was it a known unknown for some of the Appellate Body members? Whatever the answer, with this *Case Review*, the insight is a known known.

C. Countervailing Duties and Pre-Privatization Subsidies: The *Certain Products* Case

Citation

United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (issued December 9, 2002, adopted January 8, 2003) (complaint by the European Communities).

Facts[112]

This case is the child, if not sibling, of the 2000 *British Steel* case.[113] Indeed, there is a delicious irony in the comments of the spokesman of the EC, representing mostly civil law countries, about the link between the disputes: "The *British Steel* case *set a clear precedent* for a whole raft of cases."[114] As explained below, the spokesman may have been a bit enthusiastic in his application of precedent. There are material factual and legal distinctions between the two cases. In both cases the Appellate Body was presented with American countervailing (CVD) orders against

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www.bbc.co.uk/radio4/news/bh/rumsfeld.shtml (last visited Apr. 23, 2004); Timble, *Gallery of Fun Donald Rumsfeld Quotes*, *at* http://www.timble.me.uk/fun/ (last visited Apr. 23, 2004).

112. *See WTO Update*, *supra* note 45, at 112-14; WTO Report of the Panel, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WTO Doc. WT/DS212/R, ¶¶ 1.1-2.61 (July 31, 2002), *adopted* Jan. 8, 2003, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *US-Countervailing Measures* Panel Report].

113. *See* WTO Report of the Appellate Body, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138/AB/R (Oct. 5, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm. Our *WTO Case Review 2000* treats the earlier case. *WTO Case Review 2000*, *supra* note 20, at 63-73. *See also* Guy de Jonquières & Edward Alden, *EU Plans to Fight Punitive U.S. Duties*, FIN. TIMES, Oct. 31, 2000, at 10 (reporting " [t]he EU action is intended to build on its successful WTO complaint against U.S. countervailing duties on exports by British Steel. The WTO ruled against the measures, saying British Steel ceased to benefit from subsidies after it was privatised in the early 1990s . . . . U.S. officials said the ruling did not set a precedent for other cases.").

114. Joe Kirwin, *EU Will File WTO Challenge to Duties U.S. Imposed on Some EU Steel Imports*, 18 Int'l Trade Rep. (BNA), No. 30, at 1194 (July 26, 2001) (emphasis added) (quoting European Commission Spokesman Anthony Gooch).

subject merchandise from foreign producers that had received government subsidies. In both cases the subsidies were paid while the producers were state-owned enterprises. However, those subsidies had ceased on or before privatization, and privatization obviously meant a change in the ownership of the enterprises. In both cases, the controversy was about technical tests and change in ownership, with large policy implications.

The tests were used by the United States Department of Commerce ("DOC") in CVD investigations to determine whether the benefit of a pre-privatization subsidy carries through to a newly privatized entity. Only if the benefit survives the change in ownership could the United States lawfully impose a CVD. However, was the test itself, the means by which the DOC conducted the investigation, lawful? If the Appellate Body answered "no," then the DOC would have to go back to the proverbial "drawing board" and figure out a new, WTO-consistent methodology for deciding whether a financial contribution bestowed by a government on a state-owned enterprise ("SOE") redounds to the benefit of the enterprise after it is transferred to private ownership. Furthermore, the entire scheme the United States had in place to deal with merchandise from economies in transition was in doubt. China was first and foremost on this list, but so also were countries likely to be WTO Members soon or within a few years, such as Russia, Kazakhstan, Saudi Arabia, and Vietnam.[115] There is another delicious irony, this time associated with American policies. The United States, as a major element of its international economic policy, encourages transition-economy and developing countries to privatize their SOEs, so that the DOC policy of countervailing (and thus penalizing) privatized entities is at cross-purposes with what ought to be a prime objective of supporting market-based reforms.[116]

The *British Steel* and *Certain Products* cases must be read in light of these

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115. *See* Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 Int'l Law. (forthcoming Fall 2004) (discussing the accession of Saudi Arabia).

Not surprisingly, the Certain Products case attracted interest among WTO Members in which significant privatization transactions had occurred, were occurring, or were planned. For example, Brazil joined the EU complaint to the Panel. *See* Frances Williams, *Brazil in U.S. Steel Move*, FIN. TIMES, Jan. 9, 2001, at 10 (mentioning Brazil's complaint); Daniel Pruzin, *Brazil Joins in EU Complaint Against U.S. Countervailing Steel Duties*, 17 Int'l Trade Rep. (BNA), No. 50, at 1946 (Dec. 21, 2000) (explaining Brazil's steel exports, like cut-to-length plate, from producers such as CSN, USIMINA, and COSIPA, that were subject to CVD orders in the United States).

116. *See, e.g.*, Daniel Pruzin, *WTO Set to Rule Against U.S. on Countervailing Duties on European Steel*, 19 Int'l Trade Rep. (BNA), No. 20, at 866 (May 16, 2002) (quoting Richard Weiner, an attorney from the Brussels Office of Hogan and Hartson, who represented a European firm fighting the CVD orders). The WTO Panel Report in *Certain Products* "certainly bolsters the argument that the United States ought to rethink the way it treats its trading partners in the steel sector . . . . If they [*sic*] want the rest of the world to privatize in order to get rid of inefficient producers but don't allow these producers to get out from the countervailing duty orders on them through privatization, they basically discourage them from privatizing in the first place." *Id*.

dramatic implications, especially because it is rather easy to get lost in the technicalities of change in ownership tests.[117] In the earlier case, the Appellate Body held against the American practice. Specifically, the Appellate Body rejected the so-called "gamma methodology," and the United States conceded this point in the *Certain Products* case. With the gamma methodology, the DOC assessed the extent to which, if any, a transaction price in a privatization incorporated unamortized pre-privatization subsidies. If the price did not fully reflect those subsidies, then the DOC authorized issuance of a CVD order against the remaining unamortized subsidies. In contrast, with the "pass-through" methodology, the DOC presumed the totality of benefits from unamortized pre-privatization subsidies accrued to the post-privatized entity. Because of this holding in the *British Steel* case, the gamma methodology was not at issue in the *Certain Products* case. Also in *British Steel*, the Appellate Body agreed it was permissible for a WTO Member to presume the benefit of a non-recurring subsidy continues over a period of time, and for a Member to presume the period normally is the average useful life of the assets in the relevant industry. However, the Appellate Body said it would be impermissible for the second presumption to be irrebuttable. That, too, i.e., an irrebuttable presumption of benefits running with the average useful life of assets, was not at issue in *Certain Products*.

So while the gamma methodology was not at issue in the *Certain Products* case, another methodology used by the DOC was the focal point for controversy. Called the "same person" methodology (described below), it was a way for the DOC to decide whether the benefits from a pre-privatization subsidy continue after privatization. Indubitably, the DOC thought this test (unlike its predecessor, the gamma methodology), would pass WTO muster. The EC was angered by the severe impediment posed to its steel exports by American CVDs against subsidies bestowed in the 1980s, from which, said the EC, the producers and exporters no longer received a benefit following transparent, market-oriented privatizations.[118] In the second iteration, the DOC was no more lucky than in the first one. In the *Certain Products* case, as in the *British Steel* case, the Appellate Body again ruled against the American method.

The second ruling, like the first, came about by attack launched by the EU against American trade remedy laws. In November 2000, the EC brought a challenge against continued application of CVD duties by the United States on a range of products. The EC said that the United States was wrong to apply the so-called "change in ownership" methodology in reaching twelve affirmative subsidy determinations. This terminology reflects the context in which the methodology is applied by the United States DOC; namely, a change in the ownership of a company

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117. The American steel industry well understood the drama. *See* de Jonquières, *supra* note 113, at 10 (reporting "[l]awyers for the U.S. steel industry said the EU could be setting a dangerous precedent by insisting that companies should automatically be considered free of subsidies if they were privatised.")

118. *See* Daniel Pruzin & Joe Kirwin, *EU Announces it Will Initiate Case in WTO Against U.S. Duties on Steel*, 17 Int'l Trade Rep. (BNA), No. 45, at 1738 (Nov. 16, 2000) (discussing the EC's position).

from government to private hands (i.e., a transition from a SOE to a private company). Steel of one type or another was the subject merchandise in the twelve CVD orders. The subject steel merchandise came from France, Germany, Italy, Spain, Sweden, and the United Kingdom. There were fourteen different CVD investigations, resulting in twelve orders. Of these twelve orders, six stemmed from original investigations.[119] Two orders were in the context of administrative

119. Specifically, these six orders, and some basic facts about them, are as follows:

(1) *Stainless Sheet and Strip in Coils from France*, in which the DOC imposed a CVD of 5.38% on imports produced by Usinor-Sacilor S.A. ("Usinor") for subsidies received in the 1980s. The privatization of Usinor occurred between 1995-98, and the POI was 1997. Usinor challenged the DOC's final determination in the Court of International Trade (CIT), and the CIT remanded the case to the DOC to consider the effect of a major decision by the Court of Appeals for the Federal Circuit, Delverde SrL. v. United States, 202 F.3d 1360 (Fed. Cir. Feb. 2, 2000) (*Delverde III*), *reh'g denied* (June 20, 2000). (This decision is treated above.) The DOC applied the same person methodology, finding Usinor received a financial contribution and benefit from the French Government despite the change in ownership, because it was the same person before and after the privatization sale. The CIT issued a remand order in which it found the same person methodology to be inconsistent with the American CVD statute. *See* Allegheny Ludlum Corp. et al. v. United States, 182 F. Supp. 2d 1357 (Ct. Int'l Trade, Jan. 4, 2002).

(2) *Certain Cut-to-Length Carbon Quality Steel from France*, in which the DOC imposed a CVD of 5.56% and 6.86% on imports produced by Usinor and another steel company, GTS Industries ("GTS"), respectively. GTS had been a wholly-owned subsidiary of Dillinger, a German steel company, and Usinor had held a 70% stake in the parent company of Dillinger. However, between 1995-98, Usinor was privatized, and in 1996 Usinor cut its stake in the parent of Dillinger from 70 to 48.75%. The DOC agreed Usinor no longer controlled GTS, but said GTS benefited from subsidies Usinor received from the French Government in the 1980s. GTS complained to the CIT, which remanded the case to the DOC in light of the *Delverde III* decision of the Federal Circuit. The DOC applied the same person methodology, did not consider evidence the privatization was at arm's length for fair market value, and found Usinor – and, therefore, GST – was the same person before and after privatization. The CIT held the same person methodology to be inconsistent with the American CVD statute. *See* GTS Industries, S.A. v. United States, 182 F. Supp. 2d 1369 (Ct. Int'l Trade, Jan. 4, 2002).

(3) *Certain Stainless Steel Wire Rod from Italy*, in which the DOC imposed a CVD of 22.22% on imports produced by Cogne Acciai Speciali S.r.l. ("CAS") for subsidies received from the Italian Government before 31 December 1992. CAS was privatized on 27 December 1993, via the purchase by one company of all of the shares, albeit at a price above an amount determined in 1992 by an independent analyst. The DOC said at least 21.74% of the total 22.22% CVD margin reflected pre-privatization subsidies.

(4) *Stainless Steel Plate in Coils from Italy*, in which the DOC imposed a CVD of 15.16% on imports produced by Acciai Speciali Terni S.p.A. ("AST") for financial contributions received from the Italian Government before privatization, and for debt relief provided during the process of privatization. AST was privatized in July 1994, when a holding company created by a German-Italian consortium purchased all of its shares, albeit at a price above that computed by independent experts. The DOC said at least 13.42% of the total 15.16% margin was due to pre-privatization subsidies. After AST challenged the DOC's final determination in the CIT, that Court remanded the matter to the DOC for reconsideration in

reviews.[120] The remaining four orders were associated with sunset reviews.[121]

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light of *Delverde III*. The DOC applied the same person methodology, did not consider evidence the AST privatization was at arm's length for fair market value, and issued a new rate, 17.25%. AST disputed the DOC's remand determination, and the CIT rejected the DOC's determination.

(5) *Stainless Steel Sheet and Strip in Coils from Italy*, in which the DOC imposed a CVD of 12.22% on imports produced by AST for pre-privatization financial contributions received from the Italian Government, and for debt relief obtained during the privatization process. AST also challenged this final determination in the CIT, with the matter stayed at the time of the WTO case.

(6) *Certain Cut-to-Length Carbon-Quality Steel Plate from Italy*, in which the DOC imposed a CVD of 26.12% on imported produced by ILVA Laminati Piani S.r.l. ("ILP," which in its pre-privatized form was "ILVA S.p.A.") for subsidies received from the Italian Government before privatization occurred in March 1995. The DOC said at least 22.68% of the 26.12% margin was composed of subsidies given to the company when it was state-owned. ILP challenged the DOC's final determination, with the matter in the CIT at the time of the WTO case, and the DOC having conducted a remand determination using the same person methodology.

120. An administrative review occurs either on the initiative of the DOC or pursuant to a written request of a domestic interested party, foreign government, or exporter, producer, or importer the merchandise of which is subject to a CVD (or AD) order. The DOC's regulations on CVD administrative reviews are set forth at 19 C.F.R. § 351.213. The DOC may rescind all or part of a CVD order if it finds that during the period covered by the review, there were no entries of subject merchandise.

In the *Certain Products* case, the controversial CVD orders arising in the context of an administrative review, and some basic facts about them, are as follows:

(1) *Cut-to-Length Carbon Steel Plate from Sweden*, in which the final result of an administrative review by the DOC was a CVD rate of 1.91% on imports produced by SSAB Svenskt Stal AB ("SSAB") for financial contributions made by the Swedish Government to the state-owned Swedish steel industry before 1987. SSAB was privatized in three stages, 1987, 1989, and 1992.

(2) *Grain-Oriented Electrical Steel from Italy*, in which the final result of an administrative review by the DOC was a CVD rate of 14.25% for financial contributions from the Italian Government before privatization, plus debt relief provided during privatization. The DOC applied the same person change in ownership methodology to AST, and concluded AST was the same person before and after privatization because it produced the same specialty steel products in the same factories, marketed and sold these products to the same or similar customers, employed the same workers, and used the same or similar suppliers. AST challenged the DOC's review in the CIT.

121. Sunset reviews began in AD and CVD cases as a result of Article 11.2-3 of the Uruguay Round AD Agreement and Articles 21.2-3 of the Uruguay Round SCM Agreement, as these provisions mandate termination of an order within 5 years absent a review. Accordingly, the DOC automatically initiates a sunset review on its own within 5 years of the date of publication of a CVD (or AD) order. The DOC's regulations on CVD sunset reviews are set forth at 19 C.F.R. § 351.218. The focus of a sunset review of a CVD order is whether subsidization is likely to continue, or to recur, if the order were to be lifted. If the DOC renders a negative determination, then it must revoke the order. If the DOC renders an affirmative determination, then it informs the USITC of that result, along with a calculation of

the magnitude of the net countervailable subsidy that is likely to occur if the order is revoked. The USITC assesses the likelihood of continued or recurred injury, should the order be revoked, and may consider this magnitude.

In the *Certain Products* case, the controversial CVD orders arising in the context of a sunset review, and some basic facts about them, are as follows:

(1) *Cut-to-Length Carbon Steel Plate from the United Kingdom*, in which the definitive result of a sunset review in April 2000 by the DOC was continuation of a CVD order and a 12% CVD rate. That was the same rate the DOC originally imposed in 1993 on the basis of subsidies received from Her Majesty's Government by British Steel before it was privatized in 1988. British Steel challenged various aspects of the case in the CIT.

(2) *Certain Corrosion-Resistant Carbon Steel Flat Products from France*, in which the definitive result of a sunset review in April 2000 by the DOC was continuation of a CVD order and a 15.13% CVD rate. That was the same rate the DOC originally imposed in 1993 on the basis of financial contributions received from the French Government by Usinor before it was privatized in 1995.

(3) *Cut-to-Length Carbon Steel Plate from Germany*, in which the definitive result of a sunset review in August 2000 by the DOC was continuation of a CVD order and a 14.84% CVD rate. That was the same rate the DOC originally imposed in 1993 on the basis of financial contributions received from the German Government and the regional government of Saarland by Dillinger before it was privatized in 1989, along with debt relief obtained during the privatization process. Dillinger challenged the DOC's review in the CIT.

(4) *Cut-to-Length Carbon Steel Plate from Spain*, in which the definitive result of a sunset review in April 2000 by the DOC was continuation of a CVD order and a 36.86% CVD rate. That was the same rate the DOC originally imposed in 1993 on the basis financial contributions received from the Spanish Government by CSI Corporación Siderúrgica ("CSI") before it was privatized in 1997-98.

With respect to all twelve orders, the change in ownership was complete, which is to say the governments sold all (or substantially all) of their ownership interests, and retained no controlling stake in the privatized entity. Interestingly, in connection with litigation concerning two of the orders – pertaining to British Steel and the German Steel company Dillinger AG – the United States Court of International Trade ("CIT") asked the DOC to determine whether privatization had occurred at arm's length and for fair market value.[122] In both instances, the DOC agreed that the privatization had occurred on these terms and was consistent with commercial considerations, essentially because the stock was offered to unrelated private investors (in the *British Steel* case, around the world), the offering price was based on valuations by independent consultants, and the unrelated investors purchased nearly the entire offering.

According to the change in ownership methodology, the DOC presumes non-recurring subsidies granted to a former producer of a good, before the ownership of this producer changed (i.e., granted while it was a state-owned enterprise), pass through to the current producer of the good after the change of ownership (i.e., after privatization). Put succinctly, the presumption in the methodology is that benefits from a pre-privatization subsidy continue after privatization, even though the subsidy itself terminated by the time of privatization. Hence, it is appropriate to levy a CVD against imports from the privatized entity. The statute pursuant to which the DOC engaged in the change in ownership methodology is Section 771(5)(F) of the Tariff Act of 1930, as amended.[123] Section 771(5)(F) states:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's-length transaction.

The gravamen of the EC's complaint was that the change in ownership methodology obviates the need for the DOC to establish the essential elements of a countervailable subsidy; namely, the existence of a financial contribution and a benefit from this contribution to the producers under investigation. When consultations under the DSU failed, a panel was convened by the DSB in September 2001 to adjudicate the case. However, at the request of the EC, the Director-General had to step in under Article 8.7 of the DSU to determine the composition of the Panel.

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122. *See* British Steel PLC v. United States, 27 F. Supp. 2d 209 (Ct. Int'l Trade Oct. 14, 1998) (concerning the change in ownership of British Steel); AG der Dillinger Huttenwerke et al. v. United States (Dillinger), 193 F. Supp. 2d 1339 (Ct. Int'l Trade, Feb. 28, 2002) (concerning the change in ownership of Dillinger).

123. 19 U.S.C. § 1677(5)(F) (2004).

The change in ownership methodology has not been the only tool used by the DOC in pre-privatization CVD cases. The DOC has sometimes combined it with another inquiry called the "same person" method, thereby creating a two-step test. The DOC developed this "same person change in ownership" methodology following a major decision by the United States Court of Appeals, *Delverde SrL. v. United States* ("*Delverde III*").[124] In *Delverde III*, the Federal Circuit held it was the intent of Congress, in enacting 19 U.S.C. Section 1677(5)(F), that the DOC examine the particular facts and circumstances of a privatization sale and determine whether the purchaser received (directly or indirectly) from the government both a financial contribution and a benefit. In response, the DOC applied the combined change-in-ownership/ same person methodology for the first time in one of the cases leading to a CVD order that engendered the WTO action.[125]

First, the DOC asked whether the post-privatization entity is the same legal person that received subsidies before privatization, or whether it is a distinct entity from the one obtaining the subsidies. The DOC used a non-exclusive list of criteria, including the continuity of (1) general business operations; (2) production facilities; (3) assets and liabilities; and (4) personnel (i.e., retention of personnel). If the DOC finds that these criteria indicate a same legal entity, then it imposes a CVD on account of the pre-privatization subsidy. In other words, the DOC deemed all of a pre-privatization subsidy to reside in the post-privatized entity, because that entity is not a new or distinct legal person from the one existing before privatization. In turn, the DOC did not proceed to the second step, which entails looking at the circumstances of the change in ownership.

In other words, the "same person" inquiry was whether the change in ownership from state to private hands results in the same or a different legal entity before versus after privatization. If the DOC found the same person despite privatization, then it presumed the benefits of the subsidy carry through as well. In contrast, if the DOC found that the continuity criteria indicate a post-privatization entity that is a new legal person, then it did not impose a CVD on imports produced by the entity on the basis of the pre-privatization subsidies. However, in that instance the DOC proceeded to the second step of the methodology. In this step, the DOC considered whether the post-privatization entity received a subsidy as a result of the change in ownership. The DOC checked whether the sale of the SOE by the government was conducted at arm's length, and for fair market value. If not, then the DOC imposed a CVD on account of the subsidy received from the change in ownership.[126]

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124. *See generally Delverde SrL.*, 202 F.3d 1360.

125. *See* Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review, 66 Fed. Reg. 2,885 (Jan. 12, 2001).

126. In June 2003, the DOC again modified its change-in-ownership methodology. It dropped the same person test, and instead developed a rebuttable presumption, which it describes in its regulations as follows:

The [new] methodology is based on certain rebuttable presumptions . . . . The "baseline presumption" is that non-recurring subsidies can benefit the recipient over a period of time -

The EC argued that the change in ownership methodology violated Articles 1.1(b), 10, 14, 19, and 21 of the SCM Agreement. Its argument was heated, calling the method "self-serving."[127] Before delving into the legal provisions, it is worth quoting the Commission's announcement of filing the case:

> In order to demonstrate that the two companies [an SOE and its privatized successor] are the same person, the DOC maintains that if a firm keeps the same factory, any of the same employees, any of the same customers, any of the same suppliers, this is sufficient reason to presume an automatic pass-through of subsidies.
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> [T]he DOC's approach is premised on a preposterous assertion: that subsidies somehow become glued to, live in and then automatically travel with assets wherever they may be sold and regardless of the amount paid for them.
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> Thus, under the DOC's approach, if an unsubsidized private company purchases a factory from a prior subsidized owner for 20 times the actual market value of the plant, the DOC would impose countervailing duties on the new owner.[128]

As for the law, the SCM Agreement itself, of course, amplifies the foundational authorization in GATT Article VI.3 concerning CVDs.

In particular, GATT allows a WTO Member to impose a CVD "for the purpose of *offsetting* any bounty or *subsidy* bestowed, directly or indirectly, upon the manufacture, production, or export of any merchandise."[129] Article 1(b) of the SCM Agreement contains the third of four crucial elements in the definition of a "subsidy;" namely, that there must be "a benefit . . . conferred." Under Article 1, a "subsidy" is deemed to exist if there is (1) a "financial contribution;" (2) from "a government or any public body;" (3) conferring a "benefit;" on (4) a "specific" enterprise, industry,

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normally corresponding to the average useful life of the recipient's assets. However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm's-length transaction for fair market value.

Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Federal Register 37,125 (June 23, 2003) (emphasis added). To summarize, it appears the DOC has gone through several tests for whether a financial contribution and benefit from a pre-privatization subsidy carry through to a post-privatized entity: the pass-through methodology; the gamma methodology; the basic change-in-ownership methodology; the change-in-ownership same person methodology; and the change-in-ownership rebuttable presumption methodology.

127. Kirwin, *supra* note 114, at 1194 (quoting the Commission).

128. *Id*.

129. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A5, A23, 55 U.N.T.S. 187 [hereinafter GATT] (emphasis added).

or group thereof. Article 10 is another guarantee-type of provision, requiring Members to be sure that any CVD measure they impose conforms with GATT Article VI.3, and the rules of the SCM Agreement and Agreement on Agriculture. The first of two footnotes to Article 10 usefully defines a "CVD" as a special duty to offset a direct or indirect subsidy bestowed on the manufacture, export, or production of merchandise, as set forth in GATT Article VI.3. In brief, a CVD can be imposed only to offset a subsidy.

Article 14 deals with calculation of the amount of a subsidy; in particular, the determination of whether a benefit from the subsidy accrues to its recipient. It is worth quoting in its entirety.

> For the purpose of Part V [of the SCM Agreement, entitled "Countervailing Measures"], any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
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> (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
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> (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
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> (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
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> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit

> unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

Article 14 is a significant provision in the SCM Agreement. It does more than mandate the existence of a method to calculate the benefit to a recipient of a subsidy. It gives substantive guidance as to measuring the benefit associated with four categories of subsidies (equity infusions, loans, loan guarantees, and goods and services, in sub-paragraphs (a)-(d), respectively). Furthermore, it demands transparency in methodology.

Articles 19 and 21 of the SCM Agreement discuss, respectively, the imposition and collection of CVDs and the duration and review of CVDs. Article 19.1 authorizes imposition of a CVD after "a final determination of the *existence* and *amount* of" a subsidy, and a determination that injury is caused by the subsidy (emphasis added). Article 19.2 encourages WTO Members to apply the "lesser duty rule" (i.e., a CVD less than the amount of the full subsidy, but sufficient to remove the injury from the subsidy), while Article 19.4 sets as an upper bound on a CVD "the amount of the subsidy found to *exist*" (calculated on a per unit basis) (emphasis added). Article 19.3 is an MFN-type rule, calling for the non-discriminatory imposition of a CVD on imports from all Members found to be providing a subsidy and causing injury.

As for Article 21, it has a "soft sunset" rule. Paragraph 1 states a CVD shall remain in force only as long as needed to counteract injurious subsidization (i.e., not only must the subsidy continue to exist, but so, too, must the injury it causes). Article 21 also has a "hard sunset" rule. Paragraph 3 sets a termination date, or sunset, for a CVD order of no longer than 5 years from the imposition of the order (or the most recent review of the order), unless the administering authority determines in a sunset review that revocation of the order would be likely to lead to continued or recurred subsidization and injury. Article 21, paragraph 2 articulates treatment of other kinds of reviews of CVD orders. This provision calls for administrative reviews (or, after a reasonable period of time, reviews requested by an interested party) and requires termination of a CVD order if a review shows that the order is no longer warranted. Pursuant to Article 21.4, the same rules of evidence and procedure used in the initial CVD investigation are used in any review, and the entire Article applies *mutatis* mutandis (i.e., making necessary alterations) to undertakings (in effect, settlement agreements) rendered under Article 18.

Major Substantive Issues on Appeal[130]

130. *See WTO Update*, *supra* note 45, at 112-14; WTO Report of the Appellate Body,

Neither the EC nor the United States contested that all of the firms subject to the CVD orders had been SOEs and had been privatized at the time of the DOC's investigations. Likewise, the EC admitted that all of the former SOEs had received non-recurring financial contributions. The United States agreed that the European governments had sold all or substantially all of their interests in the SOEs and no longer retained any controlling interest in the privatized entity. Significantly, the United States also agreed that in each privatization, the sale transaction had been at arm's length and for fair market value. Finally, the two sides respected the *British Steel* holdings, accepting the propositions that two rebuttable presumptions were permissible; namely, (1) the benefit of a non-recurring subsidy continues over a period of time; and (2) the period normally is the average useful life of the assets in the relevant industry.

The controversy in *Certain Products* focused on the post-privatization impact (if any) on of the firms subject to the twelve American CVD orders on the continued existence of benefits from pre-privatization financial contributions by the government. The controversy began with the EC's charge that the American "same person" methodology did not involve a proper determination of whether a benefit to

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United States – Countervailing Measures Concerning Certain Products from the European Communities, WTO Doc. WT/DS212/AB/R, ¶¶ 49, 84-85, 161 (Dec. 9, 2002), *adopted* Jan. 8, 2003, *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *US-Countervailing Measures* Appellate Body Report]; *US- Countervailing Measures* Panel Report, supra note 112, ¶¶ 1.1-2.61.

In addition to the substantive issues discussed, the appeal raised two procedural issues, concerning the sufficiency of notice of the appeal, and an *amicus curiae* brief from the American Iron and Steel Institute. (The United States and EU both agreed the Appellate Body could consider this brief, but which it chose not to because it said the brief was not of assistance). *See US-Countervailing Measures* Appellate Body Report, *supra* note 130, ¶¶ 50-76.

the producer of subject merchandise actually accrues from the non-recurring subsidy it had received before (but not after) privatization. The Panel agreed. In its July 2002 Report, the Panel held all twelve American CVD orders violated the SCM Agreement.[131] The Panel further held that if a privatization occurs on arm's length terms, and for fair market value, then the benefit from a previous, non-recurring financial contribution to a state-owned producer no longer accrues to the privatized entity. Hence, the Panel ruled that the American statute under which the DOC developed the same-person methodology (Section 771(5)(F) of the Tariff Act of 1930, as amended, 19 U.S.C. Section 16775(F)), as well as the twelve CVD orders, were inconsistent with the SCM Agreement.

In addition, the EC charged that the DOC did not undertake sunset reviews in a manner compatible with Article 21.3 of the SCM Agreement. The EC challenged the DOC's practices of expediting sunset reviews, and ignoring comments of interested parties in certain cases. Specifically, whenever the DOC initiated a sunset review, it requested any interested party wishing to participate to submit comments on the likelihood of continued or recurred subsidization. If an exporting producer (the merchandise of which is subject to the CVD order under review) did not submit comments to the DOC, then the DOC conducted an "expedited" sunset review. In that instance, moreover, the DOC does not take into account comments submitted by interested parties. Why not? The DOC argued that in these cases, the evidence already on the record (i.e., that was filed with the DOC during the original investigation, and during any administrative review) is sufficient. It based this argument on the text of Article 21.3, stating that nothing therein creates an obligation to convert a sunset review of a CVD order in which exporting producers fail to submit comments into a full-blown administrative review of a CVD order.

In September 2002, the United States appealed the Panel's holdings. In its Report, the Appellate Body agreed with the Panel that the core legal problem was whether a benefit derived from a non-recurring financial contribution continues to exist following a transfer of all (or substantially all) of the ownership in an SOE to a private owner on an arm's length basis for fair market value. The Appellate Body dissected this problem into three issues: (1) extinction of subsidy benefits through a privatization; (2) legality of the same person methodology; and (3) legality of the American CVD statute. The United States prevailed on the first and third issues, but not the second. From the DOC's perspective, the most positive way to characterize the outcome is as a mixed result. Perhaps a more accurate characterization is that loss on the second issue mattered greatly, because conceptually that issue was the most important of the three.

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131. Consequently, the Panel said the American CVD orders constituted a *prima facie* nullification or impairment of benefits accruing to the EC under Article 3.8 of the WTO Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU").

Holdings and Rationale[132]

1. Extinction of Benefits through Privatization

To be more specific, the Appellate Body effectively framed the first issue as follows: if a privatization is conducted at arm's length and for fair market value, then does that privatization *systematically* extinguish the benefit from a non-recurring financial contribution bestowed before privatization? The Panel held the answer is "yes," stating the benefit indeed is systematically eliminated in any privatization on those terms. In other words, the Panel held that once an importing Member has determined that a privatization occurred at arm's length and for fair market value, then that Member must reach the conclusion that no benefit from the prior subsidy continues to accrue to the privatized producer.

The Appellate Body disagreed, and reversed this holding. However, the reversal was not dramatic. The Appellate Body ruled against the United States, as had the Panel, on the meaning of the terms "recipient" and "benefit," and it was inclined to go almost as far as the Panel had on the question of extinction. The difficulty with the Panel's holding, in the Appellate Body's judgment, lay in its mandatory nature. That is, the Appellate Body cut back on the Panel's dramatic language that " [o]nce an importing Member has determined that a privatization has taken place at arm's length and for fair market value, it *must* reach the conclusion that no *benefit* resulting from the prior financial contribution (or subsidization) continues to accrue to the privatized producer (emphasis added)."[133] But for the word "must," the Appellate Body might have left the Panel's holding alone.

In reaching its conclusion, the Appellate Body had to address American arguments about the proper way to define "recipient" and "benefit." These arguments were sophisticated. The United States urged the Appellate Body to hold the Panel guilty of poor economic analysis. The United States said that the Panel focused on the economic effects of privatization from the perspective of the new owner of a former SOE the focus should have been on the legal person producing the subject merchandise. The Panel ignored the distinction between this legal person (typically a private corporation) and the new shareholders of the legal person. Obviously, however, a corporate entity and its shareholders are distinct. In turn, shareholders cannot redeem a benefit that the legal person received. That is, the word

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132. *See WTO Update*, *supra* note 45, at 112-14; *US-Countervailing Measures* Appellate Body Report, *supra* note 130, ¶¶ 49, 77-161.

133. *US-Countervailing Measures* Panel Report, *supra* note 112, ¶ 8.1(d), *quoted in US-Countervailing Measures* Appellate Body Report, *supra* note 130, ¶ 87.

"recipient" in the SCM Agreement cannot embrace both a legal person and a shareholder of that person – a proposition for which the United States cited both the *British Steel* and *Canada – Aircraft* Appellate Body decisions.

The American argument was grounded in neo-classical economic theory. The United States rightly pointed out that a subsidy shifts the supply curve of the merchandise produced by the recipient outward, thus reflecting the increased quantity of output the recipient is willing and able to produce at any given market price for the output, because the government is subsidizing part of the cost of production. The United States also contended that privatization does not shift this supply curve of the merchandise produced by the privatized entity back to where it had been before the government gave a financial contribution to the SOE. If the new private owner pays full market price for the SOE, then all that is certain is the new owner is not receiving a new subsidy. It is not correct to infer from that price that the subsidy has been eliminated from the perspective of the legal person actually engaged in the manufacture of the subject merchandise. For example, a change in ownership need not entail removal of new equipment paid for by the previous subsidy, extraction of knowledge from workers whose training was covered by the subsidy, or increase the debt load that had been lowered by virtue of the subsidy.

To be sure, the United States did not mean to argue that CVD law is designed to recreate the *ex ante* conditions existing before the bestowal of a subsidy. It also did not want to suggest that the benefit of a subsidy attaches only to production activity. So, why did the United States have to fashion its argument in terms of a distinction between a legal person and its owners, and talk about supply curves?

The United States knew its ultimate goal was to defend the same person methodology. Consequently, it had to be clear about who the "person" – or recipient – was. The American position was that if an SOE, which is a legal person, receives a benefit, and if that same legal person continues to exist after privatization, then the benefit also continues to exist until it is either fully amortized or repaid. The price paid for the SOE by the shareholders – the new private owners, who are a distinct person, upon whom the benefit was not conferred – does not matter. Even if the price were negotiated at arm's length, and based on a fair market value, the benefit of the financial contribution to the recipient SOE was not extinguished if the recipient is the same legal person. In brief, the United States had to argue a change in ownership, irrespective of the price paid in the privatization, never extinguishes the benefit of a prior subsidy if the SOE and new company are the same legal person, because that was precisely the implication of the DOC's methodology.

The EC's rebuttal, put frankly, was that the United States both misread the applicable rulings and that its argument was too sophisticated. For once, it was the EC accusing the United States of making the case more complex than it needed to be. The Panel in *Certain Products*, said the EC, squarely rejected the distinction between firms and their owners for the purpose of determining whether a "benefit" exists

under the SCM Agreement.[134] It did so because in the *Canada – Aircraft* case the Appellate Body rightly found that a "recipient" need not be limited to the firm exporting subject merchandise, but could include its owners too. This finding made good sense under Article 1.1(b) of the SCM Agreement because that provision does not require that a financial contribution be made directly to a "recipient," nor does it demand that the recipient of the financial contribution be the same as the recipient of the benefit of the contribution. It is the causal relationship between the contribution and benefit that matters, and this relationship can exist (as the EC observed and the United States admitted) where a subsidy is given to one part of an entity that liberates resources applied to a different part of that entity.

Most fundamentally, said the EC, a firm privatized at arm's length and for fair market value receives nothing on terms more favorable than what the market itself would have provided. That is, as the Appellate Body ruled in the *Canada – Aircraft* decision, it is the marketplace that defines whether a "benefit" exists. If a sale is at arm's length and fair market value is paid, then *ipso facto* any advantage a firm may have obtained from a previous subsidy is removed. The new owners have paid for – or, put better, paid off – that benefit. The fair market value of the privatization includes repayment to the government of the subsidy it previously conferred, because the market appraises the benefit already received from that subsidy at the time of the sale. Hence the benefit is extinguished an arm's length, fair market value transaction.

The Appellate Body took little time to explain why the United States incorrectly interpreted the word "benefit" as used in the SCM Agreement. The U.S. argument that a privatization does not entail removal of equipment or human capital, nor increase debt, was trivial. All this argument amounted to was that privatization does not extinguish the utility value of equipment (and other factor resources) acquired as a result of a financial contribution. Rather, the utility value is transferred to the newly privatized firm. However, as the EC correctly observed, one precedent from the *Canada – Aircraft* case was that "benefit" under the SCM Agreement is ascertained from the marketplace. Once a fair market value is paid for the equipment, then the market value of this equipment is redeemed, regardless of the utility the newly privatized firm may derive from the equipment. In brief, the United States had the wrong conception of value; market comparisons, not utility, were relevant.

As for the meaning of "recipient," here again the Appellate Body dispensed with the U.S. argument. The United States had misconstrued the Appellate Body's holdings in both *British Steel* and *Canada – Aircraft*. In neither case did the Appellate Body draw a clear line separating a legal person (such as a privatized firm)

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134. The EC was quite evidently correct in its rendition of the Panel's finding. *See US-Countervailing Measures* Appellate Body Report, *supra* note 130, ¶ 106.

from its owners (i.e., shareholders), nor did it classify them as two different persons. Contrary to the U.S. argument, neither case stands for the proposition that the recipient of a subsidy cannot be both the legal person and the shareholders. A subsidy need not be received by only one recipient and repaid only by that recipient, rather than by the owners of that legal person. To the contrary, a subsidy could be received and enjoyed by two or more persons. The Appellate Body quoted back to the U.S. language from its report in *Canada – Aircraft*, to the effect that a "group of persons" may receive a subsidy. Such a group could be of legal persons, natural persons, or a mixture of legal and natural persons. Never, said the Appellate Body, did it exclude the possibility that a "recipient" could be both a firm and an owner. To the contrary, it affirmed its interpretation of the word "recipient" in *British Steel*.

To make matters worse for the United States, the Appellate Body also chided its reading of the SCM Agreement itself. That Agreement does not contain a definition of "recipient." The United States looked at the way the term is used in the list of financial contributions contained in Article 1.1(a)(1). That list envisions a legal person as the producer and subsidy recipient. Perhaps, replied the Appellate Body. But what about the references to "recipient" in Article 2 (an enterprise, industry, or group of enterprises or industries), Article 10 footnote 36 (a manufacturer, producer, or exporter), Article 14 (a firm), Article 11.2(ii) (an exporter or foreign producer), Article 19.3 (a source found to be subsidized), Annex I (a firm or industry), and Annex IV (a recipient firm)? In pointing to these other references, the Appellate Body explained that "the SCM Agreement does not identify the 'recipient' of a 'benefit' by using any particular legal term of art."[135] Instead, the Agreement describes the economic entity receiving a benefit in various ways.

In other words, the United States drew an incorrect inference about the meaning of a term by relying on just one provision. Moreover, even if that were the only relevant provision, the inference still would be erroneous. A government can provide an indirect financial contribution to a legal person (the firm) through natural persons (shareholders), such as by an income tax concession, and the cost of raising capital for the legal person (the firm) would be reduced. Indeed, if the U.S. distinction between legal persons and owners were accepted, there would be a wide hole in the SCM Agreement. Governments could circumvent the Agreement by providing subsidies to natural persons directly, rather than to the business associations they own.

If there was any comfort for the United States in the Appellate Body's adjudication of the meaning of "recipient," then it was in the Appellate Body rejecting the Panel's statement that no distinction between a company and shareholders should ever be made. The Appellate Body found the Panel to have strayed beyond the narrow facts of the case; namely, one kind of privatization (at arm's length, for fair market value, with all or substantially all ownership transferred) and one kind of benefit (a non-recurring financial contribution to an SOE before privatization). The Panel did not have before it other situations (such as recurring

135. *Id*. ¶ 112.

financial contributions or retention by a seller of an interest in a firm following a change in ownership). Therefore, the Appellate Body narrowed the Panel's sweeping statement, and left open the possibility that, in factual contexts different from the case at bar, it might be appropriate to distinguish between a legal person and an firm's natural person owners.

Having rejected the U.S. interpretation of the terms "benefit" and "recipient," the Appellate Body proceeded to the core legal question of extinguishing a subsidy. As intimated at the outset, the Panel held that a " [p]rivatization at arm's length and for fair market value *must* lead to the conclusion that the privatized producer paid for what he got and thus did not get any benefit or advantage from the prior financial contribution bestowed upon the state-owned producer."[136] The Appellate Body characterized this holding as an irrebuttable presumption that compels an administering authority to conclude that the remaining part of a benefit from a pre-privatization subsidy necessarily has been extinguished if the privatization occurred at arm's length and for fair market value (i.e., the balance of the benefit never continues to exist for the new owner after a privatization on these terms). That holding, said the Appellate Body, was too rigid.

Why? Essentially, the Appellate Body did not put the same degree of faith in markets as the Panel:

> Markets are mechanisms for exchange. Under certain conditions (e.g., unfettered interplay of supply and demand, broad-based access to information on equal terms, decentralization of economic power, an effective legal system guaranteeing the existence of private property and the enforcement of contracts), prices will reflect the relative scarcity of goods and services in the market. Hence, the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on the state-owned enterprise will be fairly reflected in the market price. However, such market conditions are not necessarily always present and they are often dependent on government action.
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> [G]overnments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market. In such circumstances, *the market's valuation of the state-owned property may ultimately be severely affected by those government policies*, as well as by the conditions in which buyers will subsequently be allowed to enjoy property (emphasis original).
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> The Panel's absolute rule of "no benefit" may be

136. *Id*. ¶ 120 (quoting *US-Countervailing Measures* Panel Report, *supra* note 112, ¶ 7.82).

> defensible in the context of transactions between two private parties taking place in reasonably competitive markets; however, it overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which markets operate. Privatizations involve complex and long-term investments in which the seller – namely the government – is not necessarily always a passive price taker and, consequently, the "fair market price" of a state-owned enterprise is not necessarily always unrelated to government action. *In privatizations, governments have the ability, by designing economic and other policies, to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise*. (emphasis added)[137]

In other words, in the conditions of perfect competition, the Panel's holding is true. But, those conditions do not always prevail. So, more flexible language than in the Panel's holding was needed.

That flexibility is possible by changing the word "must," which the Panel used, to "may." The Appellate Body held that a "[p]rivatization at arm's length and for fair market value *may* result in extinguishing the benefit," and even went so far as to "find that there is a *rebuttable* presumption that a benefit ceases to exist after such a privatization."[138] However, extinguishment of a benefit from a pre-privatization financial contribution is not a necessary consequence. Thus, the Panel was wrong to conclude that an administrative authority need not investigate the facts of a CVD case, and equally wrong to hold that the authority must determine automatically that a benefit is extinguished.

2. Legality of the Same Person Methodology

The Appellate Body's reasoning on the first issue was a strong clue to its holding on the second issue. As just discussed, the Appellate Body struck down the inflexible rule created by the Panel requiring an administrative authority to find that residual benefits from a pre-privatization subsidy are extinguished if the privatization occurs at arm's length and for fair market value. Even to a novice trade lawyer, the DOC's same person methodology looked suspiciously like an automatic rule. Therefore, the rule was unlikely to pass muster with the Appellate Body.

Put in legal terms, the second issue concerned the consistency of the U.S. same person methodology with Articles 10, 14, 19.1, 19.4, and 21.1-3 of the SCM Agreement.[139] As explained previously, this methodology was a two-step test. First,

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137. *Id*. ¶¶ 122-24.

138. *Id*. ¶ 127 (emphasis added to second quote).

139. From the Appellate Body Report, the extent to which the DOC relied on the same person methodology is as clear as it should be. On the one hand, the Appellate Body says in

the DOC analyzed whether a post-privatization entity is the same legal person as the entity that received the original subsidy before privatization. The factors the DOC examined included the continuity of general business operations, production facilities, assets and liabilities, and the retention of personnel. If these criteria led the DOC to conclude that the privatization did not create a new legal person, then the DOC stopped its analysis of whether a "benefit" exists. It did not consider whether the privatization occurred at arm's length and for fair market value. Rather, the DOC concluded automatically and irrebuttably that the subsidy continues to exist for the post-privatization firm, precisely because it is the same person as before. In contrast, suppose the continuity and retention criteria indicated the post-privatization entity was a new legal person, distinct from the entity that received the prior subsidy. In that instance, the DOC would not impose a CVD on goods produced after privatization on the basis of the pre-privatization subsidy. However, the DOC examined whether any new subsidy had been bestowed upon the new owners of the post-privatization entity as a result of the change in ownership. In particular, the DOC examined whether the sale was at arm's length and for fair market value. If not, the DOC could find that a new subsidy had been bestowed, and impose a CVD on that basis.

The "bottom line" of the same person method was that the DOC presumed conclusively that if an SOE and a post-privatized entity are the same legal person, then the benefit received by the SOE automatically continues to accrue to the newly privatized entity. Consequently, the DOC did not investigate the particularities of the case to determine whether a benefit does, in fact, carry through the privatization. Interestingly, the United States did not argue that the same person method was required by Federal statute or regulation. Rather, it explained that the method arose as administrative practice following orders from the CIT in appeals of certain CVD cases. The DOC applied the methodology for the first time in one of the twelve CVD orders at issue in the *Certain Products* case.

The Panel found that the same person methodology violates the SCM Agreement. The Panel objected to the methodological prohibition on examining the conditions of privatization whenever the privatized entity is not a distinct legal person from the SOE (based on criteria concerning the industrial activities, productive assets, management, and staff of the entity). The automatic attribution of a "benefit" from the pre-privatization subsidy to the privatized entity, without checking the privatization transaction, violated Article 14 of the SCM Agreement. That Article

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the twelve CVD orders at issue in the *US-Countervailing Measures* case, the DOC used both the gamma and same person methodology in the underlying investigations to determine whether a "benefit" continued to exist after privatization. On the other hand, the Appellate Body also says that of the twelve determinations, eleven of them were based on the application of the gamma method, and one actually involved the application of the same person methodology (namely, an administrative review known as *GOES from Italy*.) There is also some debate in the Report about the appropriateness of using of the gamma methodology in a sunset review, and of using the same person methodology in an administrative or sunset review, as distinct from an underlying investigation. *See id*. ¶¶ 131-35, 140.

specifically calls for a determination of whether subsidization and, particularly, a "benefit" exists. The Panel said that in some cases, there might be no benefit for a privatized producer above what market conditions dictate, yet the DOC's methodology excludes this possibility.

The United States based its appellate argument on how it interpreted the *British Steel* precedent. The U.S. view was that the Appellate Body had said in the earlier case that an investigating authority is required to reexamine a determination about the existence of a "benefit" only if a new legal person, distinct from the SOE that received the original benefit, is created. Because the *Certain Products* case involved the same legal person, not distinct legal persons, the *British Steel* holding was inapposite (as the earlier case involved an SOE and a dissimilar newly privatized entity). The EC saw through the effort by the United States to limit the *British Steel* holding to the facts of that case, and called the American interpretation of the precedent erroneous.

The EC argued that *British Steel* compels the Appellate Body to find the same person methodology *per se* inconsistent with the SCM Agreement. The Agreement, as construed in *British Steel*, mandates a new determination of whether a benefit exists when a privatization results in a change of control. In *British Steel*, both the Panel and Appellate Body found that the buyer of the SOE paid fair market value for all the productive assets and good will of the SOE; hence the financial contributions bestowed by Her Majesty's Government between 1977 and 1986 could not be deemed to confer a benefit on the privatized entity. The EC argued that the same person methodology, like the gamma methodology the Appellate Body ruled illegal in *British Steel*, establishes an irrebuttable presumption that the benefit of a financial contribution bestowed previously remains in a post-privatization enterprise unless a new legal person is created. In other words, both methodologies illegally preclude an investigation into the terms and conditions of privatization.

Not surprisingly, the Appellate Body agreed with the EC's argument, reaffirmed its *British Steel* decision, and upheld the Panel's finding. That outcome meant that the U.S. CVD orders at issue in the case violated Articles 10, 14, 19.1, 19.4, and 21.1-3 of the SCM Agreement. The key violation was of Article 21.2, which mandates a review of the continued necessity of an outstanding CVD order within a reasonable period of time after it is imposed. Article 21.2 expressly contemplates that in administrative reviews, an interested party will submit positive information about whether a previously bestowed financial contribution has been repaid or withdrawn, and whether the benefit no longer accrues. In *British Steel*, the Appellate Body expressly held that Article 21.2 requires an investigating authority to determine whether there is a continuing need for a countervailing duty order, and stated unequivocally that the authority is not free to disregard positive information submitted to it. These holdings were not contingent on the existence, or non-existence, of a distinct legal entity before versus after privatization.

The DOC's same person methodology, ruled the Appellate Body, obviously transgressed Article 21.2 and the interpretation of it in *British Steel*. Under that methodology, if the DOC concluded that the pre- and post-privatization entity were

the same legal person, then it automatically disregarded information submitted to it to support the contention that no benefit from a prior financial contribution continued to exist. Furthermore, the DOC automatically declined to determine whether a benefit continues to exist despite this information. Only if the DOC found a distinct legal person would it study the new information and determine whether a benefit exists – and, even in that circumstance, the DOC's inquiry would be limited to whether a new subsidy is provided to the owners of the privatized entity. In sum, the methodology led inexorably to a pre-determined conclusion of continued accrual of a benefit from a prior financial contribution, if the DOC found the same person to exist before and after privatization. Because the methodology barred any further analysis whenever the DOC made this threshold finding, it was illegal under Article 21.2.

It was not hard for the Appellate Body to extend its finding of a violation of Article 21.2 of the SCM Agreement in the context of administrative reviews to violations of the Articles 10, 14, 19.1, and 19.4 in the context of original CVD investigations. Indeed, the Appellate Body said the extension was "*inevitable*."[140]

> In an original investigation, an investigating authority *must establish all conditions* set out in the *SCM Agreement* for the imposition of countervailing duties. Those obligations, identified in Article 19.1 of the *SCM Agreement*, read in conjunction with Article 1, include a *determination of the existence of a "benefit." As in the administrative reviews, the "same person" method necessarily precludes a proper determination as to the existence of a "benefit" in original investigations where the pre- and post-privatization entity are the same legal person. Instead, in such cases, the "same person" method establishes an irrebuttable presumption that the pre-privatization "benefit" continues to exist after the change in ownership.* Because it does not permit the investigating authority to satisfy all the prerequisites stated in the *SCM Agreement* before the imposition of countervailing duties, particularly the identification of a "benefit," we find that the "same person" method, as such, is inconsistent with WTO obligations that apply to the conduct of original investigations.[141]

All that was left for the Appellate Body to explain was why the same person methodology, in the context of a sunset review, violated Article 21.3. This task was also fairly easy. The reasoning was the same: the method fails to ensure the DOC investigates whether a benefit continues if it concludes no new legal person is created by a privatization. In sum, the Appellate Body ruled against the U.S. practice of imposing CVD orders without determining whether a pre-privatization benefit

140. *Id*. at 147 (emphasis added).
141. *Id*. (emphasis added).

continues to flow through to the privatized entity in every context in which the DOC engaged in this practice (i.e., original investigations, administrative review, and sunset reviews).

A more resounding defeat for the United States scarcely could be imagined. The Appellate Body holding went far beyond the twelve CVD orders at issue in the case, because it meant the way the DOC had been going about subsidy investigations in privatization cases was illegal under WTO rules. The Appellate Body had no choice but to make a dramatic recommendation. It "requested" that the United States bring its same person methodology into conformity with the SCM Agreement.[142] At least as seen through many American eyes (including some in Congress), the United States was being told to abandon the methodology. No longer would it be so easy to impose a CVD order in privatization cases. Given the large number of privatizations occurring in many countries – in recent years, currently, and in the future – the holding meant that every case would require an investigation, otherwise no order could be issued consistently with the SCM Agreement.

3. Legality of the American CVD Statute

On the third issue, the Panel found the U.S. CVD statute, 19 U.S.C. Section 1677(5)(F), to be *per se* inconsistent with Article 10, 14, 19, and 21 of the SCM Agreement. The Panel read the statute as a *per se* rule. It prevented the DOC from automatically concluding that after a privatization is conducted at arm's length for fair market value, the benefit of a non-recurring, pre-privatization financial contribution bestowed on an SOE no longer accrues to the privatized producer. That is, the statue requires the DOC to apply a methodology (whether it be the gamma, same person, or some other method) that bars it from finding systematically that a benefit no longer accrues to a privatized producer by virtue of an arm's length, fair market value privatization. The Panel's view was that a privatization on these terms does, in all instances, extinguish a benefit, and judged the U.S. statute as illegal because it denied the DOC discretion to devise a methodology flexible enough to allow for this possibility.

The Panel's finding was a direct threat not only to the statute – and the Congress responsible for passing and amending it – but also to the U.S. federal courts. The Panel expressly mentioned the interpretations of Section 1677(5)(F) by the Court of Appeals for the Federal Circuit and the CIT.[143] Perhaps mindful of this threat, and certainly cognizant of the thorough victory the EC had on the second issue, the WTO-consistency of the same person methodology, the Appellate Body was disinclined to "stick it" to the United States on the third issue.

The Appellate Body disagreed with the Panel's interpretation of the

142. Significantly, the Appellate Body specifically mentions this methodology in its final paragraph containing recommendations. *See id*. ¶ 162.

143. *See id.* ¶ 155 (quoting paragraph 8.1(d) of the Panel Report, which mentions these court decisions, as well as the *Statement of Administrative Action*).

American statute, reversing its finding that the U.S. statute is inconsistent with the SCM Agreement. The Appellate Body opined that a privatization at arm's length and for fair market value usually, but not always, extinguishes the remaining part of a benefit from a prior, non-recurring financial contribution. That is why the Appellate Body, in adjudicating the first issue, reversed the Panel's conclusion that an investigating authority must automatically determine that the remaining part of a benefit from a prior financial contribution does not carry through a privatization at arm's length and for fair market value. In other words, the Appellate Body connected its reasoning on the first issue with its holding on the third issue.

There were two connecting points. First, the SCM Agreement allows for a finding of continued accrual of benefits after an arm's length, fair market value privatization. In reaching its conclusion, the Panel wrongly believed that the Agreement did not allow for this possibility. Since it does, said the Appellate Body, the American statute cannot be held to violate the Agreement. Second, that statute does not prescribe any particular methodology. It does not handcuff the DOC to the same person methodology (i.e., the discretion the Panel said the DOC lacks actually does exist).

In making these points, the Appellate Body was careful to erase the Panel's language regarding the American federal courts. The Appellate Body stated "we also see nothing in the interpretation of Section 1677(5)(F) made by the U.S. Court of Appeals for the Federal Circuit [and, by implication, the CIT] that would prevent the [DOC] from complying with its obligations under the SCM Agreement."[144] Defenders of the Appellate Body could breathe a sigh of relief. They knew that critics of the Appellate Body would not be able to use the resolution of the third issue in the *Certain Products* Report as evidence (or yet more evidence) of a runaway court in Geneva threatening U.S. judicial sovereignty. To the contrary, the defenders just might be able to point to this resolution as evidence of the responsible role played by the Appellate Body in cutting back on activist panels.

Commentary

1. Sophisticated, Interdisciplinary Argumentation

One noteworthy feature of the Appellate Body's Report, intimated in the discussion above, is the debate between the United States and EC about the meaning of the *British Steel* case.[145] The two sides squared off against one another like common law litigants debating the proper interpretation and application of a precedent. The Appellate Body rightly acted as the adjudicator of its earlier holding. There is no need to dwell on the operation, in fact, of *stare decisis* in Appellate Body litigation.[146] Suffice it to say that this kind of argumentation is increasingly evident in

144. *Id*. ¶ 159.
145. *See id*. ¶¶ 137-46.
146. *See* Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO*

Appellate Body reports.

A second interesting point about the Appellate Body's Report is how it dealt with sophisticated, interdisciplinary argumentation. The Appellate Body did not shy away from jousting with the United States in the area of economics and corporate finance. For example, the Appellate Body said that the United States simply had no basis for asserting the cost and volume of production of a firm necessarily remains the same on the day before and the day after privatization, regardless of the price paid for the assets of the firm.

The Appellate Body pointed out that costs include the cost of capital (i.e., the money raised by investors buying an SOE). Profit-maximizing private investors will seek to recoup the full amount of their investment through the operations of the privatized entity. The cost of capital could be lower, if a government deliberately sells an SOE for less than fair market value, because the underpriced entity attracts more private investment than it otherwise would have if sold at fair market value.[147] Likewise, the new owners may adjust production volumes in their efforts to recoup their investment. Reasonable minds can differ about "who was right." However, it would be unfair to call the Appellate Body unsophisticated. To the contrary, it was a bench well-prepared to deal with technical points drawn from concepts outside of law.

2. Strike Two

The United States has defended two cases through the appellate stage of the WTO on the DOC's methodology for imposing a CVD on merchandise from privatized entities. In the *British Steel* case, the Appellate Body ruled against the DOC's gamma methodology. In the *Certain Products* case, the Appellate Body ruled against the same person methodology. These unsuccessful defenses raise difficult questions for the United States and some of its trading partners.

First, the United States is going to have to come up with a methodology in privatization cases that passes WTO legal scrutiny. That same methodology will have to satisfy political constituencies fearing competition from former SOEs in countries like Brazil, India, Korea, Mexico, and, most importantly, China. In other words, concocting a technical methodology will be a balancing act. That act will be all the harder because it will have to be performed during, or shortly after, a general election in the United States.

Second, countries seeking to join the WTO are going to have to be careful that the United States does not try to circumvent its defeats in *British Steel* and *Certain Products* by negotiating alternative arrangements in the terms of accession.

Adjudication (Part Three of a Trilogy), 33 GEO. WASH. INT'L L. REV. 873 (2001); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy),* 9 J. TRANSNAT'L L. & POL'Y 1 (1999); Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999).

147. *See US-Countervailing Measures* Appellate Body Report, *supra* note 130, ¶ 103.

For example, suppose the United States were to insist on inserting the following provision in an accession protocol of a country such as Vietnam that is likely to experience many privatizations in the coming years: "A countervailing duty order may be imposed on the assumption that benefits from a financial contribution bestowed before privatization carry through to a privatized entity and continue for the normal, useful life of assets in that entity." That provision would violate the spirit, if not the holdings, of the Appellate Body.[148] Yet, if the United States were to take the position that those holdings are relevant only for the cases in which they were rendered, then it would be logically consistent for it to insert this kind of provision and, thereby, circumvent a future defeat in a case brought by the newly acceding country.

3. Being Nice to the United States

Arguably, the Appellate Body was nice to the United States in the *Certain Products* case. It did not draft its Report, in terms of condemning the same person methodology, as strongly as it could have. The Appellate Body could have – with great irony, but also indelicacy – said the DOC's methodology was "un-American."

How so? As is well known, a presumption running throughout most of American law and legal culture is innocence until guilt is proven. The same person methodology was worse than a presumption of guilt (i.e., worse than the reverse presumption of "guilty until proven innocent"). That methodology, particularly when applied in an administrative review, was "guilty with no possibility of being proven innocent."

D. Safeguards, Injury and Causation: The *Steel Safeguards* Case

Citation

United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/AB/R, WTDS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, AB-2003-3 (issued November 10, 2003, adopted December 10, 2003) (complaints by the European Communities, Japan, Korea, China, Norway, Switzerland, New Zealand, and Brazil; with Canada, Cuba, Mexico, Taiwan, Thailand, Turkey, and Venezuela as Third Participants). [149]

148. It would also be consistent with current U.S. policy toward Vietnam, China, and other centrally controlled economies precluding U.S. countervailing duty actions against those countries.

Explanation

1. Introduction – Controversy, Threats, Turmoil, and Capitulation

U.S. – Steel Safeguards is probably the most controversial, and certainly one of the most complex trade remedy actions in the nine-year history of the WTO. Seldom has protection of the domestic steel industry – a common practice for the United States and many other nations during the past thirty years – generated such legal and political disagreement both within the United States and between the United States and its major trading partners. From its inception on June 28, 2001, when the U.S. International Trade Commission ("USITC") initiated the investigation at the request of the steel industry and its unions,[150] to the termination of the safeguards on December 4, 2003, for "changed economic circumstances,"[151] the process was a continuing challenge to the Bush Administration, consumers of steel in the United States, firms and nations exporting steel to the United States, and, indeed, to multilateral efforts to reduce trade barriers through the WTO's Doha Development Round and the Free Trade of the Americas, among others.

The safeguard measures were obviously crafted in part with U.S. steel consumers and foreign trade partners in mind. Initially, the safeguards excluded some 35% of total imports of steel into the United States. Developing countries accounting for about 13% of imports were excluded,[152] along with free trade agreement partners Canada, Mexico, Jordan, and Israel.[153] Also, the additional tariffs (30%, 15%, and 13% initially for most categories) were reduced to 24%, 12%, and 10% in the second year and to be reduced to 18%, 9%, and 7%, respectively, in the third year.[154] The program was fine-tuned on at least two occasions, with previously safeguarded products being removed from the list, usually on grounds that there was insufficient availability from U.S. sources,[155] and as a result of the political pressures

149. *U.S. – Steel Safeguards* Appellate Body Report.

150. Institution and Scheduling of an Investigation Under Section 202 of the Trade Act of 1974, 66 Fed. Reg. 35, 267 (July 3, 2001).

151. Proclamation No. 7741, 68 Fed. Reg. 68,483 (Dec. 4, 2003).

152. Article 9 of the *Safeguards Agreement* provides that developing countries which individually have a market share of 3%, and in the aggregate account for less than 9% of the market, are to be excluded from the safeguards measures.

153. *Steel Tariffs Exclude As Much as 35% of Imports*, INSIDE U.S. TRADE, Mar. 8, 2002, at 1-3, *at* www.insidetrade.com [hereinafter *Steel Tariffs Exclude 35%*].

154. Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. 10593, 10594 (Mar. 5, 2002); *see also* Presidential Proclamation No. 7529, 67 Fed. Reg. 10,553 (Mar. 5, 2002).

155. *See* Rosella Brevetti & Chris Rugaber, *Steel - U.S. Exempts Additional 46 Products from Steep U.S. Steel Safeguard Tariffs*, 19 Int'l Trade Rep. (BNA), No. 25, at 1079 (June 20, 2002); Andrew Becker, *Bush Scales Back Tariffs on Steel*, N.Y. TIMES, Aug. 23, 2002, at A1.

from irate American steel consumers experiencing significant price increases.[156] However, it was probably more significant in terms of U.S. trade relationships that most of the imports from the EU ($4 billion worth), Brazil, Russia, and China, were not excluded, at least initially.[157]

The "ripple effect" was predictable and prompt. Other steel producing and importing nations, including the EU, China, Canada, and Venezuela, feared the trade diversionary impact of the partial closure of the massive U.S. steel market, and made preparations to impose defensive safeguards themselves.[158] The United States was not in a good position to object. U.S. Deputy Treasury Secretary Kenneth Dam simply indicated that the situation was "worrisome" and encouraged the EU to be "as careful and deliberate as possible" so that trade tensions would not be exacerbated. Dam recognized, however, that every other nation "needs to do what it needs to do."[159]

The initial challenge to the legality of the United States' actions was filed on behalf of the European Union as a request for consultations under the DSU in Geneva on March 7, 2002, less than forty-eight hours after the safeguards were initially imposed.[160] Ultimately, seven other WTO Members became parties to the DSU action against the United States, and another seven participated as Third Parties (*i.e.*, more than 10% of the WTO's membership). Threats of retaliation began immediately after the imposition of the safeguards,[161] and by the time President Bush terminated the safeguards twenty-one months later, the United States faced potential retaliation well in excess of $2 billion.[162] The termination took place six days *before*

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156. Neil King, Jr. & Robert Guy Matthews, *A Global Journal Report: Errant Shot? So Far, Steel Tariffs Do Little of What President Envisioned,* WALL ST. J., Sept. 13, 2002, at A1.

157. *Steel Tariffs Exclude 35%, supra* note 153.

158. *See Steel: EU Adopts Steel Safeguards Tariffs to Limit Steel Diverted by U.S. Measures*, 19 Int'l Trade Rep. (BNA), No. 13, at 527 (Mar. 28, 2002) [hereinafter *Steel - EU Adopts Steel Safeguards*]; Peter Menyasz & Mike Ceaser, *Steel: Canadian Tribunal Sets Inquiry on Steel Safeguard Action; Venezuela Raises Tariffs*, 19 Int'l Trade Rep. (BNA), No. 15, at 668 (Apr. 11, 2002); Noah J. Smith, *Safeguards: China Launches Steel Safeguards Investigation Involving 11 Categories,* 19 Int'l Trade Rep. (BNA), No. 23, at 1013 (June 6, 2002).

159. *Steel - EU Adopts Steel Safeguards, supra* note 158, at 527.

160. The safeguards were imposed under Section 203 on March 5, 2002. Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. at 10, 593.

161. *See* Neil King Jr. & Geoff Winestock, *Bush's Proposed 30% Tariffs May Spark Trade Battle or Derail Other Efforts,* WALL ST. J., Mar. 7, 2002, at A3 (quoting EU Trade Commissioner Pascal Lamy as stating that the tariffs could cost European steel makers as much as $2 billion per year in lost trade, and indicating that the EU was considering immediate retaliation).

162. Gary G. Yerkey, *Steel: President Bush Seen Facing 'Stark Choice' On Steel Tariffs; Further Extensions Unlikely,* 20 Int'l Trade Rep. (BNA), No. 44, at 1831 (Nov. 6, 2003) (quoting EU Trade Commissioner Pascal Lamy's intent to impose $2.2 billion worth of annual sanctions five days after the WTO adopted the Appellate Body report); Todd Zaun, *Japan*

the Dispute Settlement Body approved the Appellate Body report, but only ten days before massive retaliation from the EU. Japan and probably other countries would have eventually retaliated as well.[163] The termination, applauded by American steel users and condemned by the steel workers' unions,[164] avoided a likely trade war[165] and produced an obvious sense of relief on the part of foreign steel exporters. However, for some, such as EU Trade Commissioner Pascal Lamy, there remained "[a] continuing sense of dismay over what has amounted to an abuse of internationally agreed safeguard rules, in the form of additional tariffs of up to 30% unilaterally imposed by the U.S. for a year and a half."[166]

In explaining the termination, U.S. authorities carefully avoided conceding, in public at least, that the safeguards had been terminated as a proximate result of the DSB decision and the threat of massive trade sanctions. President George W. Bush stated "[t]hese safeguard measures have now achieved their purpose. And as a result of changed economic circumstances, it is time to lift them," without mentioning the WTO.[167] He also noted that consolidation in the industry had taken place during the twenty-one months of the safeguards; productivity had increased with resulting lower production costs; new labor agreements had been negotiated; and the Pension Benefit Guaranty Corporation had guaranteed steelworker pensions relieving the industry of the burden.[168] In the course of an extensive press briefing, U.S. Trade Representative Robert Zoellick stressed the changes that had taken place in the industry, including:

Threatens Retaliation Against U.S. Over Steel Tariffs, WALL ST. J., Nov. 28, 2003, at A2 (noting threat from Japan to impose $85 billion a year in sanctions in U.S. goods); Peter Wonacott & Scott Miller, *China Weighs Tariffs on U.S. Goods*, WALL ST. J., Nov. 21, 2003, at A11.

163. *But see also* Martin Fackler & Scott Miller, *Asia and Brazil Show Restraint on Steel Tariffs*, WALL ST. J., Nov. 12, 2003, at A16 (noting that several Asian nations and Brazil were either urging the United States to accept the ruling, or "studying alternatives").

164. Edward Alden et al., *US to Dismantle Steel Tariffs and Avoid Sanctions: Bush Eases Relations with Europe and Japan But Angers American Steelworkers*, FIN. TIMES (London), Dec. 5, 2003, at 1.

165. It was said that the Bush Administration decided they could not run the risk of EU sanctions, *inter alia*, against orange juice and other citrus products from Florida; motorcycles, farm machinery, textiles, shoes, and other products. Mike Allen, *President To Drop Tariffs on Steel; Bush Seeks to Avoid a Trade War and Its Political Fallout*, WASH. POST, Dec. 1, 2003, at A-1.

166. Pascal Lamy, *The Genie Is Out of the Bottle*, WALL ST. J., Dec. 8, 2003, at A14.

167. Press Briefing, Scott McClellan, Office of the Press Secretary (Dec. 4, 2003) (on file with author) [hereinafter Press Briefing by Scott McClellan].

168. *Id.* President George W. Bush also gave his jobs and growth plan credit for creating "more favorable economic conditions for the industry," and suggested that "the improving economy will further help stimulate demand." *Id*. Concerns regarding the domestic steel industry expressed in early December appear to have been unfounded. Six weeks later, steel prices in the United States (and world-wide) were increasing, often by double digits. *See* Paul Glader, *Steel Prices Jump, Spurring Protests From Customers,* WALL ST. J., Jan. 23, 2004, at A2.

(1) the elimination of four million tons of inefficient capacity; (2) the fact that prices had increased and stabilized, industry profitability returned, with imports decreased; and (3) China's increase in steel consumption annually each year since 2001.[169] However, he also conceded that "safeguards unavoidably impose some costs on consumers." While the "decision was independent of [the threat of EU retaliation "meant to inflict maximum political pain on the President's reelection]," Ambassador Zoellick frankly conceded that "it's good that we now don't have retaliation."[170] Also, he emphasized that " [w]henever you can, you try to work out those [potential trade retaliation] problems, because the goal is to try to open markets, not to close them. But that's part of the WTO process, and we accept that process."[171]

2. A Domestic Safeguards Action Whose Time Had Come – and Gone?

From the outset, the imposition of WTO-legal safeguards – if that was the objective of the United States – was an uphill factual and legal battle. First, the WTO Appellate Body has never found a safeguard measure to be consistent with Article XIX of GATT, the Agreement on Safeguards,[172] or both.[173] Second, in several of the

169. Press Briefing by Scott McClellan, *supra* note 167.

170. *Id.*

171. *Id.* U.S. Ambassador to the WTO, Linnet Deily, was not so gracious. She criticized the Appellate Body decision emphasizing that the Bush Administration "stands by" its March 2002 safeguards decision, and insisted that "The President based the decision to terminate the safeguard measures on his own determination that the effectiveness of the safeguard measures has been impaired by changed economic circumstances," without mentioning the sanctions threat. *See* Daniel Pruzin, *Steel: U.S. Criticizes WTO Appellate Ruling On Steel Tariffs, Stands by its 2002 Decision,* 20 Int'l Trade Rep. (BNA), No. 50, at 2059 (Dec. 18, 2003).

172. For the texts of the Safeguards Agreement and the General Agreement on Tariffs and Trade, respectively, *see* Bhala, *supra* note 41, at 521-30, 183, 226-27.

173. *See generally WTO Case Review 2000*, *supra* note 20 (discussing WTO Report of the Appellate Body, *Argentina - Safeguard Measures on Imports of Footwear*, WTO Doc. WT/DS121/AB/R (Dec. 14, 1999), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm [hereinafter *Argentina-Footwear* Appellate Body Report]); WTO Report of the Appellate Body, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc. WT/DS98/AB/R (Dec. 14, 1999), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members3_e.htm [hereinafter *Korea – Dairy* Appellate Body Report], *discussed in WTO Case Review 2000*, *supra* note 20, at 87; WTO Report of the Appellate Body, *United States - Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, WTO Doc. WT/DS166/AB/R (Dec. 22, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *US-Wheat Gluten* Appellate Body Report], *discussed in WTO Case Review 2001*, *supra* note 86, at 608; WTO Report of the Appellate Body *, United States - Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WTO Doc. WT/DS177/AB/R (May 1, 2001), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *US-*

Appellate Body safeguards decisions, including *Argentina – Footwear* and *United States – Wheat Gluten,* the Appellate Body had made it clear that meeting the "unforeseen developments" requirement of GATT, Article XIX, was an extremely difficult if not impossible task. Third, prior efforts of a WTO Member to exclude from the safeguards measures other members of a regional trade agreement (Brazil in *Argentina – Footwear*, Canada in *United States – Wheat Gluten*, and Canada and Mexico in *United States – Line Pipe)* had been held inconsistent with the Safeguards Agreement. This was a particular challenge in *Steel Safeguards,* since during the five-and-a-half year period of review Canada was the largest single source of imported steel, and during most of the period Mexico was number three, after Brazil.[174] Even if it remains theoretically possible for a WTO Member to bring a safeguards action that would pass Appellate Body muster – which the authors seriously doubt – *this* was not the one.

Finally, by the time the United States steel industry received the necessary U.S. government support (from the Bush Administration)[175] to file a safeguards action, it was several years too late for likely success. (The Clinton Administration, of course, used safeguards to protect the U.S. steel pipe, lamb meat, and wheat gluten industries, all of which were later ruled illegal by the Appellate Body.[176]) While U.S. imports of most steel products increased from 1996-1998, imports of key products decreased from 1999 on, most precipitously during the first six months of 2001 compared to the first six months of 2000.[177] The relatively long period of investigation selected by the International Trade Commission was 1996 through 2000, and the first six months of 2001, which latter period was compared to the comparable six month period of 2000.[178] Because both GATT, Article XIX, and

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Lamb Appellate Body Report] *discussed in WTO Case Review 2001*, *supra* note 86, at 620; WTO Report of the Appellate Body, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,* WTO Doc. WT/DS202/AB/R (Feb. 15, 2002), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *US – Line Pipe* Appellate Body Report], *discussed in WTO Case Review 2001*, *supra* note 86, at 178.

174. *See* United States International Trade Commission, *U.S. Imports of Steel Products Overall Trends by Source Country – Quantity*, (last visited Apr. 22, 2004), *available at* http://dataweb.usitc.gov/scripts/steel.asp [hereinafter *U.S. Imports of Steel Products – Quantity*].

175. The Clinton Administration, despite some jawboning of foreign producers, steadfastly refused to support such efforts despite its close ties to the steel workers unions. *See* Gary Yerkey, *President Clinton Defends Decision to Keep U.S. Market Open Despite Domestic Backlash,* 16 Int'l Trade Rep.(BNA), No. 36, at 1487 (Sept. 15, 1999); *Trade Outlook: Steel*, 16 Int'l Trade Rep. (BNA), No. 3 (Jan. 20, 1999), *available at* http://www.bna.com (reporting threats to initiate a Section 201 action if Japan failed to reduce steel exports to the United States).

176. *See* Yerkey, *supra* note175.

177. U.S. Imports of Steel Products, *supra* note 174.

178. *See* discussion *infra.*

Article 2 of the *Safeguards Agreement* effectively require a showing of increasing imports, the basic import data itself provided only limited support for the action, assuming, as the Appellate Body determined in *Argentina – Footwear*, that it is not sufficient for the competent authority to simply compare the volumes of imports at the starting point and the ending point of the investigation. If the case had been brought two years earlier, the focus would have been on 1996-1998 data, and this problem – although probably not the others – might have been resolved in favor of the United States.

3. Factual Background at the USITC

Observers suggest that this was the most complicated case ever litigated before the USITC.[179] A visit to the USITC website[180] reveals a massive record of at least several thousand pages. The USITC divided the industry into numerous categories (with the commissioners occasionally differing on the categorization). Ultimately, affirmative injury determinations were made with regard to imports of CCFRS (certain cold flat rolled steel), hot-rolled bar, cold-finished bar, rebar, FFTJ (carbon and alloy fittings, flanges and tool joints), stainless steel bar, and stainless steel rod. Divided decisions (later treated as affirmative) were made with regard to tin mill products; stainless steel wire; stainless steel fittings and flanges; and tool steel.[181] The USITC Commissioners recommended a variety of tariffs and tariff-rate quotas for ten steel product categories, and the inclusion in some of the measures of imports from Canada and/or Mexico.[182] As usual in U.S. safeguards actions, the President of the United States fashioned his own remedies, which as noted earlier involved primarily tariffs as high as 30%, but decided to exclude Mexican and Canadian imports entirely from the safeguard measures.[183]

Concerns within the U.S. government that the USITC determination might not pass DSB muster were apparent even before the imposition of safeguards on March 7, 2002. On January 3, 2002, Ambassador Zoellick requested the USITC to provide more information, *inter alia*, on unforeseen developments and the potential exclusion from any safeguards measures of imports from Canada, Mexico, Israel and Jordan.[184] The USITC provided the supplemental information, which was included

179. *See* Daniel Pruzin, *Trade Law Experts Pan U.S. Steel Tariffs, Say WTO Members Permitted to Retaliate*, 19 Int'l Trade Rep. (BNA), No. 512 (Mar. 21, 2002), *available at* http://www.bna.com.

180. *See* Steel Global Safeguard Investigation, *at* http://www.usitc.gov/steel/default.htm.

181. *U.S.-Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 12; *see* USITC Report, Inv. No. TA-201-73 (Dec. 2001), Vol. 1, at 1, note 1.

182. USITC Report, *supra* note [ ], at 2-7.

183. *See* Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. at 10,595.

184. Letter from Robert Zoellick, United States Trade Representative, to Stephen Koplan, Chairman, United States International Trade Commission (Jan. 3, 2003) *available at* https://edis.usitc.gov/hvwebex/hvweb.dll?DisplaySecList&9351&%5bNULL%5d&View{1{R

among the data provided to the Panel convened under the DSU.[185]

4. Unresolved Issues of the Unique Retaliation Provisions of the Safeguards Agreement

Although not discussed in any detail herein, the Safeguards Agreement contains unique provisions governing compensation which arguably apply well before the DSB has passed on the legality of measures taken by a Member under the Safeguards Agreement. As a general rule, compensation is required for safeguard measures (i.e., from the Member applying the safeguards measures to the exporting Member). The Safeguards Agreement specifies that if no agreement on compensation is reached within 30 days in consultations required under the Safeguards Agreement,[186] the affected exporting Members are free, within a 90 day period after imposition of the safeguards measure, to apply "substantially equivalent concessions."[187] However, in typical GATT/WTO fashion, there is an exception to this rule, and an exception to the exception. The right of suspension is not to be "exercised for the first three years that a safeguard measure is in effect, *provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.*"[188]

This language suggests that under what the drafters assumed would be "normal" circumstances (i.e., safeguards measures that were in response to increasing imports and otherwise consistent with the requirements of the Safeguards Agreement,) the United States would have had a free ride for almost all of the three year and one day period of safeguard measures. However, the language of Article 8 leaves exporting Members who might wish to retaliate immediately in a very difficult position. How are they to know, before the Appellate Body has ruled some twenty months later (as in this proceeding) whether these two conditions have been met? Is it enough that the public import data shows the trend of decreasing imports during the latter part of the period, or that similar impositions of safeguard measures have been repeatedly held inconsistent by the Appellate Body? Would any leading world trader Member of the WTO risk what would certainly be denounced as unilateral retaliation, if action were taken before the Appellate Body had ruled? Probably not.

This undoubtedly explains to a great extent why the EU, having threatened immediate retaliation, thought better of it and waited until after the Appellate Body had ruled in November 2003 before promising action within five days after the

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185. United States International Trade Commission , USITC Supplementary reports, Jan. 9, 2002 and Feb. 4, 2002, *available at* http://www.usitc.gov; *see U.S.-Steel Safeguards* Appellate Body Report, *supra* note 44, at 5 n.24.

186. *Safeguards Agreement, supra* note 152, art. 12.

187. *Id.* arts. 8(1), 8(2).

188. *Id*. art. 8(3) (emphasis added).

decision had been adopted by the DSB.[189] Article 8 has not been reviewed by a panel or by the Appellate Body, but the supposed legal right of unilateral retaliation provided therein probably has little viability in the real world of WTO Member practice.

5. Principal Issues on Appeal[190]

Despite the significance of the case in world trade, the Appellate Body's report in *US – Steel Safeguards* breaks relatively little new ground in its safeguards jurisprudence. All of the major issues – "unforeseen developments" under GATT, Article XIX; "parallelism" requirements for special treatment of free trade agreement and customs unions partners, and the proper treatment of imports as the cause of serious injury when imports are not increasing during the entire period of review; and causation – had been dealt with in earlier Appellate Body decisions.[191] Nevertheless, the analyses of "unforeseen developments" and increasing imports, in particular, goes somewhat further in explaining the Appellate Body's view of what the competent authority must do to meet the requirements of GATT, Article XIX and the Safeguards Agreement than previous decisions.

Principal issues are as follows:

> (a) Whether the Panel erred in finding that the United States acted consistently with GATT, Article XIX(1)(a) and Article 3.1 of the Safeguards Agreement in demonstrating that "unforeseen developments resulted in increased imports causing

189. *See* Pruzin, *supra* note 179 (indicating that the EU intends to seek compensation under Article 8 of the Safeguards Agreement in the amount of $2.5 billion); Joel Kirwin & Gary Yerkey, *Steel – EU Members Support Plan to Delay Retaliatory Sanctions on U.S. Products,* 19 Int'l Trade Rep. (BNA), No. 1030 (June 13, 2002), *available at* http://www.bna.com.

190. *U.S.-Steel Safeguards* Appellate Body Report, *supra* note 44, ¶¶ 264-268.

191. *See Argentina-Footwear* Appellate Body Report, *supra* note 173 (discussing all three issues); *US-Lamb* Appellate Body Report, *supra* note 173 (discussing "unforeseen developments"); *U S –Wheat Gluten* Appellate Body Report*, supra* note 173; *US – Line Pipe* Appellate Body Report, *supra* note 173 (discussing "parallelism" and causation).

> serious injury to domestic producers" of many of the major product categories covered by the USITC's investigation;
>
> (b) Whether the Panel erred in determining that the United States violated Articles 2.1 and 3.1 of the Safeguards Agreement by failing to provide a "reasoned and adequate explanation" of how the findings of increased imports were supported by the facts;
>
> (c) Whether the Panel erred in finding that the United States failed to establish "explicitly that imports from sources not excluded from the scope of the measure [from FTA partners Canada, Mexico, Israel and Jordan] satisfy, *alone*, the requirements for imposition of safeguard measures"; and
>
> (d) Whether the Panel erred by finding that the United States' causation analysis was inconsistent with Articles 2.1, 3.1 and 4.2 of the Safeguards Agreement.

The Appellate Body also considered procedural issues:

> (a) Whether the Panel failed to meet the "objective assessment" requirement of Article 11 of the DSU with regard to the Panel's analysis of the facts and the law; and
>
> (b) Whether the Panel acted inconsistently with Article 12.7 of the DSU by failing to provide the "basic rationale" underlying some of its findings and conclusions.

The Appellate Body noted certain conditional appeals, to be pursued only if the Appellate Body were to reverse major aspects of the Panel decision, respecting, *inter alia*, the definitions of "like product" used by the USITC; whether the remedies imposed by the United States violated Article 5.1 of the Safeguards Agreement by going beyond the extent necessary to remedy the injury; and by identifying developing country members for exclusion from the safeguards measures based on the rules for the United States "Generalized System of Preferences"; and failing to provide an explanation as to why China was not treated accordingly. Ultimately, none of these issues were decided by the Appellate Body.

Finally, the Appellate Body indicated that none of the parties challenged the United States' safeguards laws, regulations, or methodologies generally; the challenge was limited to the specific safeguard measures applied in this case.[192]

6. Unforeseen Developments and Article 3.1 of the Safeguards Agreement[193]

The United States had challenged the Panel's determination that the United

192. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 267.
193. *Id*. ¶¶ 269-330.

States had failed to meet the requirements of GATT Article XIX(1)(a)[194] of demonstrating that unforeseen developments have resulted in increased imports of the products that were subject to safeguards measures, despite an investigation and explanation on the part of the USITC that went far beyond *US – Lamb*.[195] Interestingly, in the present case the United States did not raise the issue of whether "the Russian crisis, the Asian crisis and the continued strength of the United States' market together with the persistent appreciation of the US dollar,"[196] actually amounted to unforeseen developments. Thus, the Appellate Body once again was able to avoid addressing that issue.

The analysis began with a discussion of the appropriate standard of review for claims under Article XIX; in particular, whether the "reasoned and adequate explanation" test required under the Safeguards Agreement also applies to Article XIX. The United States had argued that because Article XIX established a "distinct obligation that is different from obligations" under Articles 2 and 4 of the Safeguards Agreement, a different (and presumably less extensive) standard of review should have been applied.[197] However, the Appellate Body, relying on its reports in *Argentina – Footwear* and *US – Lamb*, disagreed. As stated in *Argentina – Footwear,* because Article XIX of GATT and the Safeguards Agreement "relate to the same thing, namely the application by Members of safeguard measures," the same standard is applicable. Also, as indicated in *US – Lamb*, "unforeseen developments" is a "pertinent issue of fact and law" under Article 3.1 of the Safeguards Agreement, again supporting the application of the same standard.[198]

Article 3.1 provides, in relevant part, that " [t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions on all pertinent issues of fact and law." In interpreting Article 3.1, the United States argued that the requirements are met if the authorities "present a logical basis for their conclusion." Thus, there is no "explicit" requirement for an "explanation." Under this approach, according to the United States, the competent authority could have a "reasoned conclusion" without a "reasoned and adequate explanation."[199] Not so, according to the Appellate Body. The focus should not be entirely on "reasoned" but rather on the

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194. "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession." GATT, 55 U.N.T.S. 187.

195. *See WTO Case Review 2001*, *supra* note 86, at 620, 625.

196. *U.S.-Steel Safeguards* Appellate Body Report*, supra* note 44, ¶ 269.

197. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 274 (quoting United States' appellant's submission).

198. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶¶ 275-76.

199. *Id*. ¶¶ 284-85.

entire context. If the conclusion is to be reasoned, it has to be "reached in a connected or logical manner or expressed in a logical form." That reasoned conclusion also has to be set forth in the competent authority's report; as the EC and Norway argue, it isn't the responsibility of the Panel to deduce the rationale for itself. The Appellate Body also noted that Article 4(2)(c) requires the publication of a "detailed analysis of the case under investigation." This is effectively an "elaboration" of the "reasoned conclusion" requirement of Article 3.1.

According to the Appellate Body, the Panel had faulted the United States for not having provided a reasoned and adequate explanation as to how "'unforeseen developments' resulted in increased imports of the products on which the United States imposed safeguard measures."[200] It was not a question for the Panel of length or the form of the explanation. However, the Panel could not properly assess whether a Party meets this requirement, because it "may not conduct a *de novo* review of the evidence or substitute its judgment for that of the competent authorities."[201] This means, says the Appellate Body, that the lack of a reasoned and adequate investigation (by the failure of the competent authority to explain a finding) leaves the Panel with no alternative to finding that the competent authority has performed the analysis incorrectly [and violated Articles 2 and 4].

The United States also challenged the determination of the Panel that the competent authority must demonstrate that "unforeseen developments" under Article XIX of GATT have resulted in increased imports for each of the specific products that is subject to safeguard measure, rather than in the aggregate. Article XIX, in the view of the United States, does not specify a particular type of analysis. The analysis of the overall effects of the Russian and Asian financial crises, and the strong U.S. dollar, according to the Panel, was insufficient. That didn't support the USITC's assertion that these unforeseen developments resulted in the *specific* increased imports at issue in the proceeding. Once again, the Appellate Body was unconvinced. It noted that Article XIX(1)(a) itself requires a more specific analysis:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

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200. *Id*. ¶ 294.

201. *Id*. ¶ 299 (referring to *Argentina-Footwear* Appellate Body Report *, supra* note 173, ¶ 121).

Article XIX requires "that safeguard measures be applied to the product that 'is being imported in such increased quantities,' and those 'increased quantities' are being imported 'as a result of' unforeseen circumstances."[202]

The Appellate Body pointed out that in its reports in *Korea – Dairy* and *Argentina – Footwear*, it indicated the need for a "logical connection" which would link the unforeseen developments and the project that was subject to safeguard measures. Otherwise, the Panel could not determine that the increased imports were "as a result" of "unforeseen developments." In short, the Appellate Body agreed with the Panel that the unforeseen developments analysis must be performed on a product-by-product basis, and that the USITC did not go far enough in demonstrating the "necessary links between market displacements and increased imports to the United States." Connecting the dots was not the responsibility of the Panel: "[I]t is not for panels to find support for such [reasoned conclusions] by cobbling together disjointed references scatted throughout a competent authority's report."[203] A "reasoned conclusion," according to the Appellate Body, is not one that fails to refer to the facts that support the conclusion. Also, as the EC has argued, where macroeconomic effects were relied upon by the USITC, the USITC rather than the Panel was required to make the "logical connection."

Nor, says the Appellate Body, is it appropriate for the United States to rely on *EC – Tube or Pipe Fittings*.[204] As the United States points out, "[t]he issue there was . . . whether a particular injury factor listed in Article 3.4 of the Anti-Dumping Agreement 'ha[d] been evaluated, even though a separate record of the evaluation of that factor ha[d] been made.'"[205] There, the Appellate Body found that the Panel had reasonably concluded that the competent authorities had addressed and evaluated the relevant factor. The issue here, in contrast, is not whether certain data relevant to the unforeseen circumstances determination had been "considered" by the USITC, but the lack of explanation – the "reasoned conclusion" – provided regarding how the unforeseen developments resulted in increased imports.

Accordingly, the Appellate Body upheld the Panel determination that the "USITC's Report failed to demonstrate, through a reasoned and adequate explanation, that 'unforeseen developments' had resulted in increased imports" of the ten categories of steel products under consideration.[206]

7. Increased Imports[207]

The relevant data indicate that during the five and one half year period of review, imports of the relevant steel products did not show a steady increase, but instead increased for part of the period and decreased during the remaining months or

202. *Id.* ¶¶ 313-314.
203. *Id.* ¶ 326.
204. *See generally Brazil Cast Iron Tube* Appellate Body Report, *supra* note 85.
205. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 328.
206. *Id.* ¶ 330.
207. *Id.* ¶¶ 331-431.

years. The imposition of safeguards measures is governed (along with GATT, Article XIX) by Article 2.1 of the Safeguards Agreement:

> 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 (emphasis added).

The Appellate Body began its analysis by reiterating that the requirements of Article XIX (unforeseen developments; effect of the obligations, including tariff concessions; imports in such increased quantities; causation of serious injury) must be satisfied before safeguards may be imposed. "The fulfillment of each of these prerequisites is a 'pertinent issue of fact and law' for which 'finding[s] and reasoned conclusion[s]' must be included in the published report of the competent authorities."[208] One of those is the existence of "increased imports," which the Appellate Body uses as shorthand for the language in Article XIX(1)(a) and Article 2.1.

The United States had appealed the Panel's finding that the United States failed to provide a reasoned and adequate explanation of how the facts supported the USITC's conclusion that imports of five product categories – CCFRS, stainless steel rod, hot-rolled bar, tin mill products, and stainless steel wire – "increased" within the meaning of Article XIX(1)(a) of GATT and Article 2.1 of the Safeguards Agreement. For the first three products, the United States faulted both the Panel's general interpretation and its analysis of import data. For the latter two, the United States objected to the Panel's determination that the USITC failed to provide a reasoned explanation because the determinations were based on multiple sets of explanations that in the Panel's view could not be reconciled.

a. CCFRS, Hot-Rolled Bar, and Stainless Steel Rod

According to the Panel, Article XIX(1)(a) and Article 2.1 indicate "that it is necessary for the competent authorities to examine recent imports and that the increase in imports was 'recent;'"[209] the increase in imports must also be "sudden."[210] The Panel then considered whether a *decrease* at the end of the period of investigation could, in an individual case, prevent a finding of increased imports

208. *Id*. ¶ 331.

209. WTO Report of the Panel, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WTO Doc. WT/DS248/R, ¶ 10.159 (July 11, 2003), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm [hereinafter *US - Steel Safeguards* Panel Report].

210. *Id*. ¶ 10.166.

under Article 2.1. In making this evaluation, the Panel decided that it should take into account the duration and degree of the decrease at the end of the period as well as the sharpness and extent of the earlier increases. The Panel, says the Appellate Body, was also aware of *Argentina – Footwear,* in which the Appellate Body indicated that the competent authorities are required to look at trends in imports over the period of investigation, and that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough . . . to cause or threaten to cause 'serious injury.'"[211]

The United States argued against the "recentness, suddenness, sharpness, and significance" requirement of increasing imports, contending that this is not required by *Argentina – Footwear* or by Article 2.1 of the Safeguards Agreement. In the earlier case, according to the United States, the focus was on the "entire investigative responsibility of the competent authorities." These factors are not, however, part of the evaluation of whether imports have increased. "[I]n such increased quantities" means only that "in general, the level of imports at (or reasonably near to) the end of a period of investigation be higher than at some unspecified earlier point in time."[212] Most of the other parties – China, the EC, Korea, New Zealand and Norway – disagreed, contending that the United States' view means that any increase in imports would be sufficient to meet the requirements of Article 2.1, or as suggested by the USITC, there is no minimum quantity of increase required and a simple increase would be sufficient.

The Appellate Body viewed the first requirement of its analysis as determining if there is any threshold requirement (qualitative or quantitative) for the competent authority for a finding of the existence of "such increased quantities" of imports, or whether it is enough, as contended by the United States, that imports are higher at the end of the period than at some earlier period. The Appellate Body notes that it "examined essentially the same issue" in *Argentina – Footwear*. There, the Appellate Body emphasized that:

> Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be "s*uch* increased quantities" as to cause or threaten to cause serious injury to the domestic industry in order to fulfill this requirement for applying a safeguard measure. [This language] requires that the increase in imports must have been recent enough, sudden enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury."[213]

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211. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 340 (quoting *Argentina - Footwear* Appellate Body Report, *supra* note 173, ¶ 131).

212. *See id*. ¶ 341 (quoting from United States' appellant's submission, ¶ 107).

213. *Argentina - Footwear* Appellate Body Report, *supra* note 173, ¶ 131, *quoted in US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 345 (footnotes omitted).

The Appellate Body reaffirmed this finding, agreeing with the United States that this is a statement about the "entire investigative responsibility of the competent authorities" including those portions of the analysis relating to consideration of serious injury and causation.[214] The Appellate Body also reminds that the "title of Article XIX on safeguards is: 'Emergency Action on Imports of Particular Products,'" notes that the term "emergency action" also is found in Article 11.1(a) of the Safeguards Agreement, and reiterates that "their extraordinary nature must be taken into account."[215]

This doesn't mean, contrary to what the EC and Norway assert, that increased imports in themselves must be abnormal *in and of themselves*. Rather, the Working Party in *US – Fur Felt Hats* saw the abnormal development in the combination of increased imports, resulting from unforeseen circumstances and the result of tariff concessions, and entering under increased quantities and conditions as to cause or threaten serious injury.[216] The Appellate Body also reminded the Parties that in *Argentina – Footwear*, the Appellate Body emphasized that the "increased quantities of imports should have been 'unforeseen or unexpected.'"[217]

Moreover, it doesn't matter that the words "recent, sudden, sharp or significant" do not appear in Article 2.1 of the Safeguards Agreement. The "context" for interpretation of the increased imports requirement of 2.1 is found in Article 4.2(a), which requires the competent authorities, in the course of the investigation, to "evaluate . . . the rate and amount of the increase in imports of the product concerned in absolute and relative terms. . . ." The competent authorities are required to consider trends. Otherwise [e.g., here],

> [I]n cases where an examination does not demonstrate, for instance a clear and uninterrupted upward trend in import volumes, a simple endpoint-to-endpoint analysis could easily be manipulated to lead to different results, depending on the choice of endpoints.[218]

The United States, according to the Appellate Body, has conceded that an examination of trends is required by the competent authorities, while contending that the Panel has improperly established an absolute standard regarding recentness, suddenness, sharpness, and significant. Not so, according to the Appellate Body.

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214. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 346.

215. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 347 (quoting *Argentina - Footwear* Appellate Body Report, *supra* note 173, ¶¶ 93-94).

216. *Id*. ¶ 348 (citing 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*, *adopted* October 22, 1951, GATT/CP/106. [citation is from the list of cases cited in the Appellate Body Report]

217. *See id*. ¶ 350 (quoting *Argentina-Footwear* Appellate Body Report, *supra* note 173, ¶ 131).

218. *Id*. ¶ 354.

The Panel disclaimed an absolute standard while refusing to recognize that there are no standards at all that any increase between "two identified points in time meets the requirements of Article 2.1."[219] Thus, the Appellate Body concludes, on this issue the Panel correctly relied on *Argentina – Footwear*.

Having established the legal standard, the Appellate Body then turned to the Panel's findings as challenged by the United States and defended by other Parties. With regard to "increased imports" of CCFRS, the Panel had observed that the USITC had "noted the significant decrease between interim 2000 and interim 2001 (from 11.5 to 6.9 million short tons), but it did not seem to focus on, or at least account for, this most recent trend in concluding that imports are still significantly higher . . . than at the beginning of the period."[220] The Appellate Body agreed with the United States that under Article 2.1 imports need not be increasing at the time of the determination. However, the Panel found that because of the magnitude of the decrease between interim 2000 and interim 2001, the USITC, by failing to account for this recent trend, also failed to provide the required "reasonable and adequate explanation" of how the facts supported its "increased imports" determination. The Appellate Body cites the Panel's explanation:

> It may well be that the increase occurring until 1998 could have qualified at the time as an increase satisfying the criteria of Article 2.1 of the Agreement on Safeguards, but the Panel need not express itself on that point because that increase, in itself, was no longer recent enough at the time of the determination. In other words, the increase occurring until 1998, taken by itself and with the decrease thereafter, is not a sufficient factual basis for supporting a determination in October 2001 that CCFRS is "being imported in . . . increased quantities."[221]

According to the Appellate Body, the Panel was correct: in every case there must be "an *explanation* of how the *trend* in imports supports the competent authority's finding that the requirement of 'such increased quantities' within the meaning of Articles XIX:1(a) and 2.1 has been fulfilled."[222]

The Appellate Body's analysis was similar with regard to stainless steel rod, where U.S. imports increased from 1996-2000, particularly from 1999-2000 (25%), before declining during interim 2001 compared to 2000 by 31%. This increase, said the Panel, "was sharper than the preceding increase, and, as a matter of proportion, offset the increase of the increase of the two preceding years." The Panel effectively rejected the earlier increases in imports as a basis for a finding under Article 2.1.[223]

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219. *US - Steel Safeguards* Panel Report, *supra* note 209, ¶ 10.168.

220. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 365.

221. *US - Footwear Safeguards* Appellate Body Report, at 371, *quoting from US - Footwear Safeguards* Panel Report, ¶10.182 (emphasis added by Appellate Body).

222. *US - Footwear Safeguards* Appellate Body Report, at 374.

223. *US - Footwear Safeguards* Panel Report, at 10.267-10.269.

The United States made the same complaints as with CCFRS, and the Appellate Body rejected them again, upholding the Panel's conclusion that in light of the import trends the United States again failed to provide the necessary reasoned and adequate explanation.

The data for hot-rolled bar was similar. There the decrease during the interim 2000 to interim 2001 period was 28.9%, while the annual increase characterized by the USITC as "rapid and dramatic" for 1999 to 2000 was only 11.9%. The Panel decided that the increase over the period of 1996-2000 (52.5%), with its "alternation of increases and decreases," was not "sufficient to provide a basis for a finding that, at the moment of the determination, hot-rolled bar 'is being imported in such increased quantities.'"[224] The United States faulted the Panel for focusing on interim 2000-2001, while disregarding the earlier increases. No, says the Appellate Body. The USITC failed again to "address the relevance of the decrease that occurred at the end of the period of investigation in any way in its report." The decline was simply acknowledged.[225]

Here, the United States also argued that even if there had not been an absolute increase, the requirements of Article 2.1 were satisfied because there had been an increase relative to domestic production. The Panel had disagreed, finding that domestic production of hot-rolled bar had declined during interim 2000 to interim 2001, and was lower than in 1999, and faulting the USITC again for the lack of a "reasoned and adequate" explanation. The Appellate Body agreed with the United States, in part. The decline in imports, from 27 to 24.6% of domestic production, was relatively small compared to the increase in imports from 1996-2000 of 43.23%, and did "*not necessarily* detract from an overall determination by the USITC that the product is 'being imported in such increased quantities.'"[226] However, the USITC still failed to provide a reasoned and adequate explanation, and the Panel's finding is upheld on this ground.

b. Tin Mill Products and Stainless Steel Bar – Separate and Divergent Commissioner Rationales

The issue was somewhat different for tin mill products. Here, three members of the USITC had found serious injury for tin mill products, one treating tin mill products as separate, and two treating them combined with other steel products. The other three commissioners, who did not find serious injury, also treated tin mill products as separate products. The Panel rejected this determination on grounds that Articles 2.1 and 3.1 of the Safeguards Agreement did not permit the United States, to "base a safeguard measure on a determination supported by a set of explanations each

224. *US- Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 384 (quoting *US - Steel Safeguards* Panel Report, *supra* note 209, ¶¶ 10.204-06.

225. *Id*. ¶ 387.

226. *Id*. ¶ 396.

of which is different and impossible to reconcile with the others."[227] The United States objected, arguing that there was no requirement under the Safeguards Agreement to reconcile divergent views of different members of the competent authority, and that the three determinations constituted a "single institutional determination."

In this instance, the Appellate Body agreed, basing its conclusion in part on the somewhat unusual nature of the USITC, where "each of the six Commissioners makes an affirmative or negative finding *independently* of each other as to whether a product is being imported in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry."[228] For WTO purposes, said the Appellate Body, "there is an affirmative determination made by the competent authority . . . [and] it is from the views of these three Commissioners that a panel, and we, must find a reasoned and adequate explanation for the USITC's determination."[229] The Appellate Body indicates its "reservations with the Panel's approach," doubting that the views of the three commissioners were incapable of reconciliation. In any event, the requirement of Article 3.1 of the Safeguards Agreement that the competent authority "publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law" does not necessarily preclude the possibility of multiple findings. The Safeguards Agreement, therefore, in the view of the Appellate Body "does not interfere with the discretion of a WTO Member to choose whether to support the determination of its competent authority by a single explanation or, alternatively, by multiple explanations by members of the competent authority."[230]

Here, the Panel erred by not examining the views of the three commissioners separately to determine if one contained the necessary reasoned and adequate explanation. This failure is surprising to the Appellate Body, which notes that the Panel reviewed such multiple findings separately on the issue of parallelism. Accordingly, the Panel's determination on tin mill products was reversed. With regard to stainless steel wire, the issue – divergent findings by three commissioners – is the same as with tin mill products, and the Appellate Body reached the same conclusion. This left, of course, the question of whether the Appellate Body should complete the analysis left open by the Panel. The Appellate Body noted that in previous cases it had done this "when appropriate," but it was not necessary here because the Panel's findings on "unforeseen developments" under GATT, Article XIX, with regard to all ten products at issue.

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227. *US - Steel Safeguards* Panel Report, *supra* note 209, ¶ 10.195.
228. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 406.
229. *Id*. at 409.
230. *Id*. ¶ 414.

8. Parallelism and the Treatment of Members of Free Trade Agreements[231]

The United States excluded not only North American Free Trade Agreement (NAFTA) Parties Mexico and Canada from the scope of the steel safeguards, but free trade agreement (FTA) partners Israel and Jordan as well. President Bush made this decision even though a majority of the USITC commissioners had recommended otherwise, and after U.S. Trade Representative Robert Zoellick sought and received a supplemental panel report designed to deal with the parallelism requirement.[232] It was thus not surprising that the Panel faulted the United States for failing to "establish explicitly that imports from the sources included in the application of these measures, *alone*, satisfied the conditions for the application of the safeguard measure."[233] In particular, the Panel had opined that "[t]he increase of these [excluded] imports cannot be used to support a conclusion that the product in question 'is being imported in such increased quantities so as to cause serious injury.' *This makes it necessary. . . to account for the fact that excluded imports may have some injurious impact on the domestic industry.*"[234] The United States challenged this determination, including the Panel's insistence that the USITC make findings with regard to steel from Mexico, Canada, Israel, and Jordan for each product category, which it viewed a requirement for "redundant findings." The United States also contended that the Safeguards Agreement does not require the USITC to "account for the fact that excluded imports may have some injurious impact on the domestic industry."

Because of the exclusion of NAFTA source imports for safeguards applied to nine of the ten product categories, the Panel found that the USITC had failed to demonstrate the causal link between increased imports and serious injury, for the reason noted immediately above. In addition, the Panel faulted the USITC for failing to make the reasoned and adequate explanation with regard to imports from Israel and Jordan (while acknowledging that those imports might be so small as to have no possible effects on the findings).[235]

The Appellate Body acknowledged that the term "parallelism" does not appear in the Safeguards Agreement, but reiterates that the concept is based on Article 2. Article 2.1 permits the application of safeguard measures where "such product is being imported into its territory in such increased quantities . . . as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products." Article 2.2 states that "[s]afeguard measures shall be applied to a product being imported irrespective of its source."[236] The Appellate

231. *See id*. ¶¶ 433-74.

232. *See supra* note 184 and accompanying text.

233. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 433.

234. *Id*. ¶ 434 (quoting *US - Steel Safeguards* Panel Report, *supra* note 209, ¶ 10.598) (emphasis added by the Appellate Body).

235. *US - Steel Safeguards* Panel Report, *supra* note 209, ¶¶ 10.607-08.

236. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 439 (emphasis added by Appellate Body).

Body observes that in *U.S. – Wheat Gluten*, it concluded that because this language appears in each paragraph of Article 2, and in order to avoid giving that language a different meaning in the two paragraphs, "[i]n the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measures, under Article 2.2."[237]

According to the Appellate Body, this means that if "a Member has conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade area), that Member may not, subsequently, without any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure."[238] In the present case, the Commission relied on imports from all sources. Yet, imports from Mexico, Canada, Israel, and Jordan were excluded, creating a "gap between the imports that were taken into account in the investigation performed by the USITC and the imports falling within the scope of the measures as applied." It was thus the USITC's responsibility "to justify this gap by establishing explicitly, in its report, that imports from sources covered by the measures – that is imports from sources *other than* the excluded countries of Canada, Israel, Jordan, and Mexico – satisfy, *alone*, and in and of themselves, the conditions for the application of a safeguard measure. . . ."[239]

The United States has acknowledged that the USITC did not "account for the fact that excluded imports may have had some injurious impact on the domestic industry" as the Panel had required.[240] However, according to the United States, the Safeguards Agreement does not require this finding. The Appellate Body effectively responds, "nonsense." Article 4.2(b) of the Safeguards Agreement contains a non-attribution[241] requirement: "When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports." Specifically stated:

> [T]he phrase "increased imports" in Articles 4.2(a) and 4.2(b) must, in our view, be read as referring to the same set of imports envisaged in Article 2.1, that is *to imports included in the safeguard measure.* Consequently, imports *excluded* from the application of the safeguard measure must be considered a factor "other than increased imports" within the meaning of Article 4.2(b). The possible injurious effects that these excluded imports may have on the domestic industry must not be attributed to imports included in the safeguard measure pursuant to Article 2.4(b) (emphasis original).[242]

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237. *Id*. ¶ 440 (quoting *U S - Wheat Gluten* Appellate Body Report, *supra* note 173, ¶ 96) (emphasis added by Appellate Body).

238. *Id*. ¶ 441.

239. *Id*. ¶ 444.

240. United States' appellant's submission, at 358.

241. *See US-Lamb* Appellate Body Report, *supra* note 173, ¶ 179.

242. *US - Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 450.

Therefore, according to the Appellate Body, the competent authority must provide the usual reasoned explanation, hereby explaining how it "ensured that it did not attribute the injurious effects of *factors other than included imports* – which subsume 'excluded imports' – to the imports included in the measure."[243]

Because the USITC did not provide such an explanation, the Panel was correct in concluding that the United States erred with respect to each of nine product categories affected. However, the situation was somewhat different with regard to the tenth category, stainless steel rod. There, the excluded imports accounted for less than 0.8% of total imports. Nevertheless, the Panel faulted the USITC for failing to make an explicit finding containing a reasoned and adequate explanation, that imports from countries other than Canada, Israel, Jordan, and Mexico have caused serious injury. The Panel also faulted the USITC, with regard to the very small level of imports from Israel and Jordan, for simply stating that exclusion of those imports would not affect the USITC's conclusions with regard to the requirements for a safeguard measure. The USITC was further criticized for taking a similar approach with regard to stainless rod from Mexico and Canada, where it said that "the exclusion of these [very small] volumes [from Mexico and Canada] does not change our volumes or pricing analysis in a significant manner."[244]

The Appellate Body agreed that the Panel has "raised a valid methodological concern," even if it does not make any practical difference. The USITC should not have made two separate determinations, one for Canada and Mexico, the other for Israel and Jordan. Rather, the USITC should, as the Panel found, have issued in "*one single joint* determination, supported explicitly by a reasoned and adequate explanation, on whether imports from sources *other than Canada, Israel, Jordan and Mexico,* by themselves, satisfied the conditions for the application of a safeguard measure."[245] There is no *de minimis* limitation to the parallelism requirement! The competent authority is obligated, as indicated in *U.S. – Wheat Gluten* and *U.S. – Line Pipe*, to "establish unambiguously, with a reasoned and adequate explanation, and *in a way that leaves nothing merely implied or suggested*, that imports from sources covered by the measure, *alone,* satisfy the requirements for the application of a safeguard measure."[246] The only concession to import volume the Appellate Body makes is to allow that if the volumes of the excluded imports are very small, the explanation won't have to be as detailed as it would be under other circumstances. Otherwise, if there is not an explanation, even though the facts show very small import volumes, the Panel, by effectively making the determination would be making a *de novo* review!

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243. *Id*. ¶ 452.
244. *Id*. ¶ 463.
245. *Id*. ¶ 468.
246. *Id*. ¶ 472 (emphasis added by Appellate Body).

9. Causation[247]

For seven products – CCFRS, hot-rolled bar, cold-finished bar, rebar, welded pipe, FFTJ, and stainless steel bar – the Panel had found that the "USITC had failed to provide a reasoned and adequate explanation demonstrating that a 'causal link' existed between the increased imports and serious injury as required by" the Safeguards Agreement.[248] However, the Panel, in an exercise of judicial economy, declined to rule on various challenges to whether the USITC's determination met the requirement of a showing of "serious injury," or the proper definitions of "imported product," "like product," or "domestic industry."[249] The United States objected to the findings on causation and sought reversal of all of them. The Appellate Body, also exercising the principle of judicial economy, also declined to rule on the issue of causation.

Yet, because several participants, including the United States, asked the Appellate Body at the hearing to provide guidance on the issue of causation, the Appellate Body more or less obliged. It did so, however, simply by referring to its earlier rulings in *U.S. – Line Pipe*, *U.S. – Lamb*, and *U.S. – Wheat Gluten.* Drawing on these cases, it restates the rule:

> In sum, the *Agreement on Safeguards* – in Article 2.1, as elaborated by Article 4.2, and in combination with Article 3.1 – requires that the competent authorities demonstrate the *existence* of a "causal link" between "increased imports" and "serious injury" (or the threat thereof) on the basis of "objective evidence." In addition the competent authorities must provide a reasoned and adequate explanation of how facts (that is, the aforementioned "objective evidence") support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise.[250]

Perhaps more significantly, the Appellate Body, citing *EC – Tube or Pipe Fittings*, implies that the rule there – that Article 3.5 of "the *Anti-Dumping Agreement* does not require, *in each and every case*, an examination of the *collective* efforts of other causal factors, in addition to an examination of the *individual* effects of those causal factors" (emphasis added by Appellate Body)[251] – also applies to causation determinations under the Safeguards Agreement. This does not mean that the competent authority can ignore minimal factors when conducting its non-attribution analysis, but it does mean that only "factors that have been found to exist need to be

247. *Id*. ¶¶ 475-93.
248. *Id*. ¶ 475.
249. *Id*. ¶ 483.
250. *Id*. ¶ 489.
251. *Id*. ¶ 490 (emphasis added by *US – Steel Safeguards* Appellate Body).

taken into account in the non-attribution analysis."[252]

With regard to tin mill products and stainless steel wire, the Panel had determined the lack of a reasoned and adequate explanation of the causal link, on the same rationale as with increased imports (*i.e*., because the USITC determination was based on the differing rationales of three different Commissioners). On the same rationale, the Appellate Body reversed, without ruling on whether the proper causal link had been established by the USITC.

10. "Objective Assessment" and "Basic Rationale" Under Articles 11 and 12.7 of the Dispute Settlement Understanding[253]

The United States argued on appeal, as did Japan in *Japan – Apples*,[254] that the Panel violated the standard of review by failing to make an "objective assessment of the matter before it" as required in Article 11 of the DSU, particularly with regard to its analysis of "unforeseen circumstances." The arguments based on Article 11, according to the Appellate Body and to the United States, were not "separate and distinct" from claims relating to the Panel's substantive analysis.

As usual, the Appellate Body rejected the Article 11 claim, referring to its report in *Japan – Agricultural Products II*, which stated that "not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts."[255] Moreover, the United States' challenge here failed on another ground: "[a] challenge under Article 11 of the DSU must not be vague or ambiguous."[256] Here, the United States' claim is mentioned only in passing, and is not substantiated. Accordingly, it fails.

The United States also faulted the Panel because it allegedly "failed to set forth explanations and reasons sufficient to disclose its justification for its findings and recommendations."[257] The Appellate Body notes that Article 12.7 provides that ". . . the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." According to the Appellate Body, the Panel met this requirement, in that it:

> considered in detail the evidence that was before the USITC, and provided detailed explanations of how and why it concluded that the USITC had failed to demonstrate, through a reasoned and adequate explanation, that the alleged "unforeseen

252. *Id*. ¶ 491.

253. *Id*. ¶¶ 494-507.

254. *See infra Japan - Apples.*

255. WTO Report of the Appellate Body, *Japan—Measures Affecting Agricultural Products*, WTO Doc. WT/DS76/AB/R, ¶ 141, (Feb. 22, 1999), *available at* http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members3_e.htm [hereinafter *Japan – Agricultural Products II* Appellate Body report].

256. *US - Steel Safeguards*, Appellate Body Report, *supra* note 44, ¶ 498.

257. United States' appellant's submission, ¶ 95.

> developments" *resulted* in increased imports of *each* product subject to a safeguard measure.[258]

Thus, the Panel in its analysis, set out the "basic rationale" for its findings related to "unforeseen developments;" it "did not simply *assume*, but rather clearly pointed to, a deficiency in the USITC's reasoning."[259] Accordingly, the Appellate Body rejects the United States' claim based on Article 12.7.

11. Conditional Claims are Subject to Judicial Economy

Various Complaining Parties had requested the Appellate Body to consider other alleged United States violations of various provisions of the Safeguards Agreement, but only conditionally, in the event that the Appellate Body were to reverse the Panel's findings holding that the ten safeguard measures were in fact in accordance with GATT, Article XIX and with the Safeguards Agreement. Of course, as the Appellate Body duly noted, it did not do so. Rather, the Panel's findings of inconsistency with regard to "unforeseen developments" and "parallelism" were affirmed. Thus, the Appellate Body declined to address the conditional appeals. Conditional appeals on causation methodology were also rejected.

Commentary

1. No Mercy on "Unforeseen Developments"

U.S. – Steel Safeguards provided the Appellate Body with its best opportunity to date to interpret the "unforeseen developments" requirement of GATT, Article XIX(1)(a) in such a way that a competent authority might have some reasonable chance of demonstrating a nexus between "unforeseen developments" and increasing imports. The USITC (with the prodding of USTR), after all, had made considerable effort to identify several credible "unforeseen developments," the Russian and Asian financial crises and the unanticipated strengthening of the U.S. dollar, which in general terms, it appeared, would likely have affected the world steel market. However, even if these were legitimate "unforeseen developments" – and the Appellate Body did not decide that issue – the analysis by the USITC was not nearly adequate. First of all, even though GATT, unlike Article 3.1 of the Safeguards Agreement, provides no standard for competent authority rulings, the Appellate Body reaffirmed its conclusion in *Argentina – Footwear* that the Article 3.1 standard, rather than some softer and gentler one, applied. This was a logical and defensible legal conclusion by the Appellate Body, but not an inescapable one, particularly were the Appellate Body to be looking for a way to deal with a requirement for the imposition

258. *US – Steel Safeguards* Appellate Body Report, *supra* note 44, ¶ 503.
259. *Id*. ¶ 506.

of safeguards that had been *de facto* written out of the GATT some decades ago.[260]

Once the standard was resolved, it was a very short step to requiring the USITC in this case to show how the alleged "unforeseen circumstances" resulted in an increase in U.S. imports of each of the ten products under consideration. This "logical connection" must be made in each instance by the competent authority; if the USITC failed to do this, even if the data were present, it was not up to the Panel to make the connection for the USITC.

Where does this leave the USITC, or any other competent authority? Obviously, there may be a case in the future where an undeniable "unforeseen circumstance" can be connected logically and directly (rather than just generally) to increased imports of a particular product, but don't bet on it.

2. "Increased Imports" Means Increasing Throughout the Period of Investigation

As indicated in Part 2 of the "Explanation" above, this was a very difficult case for showing increasing imports, given that imports in major product categories were actually decreasing during the last year or two of the period of investigation. Under *Argentina – Footwear*, Articles 2.1 and 4.2(a) of the Safeguards Agreement were interpreted to mean that increased imports must have been recent, sudden, sharp and significant. Trends, particularly toward the end of the period of investigation, were very important. It was not sufficient for the competent authority to show that import volumes at the end point of the period of investigation were greater than at the starting point five and a half years ago. Once this standard was reiterated by the Panel and then by the Appellate Body, there was no hope for the United States with regard to most of its product categories. Imports were in fact increasing rapidly from 1996 through 1998. For the four major statistical categories analyzed by the USITC, the percentage increase from calendar year 1996 to calendar year 2000 was 14.1%, 64.0%, 72.0%, and 87.6%, respectively, certainly very substantial in three categories and significant in the fourth.[261] However, beginning in 1999, or during the first six

260. *See WTO Case Review 2000, supra* note 20, at 73-87. For an excellent and thorough discussion of the relationship of GATT, Article XIX, and the *Safeguards Agreement, see* Felix Mueller, *Is the GATT Article XIX "Unforeseen Developments Clause" Still Effective Under the Agreement on Safeguards?,* 37 J. WORLD TRADE 1119 (2003). Among the alternative approaches, the Appellate Body arguably could have taken at the outset would have been to determine that the GATT 1994, with the "unforeseen developments" language in Article XIX, and the *Safeguards Agreement*, without such language created a conflict. Under the *General interpretative note to Annex 1A*, "In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization... the provision of the other agreement shall prevail to the extent of the conflict."

261. The percentage increase from calendar year 1996 to calendar year 2000 was 14.1% for carbon and alloy flat products, 64.0% for carbon alloy long products, 72.0% for carbon and alloy pipe and tube, and 87.6% for stainless steel and alloy tool steel. United States

months of 2000, imports in many categories decreased, in several instances quite rapidly. The trends were all in the wrong direction.

This means that if a WTO Member intends to protect its domestic industry through safeguards, the action ought to be brought once there are a couple of years of increasing imports, particularly with a cyclical industry such as steel. The window of opportunity is lost when import trends reverse, even if the reversal was very recent (here, the first six months of 2001 compared to the first six months of 2000), and even if over the longer period the increase in imports had been very substantial.

3. The USITC Decision Making Process is Preserved

In one of the few areas in which the United States prevailed, the Appellate Body upheld the USITC voting methodology in which each Commissioner makes her own determination on the basis of her own reasoning, even to the point of choosing different product categories. The Panel's determination that the Safeguards Agreement did not permit a Member to "base a safeguard measure on a determination supported by a set of explanations each of which is different and impossible to reconcile with the others"[262] went to the roots of the USITC decision-making process. Had the Appellate Body upheld the Panel, significant legislative changes would have likely been required, or at least major alternations in Commission procedures. However, the Appellate Body, showing proper (and, perhaps, unusual) deference to the "discretion" of the Member regarding the manner in which it chooses to operate its competent authority. Multiple explanations are fine; all the Panel needs to do is to see if *one* of them contains the necessary "reasoned and adequate explanation."

The issue is not whether one believes that the current USITC Commissioner decision-making methodology is ideal. Rather, the importance of this ruling is in the Appellate Body's recognition that such a process is within the individual Member's sovereign discretion. The Appellate Body wisely avoided second-guessing the competent authority methodology. This could easily have been a Pandora's Box. Many, including these authors, believe that injury findings by a competent authority that is an independent agency, organizationally distinct from the commerce or trade ministry, such as the USITC or the Canadian International Trade Tribunal, are more likely to show objectivity than injury decisions by the trade ministry, as in the European Commission or Mexico's Secretaria de Economia. It was wise of the Appellate Body to leave such issues to national discretion.

4. Excluding Imports from FTA Partners is Fraught With Danger

Once again, the Appellate Body articulates a deceptively simple rule: if

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International Trade Commission, *U.S. Imports of Steel Products Overall Trends by Product: All Countries*, *at* http://dataweb.usitc.gov/scripts/steel.asp (last visited Apr. 20, 2004) [hereinafter *U.S. Imports of Steel Products – All Countries*].

262. *US - Steel Safeguards* Panel Report, *supra* note 209, ¶ 10.195.

imports from FTA partners are used in the determination of serious injury, they cannot be excluded from the safeguard measures. It is not enough for the competent authority to say that "[e]xclusion of these FTA partner imports wouldn't have changed our serious injury determination." Most likely, the only safe approach is to exclude FTA partner imports at the outset from the imports used as the basis of the serious injury finding, and explain very clearly what is being done. On the other hand, it is not clear whether this strictly meets the requirements of U.S. law.[263]

The USITC has tried a number of approaches, but it has not been successful to date. Here, separate findings for Canada and Mexico, and then for Israel and Jordan, the latter two suppliers of minuscule amounts of steel, did not do the trick. Moreover, a "reasoned and adequate explanation" means exactly that. Among other things, the Panel would not infer from the import data (showing that Israel and Jordan exports are negligible) that those exports are irrelevant to the serious injury finding; this must be articulated explicitly by the USITC, even if the Appellate Body allows that the explanation can be shorter if the imports are very small. This case was particularly difficult, because both Canada and Mexico are major steel suppliers to the United States, number one and number three, respectively, during most of the review period, and numbers one and two during the first six months of 2001[264] and because with regard to several product categories the USITC made affirmative injury decisions (or divided decisions) with regard to Canadian and Mexican source imports.[265] Under NAFTA, Art. 802, NAFTA Parties are required to exclude imports from other Parties unless:

> (a) imports from a Party, considered individually, account for a substantial share of total imports; and
>
> (b) imports from a Party, considered individually, or in exceptional circumstances imports from Parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.[266]

However, "substantial share" is defined to mean that the affected NAFTA Party is not among the top five suppliers,[267] which was not the case in some of the steel import categories.

Presumably, it would not be difficult for the USITC to deal with very small exporters such as Israel and Jordan, simply by doing so explicitly, with an analysis of

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263. *See* Trade Act of 1974, 19 U.S.C. §§ 2251-54 (2004).

264. *U.S. Imports of Steel Products – All Countries*, *supra* note 261.

265. Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. at 10595.

266. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex, 32 I.L.M. 289, chs. 1-9; 32 I.L.M. 605, art. 802(1), chs. 10-22 [hereinafter NAFTA].

267. *Id.* art. 802(2)(a).

the volumes of imports from those nations.[268] However, the problem is likely to become more complex in the future, if the United States is successful in negotiating free trade agreements, not only with Singapore and Chile (which agreements became effective January 1, 2004),[269] but with the five Central American nations, the Dominican Republic, Panama, Colombia, Ecuador, Peru, Bolivia, Australia, Bahrain, Morocco, Thailand, the five South African Customs Union nations, and perhaps others.[270] None of these are major suppliers. However, if and when the stalled Free Trade Agreement of the Americas is included, the problem will be even more significant, since Brazil prior to the imposition of safeguards measures was the second largest U.S. source of imported steel, after Canada.[271]

268. Israel ranked as the 50th largest supplier of steel during the period, with 11,909 tons in 2000; Jordan ranked 88th, with 3 tons in 2000. *U.S. Imports of Steel Products – Quantity*, *supra* note 174.

269. Chile Free Trade Agreement, Jun. 6, 2003, U.S.-Chile, *available at* http://www.ustr.gov/new/fta/Chile/text/index.htm; United States - Singapore Free Trade Agreement, May 6, 2003, *available at http://www.mti.gov.sg/public/PDF/CMT/FTA_USSFTA_Agreement_Final.pdf* .

270. *See Status of U.S. Trade Agreement Negotiations,* 21 Int'l Trade Rep. 168 *passim* (Jan. 22, 2004).

271. *U.S. Imports of Steel Products – Quantity*, *supra* note 174.

PART THREE: OTHER WTO AGREEMENTS:

THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES: THE *JAPAN – APPLES* CASE

Citation

Japan - Measures Affecting the Importation of Apples, WT/DS245/AB/R, AB-2003-4 (Issued November 26, 2003, adopted December 10, 2003) (complaint by the United States, with Australia, the European Communities and New Zealand as Third Participants).[272]

Introduction and Explanation

1. Facts: "Fire Blight" and "Any Apples" Exported to Japan

This proceeding concerns a Japanese "measure" aimed, according to Japan, at protecting the Japanese apple industry from a bacterium, *Erwinia amylovora* (popularly known as "fire blight"). Fire blight is said to be transmitted "primarily through wind and/or rain and by insects or birds to open flowers on the same and new plants."[273] The hosts are not limited to apples; they include pears, quince, and loquats, and some garden plants.[274] The potential concerns of an island nation such as Japan, which currently appears to be completely free from fire blight, regarding possible dissemination of fire blight from abroad are anything but irrational. Fire blight is believed to be of North American origin, reported from Ontario to British Columbia in Canada, the East Coast of the United States to California and the Pacific Northwest, and in Northern Mexico. Evidence shows that it was transmitted to New Zealand, Great Britain, Egypt, and parts of Europe during the Twentieth Century.[275] It was transmitted, but eradicated, in Australia around 1997.

A key factual question before the Panel was whether fire blight could be transmitted from the United States (or any other foreign source) to Japan through the exportation of apples – "Apple fruit" – (rather than through infected plants or other

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272. WTO Appellate Body Report, *Japan-Measures – Affecting the Importation of Apples*, WTO Doc. WT/DS245/AB/R (Nov. 26, 2003), adopted Dec. 10, 2003, *available at* www.wto.org [hereinafter *Japan – Apples* Appellate Body Report]; WTO Panel Report on U.S. Complaint on Japan—Measures Affecting the Importation of Apples, WT/DS245/R (July 15, 2003), *available at* www.wto.org [hereinafter *Japan – Apples* Panel Report].

273. *Japan – Apples* Appellate Body Report*, supra* note 272, ¶ 8; *Japan - Apples* Panel Report, *supra* note 272, ¶¶ 2.1-2.6.

274. *Japan - Apples* Panel Report, *supra* note 272, ¶ 2.5.

275. According to the Appellate Body, "The uncontested history of fire blight reveals significant trans-oceanic dissemination in the 200-plus years since its discovery." *Japan – Apples,* Appellate Body Report, ¶ 9 (citing *Japan - Apples* Panel Report, *supra* note 272, ¶¶ 2.1, 2.6).

medium) to Japan. There are, it appears, two broad types of apples that could be imported from the United States into Japan: "mature, symptomless" apples and infected or infested "immature" apples, the latter of which are far more likely to exhibit the symptoms of fire blight, "bacterial ooze or inoculum."[276] The United States claimed, as discussed below, that because it only permitted the exportation of "mature, symptomless" apples, immature apples should be ignored. Japan disagreed, primarily because of the expressed concern that immature apples, possibly with the symptoms of fire blight, might be accidentally included in export shipments.

Japan reacted to the risks of fire blight by enacting a "measure" consisting of a bundle of nine various prohibitions and requirements imposed on apples from the United States. Taken as a whole, they established a very strict regime for imports. These included: limiting imports to apples from Oregon and Washington; prohibiting imports from orchards if fire blight has been detected there or within a 500-meter buffer zone; designation of such fire blight free orchards by the U.S. Department of Agriculture; thrice yearly inspection; treatment of exported apples, packing containers, and the packing facility with chlorine before shipment; separation of apples destined for Japan with those for other markets; certification by U.S. officials that the fruit has been treated and is free of fire blight; and confirmation by Japanese officials of such certification.[277] The United States claimed before the Panel that the Japanese measures were inconsistent with various provisions of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[278] The Panel agreed in large part, and Japan appealed.

Several interesting procedural issues were also raised. The United States, having objected to the effect of the measures on "apples," changed its mind and unsuccessfully tried to convince the Panel that it meant to say "mature, symptomless apples," presumably because the United States realized that it might be more difficult to convince the Panel that the measures were unjustified under the SPS Agreement even when they were applied to the immature (and more likely infected) apples.[279] Japan effectively lost an opportunity to challenge the Panel decision on one issue because of sloppy pleading, the failure to refer explicitly in one key paragraph of the Notice of Appeal to Article 11 of the DSU.[280]

This is not, of course, the first or the most important Appellate Body decision interpreting the provisions of the SPS Agreement. That honor undoubtedly belongs to *European Communities – Measures Concerning Meat and Meat Products (Hormones),*[281] relied on extensively by the Panel, Appellate Body, and the United

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276. "Inoculum" is "[m]material consisting of or containing bacteria to be introduced into or transferred to a host or medium." *Japan – Apples* Panel Report, *supra* note 272, ¶ 2.14.

277. *Japan – Apples* Panel Report, *supra* note 272, ¶ 8.5(a)-(1); *Japan - Apples* Appellate Body Report, *supra* note 272, ¶ 15.

278. *SPS Agreement, reprinted in* Bhala, *supra* note 41, at 333, *available at* http://www.wto.org.

279. *See Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 10.

280. *Id*. Annex A.

281. *EC – Hormones*, *supra* note 35.

States. *Japan – Apples* once again raises the dichotomy in the first introductory paragraph of the SPS Agreement, "[N]o member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute . . . a disguised restriction on international trade." In this case, the Panel, after consultation with the Parties, engaged several experts, as is provided for in Article 11.2 of the SPS Agreement.[282]

The United States and Japan agreed that Japan would bring its apple quarantine measures into compliance with the decision of the DSB by June 30, 2004.[283]

2. Issues Raised on Appeal[284]

Japan was the principal appellant, asserting that the Panel erred:

> (a) in finding that the Japanese measure is inconsistent with Article 2.2 of the *SPS Agreement* because it is "maintained without sufficient scientific evidence;"
> (b) in finding that under Article 5.7 the measure is not a "provisional" measure because it wasn't imposed in a situation where "relevant scientific evidence is insufficient;"
> (c) in finding that the measure was not based on a risk assessment as defined in Annex A of the *SPS Agreement* and required under Article 5.1; and
> (d) by failing to conduct an "objective assessment of the facts of the case" as required by Article 11 of the DSU.

The United States' appeal was limited to a single issue; it claimed the Panel lacked "authority" to make findings and draw conclusions as to immature applies because United States claims before the Panel were limited to mature apples. The Appellate Body also treated as a preliminary issue the sufficiency of Japan's Notice of Appeal to the Appellate Body.

3. Arguments of the Parties[285]

a. SPS Agreement, Article 2.2

In challenging the Panel's conclusion that Japan maintained its measures

282. *Japan – Apples* Panel Report, *supra* note 272, ¶¶ 6.1-6.4.

283. Daniel Pruzin, *U.S. Japan Agree on WTO Deadline for Compliance with Apple Decision,* 21 Int'l Trade Rep. 323 (Feb. 19, 2004), *available at* http://www.bna.com.

284. *Japan – Apples* Appellate Body Report, ¶ 129.

285. *Id*. ¶¶ 17-119.

restricting the importation of apples "without sufficient scientific evidence," Japan essentially argued that the United States should have had the burden of proof in demonstrating that the pathway for fire blight (from the United States to Japan) would not have been completed even if infected fruit had been exported, and that Japan's scientific evidence supporting this risk failed to support the measure under attack. Because the United States provided evidence only with regard to mature, symptomless fruit, and explicitly disavowed any intention to establish a *prima facie* case with regard to infected [immature] fruit, it was wrong for the Panel to find a violation by Japan. In particular, in the absence of a proffering of evidence by the United States, the Panel should not have presumed that the measure lacked scientific evidence.

With regard to mature, symptomless fruit, Japan argued that the Panel failed to afford Japan "the discretion conferred by Article 2.2 on an importing Member in the evaluation of relevant scientific evidence."[286] No specific methodology is imposed on Members by Article 2.2, and, in particular, it was wrong for the Panel to substitute its own risk analysis for the risk assessment undertaken by Japan.

Australia, as Third Party, agreed with Japan, and asserted that the United States failed its burden of proving that there was insufficient scientific evidence of risk from infected [immature] fruit, the United States failed to do so. Consequently, the Panel should have made no findings on apples other than mature, symptomless apples.

The United States, as noted earlier, agreed with Japan that the Panel erred by discussing immature apples, but supported the Panel's weighing of the evidence, including the historical studies of trans-oceanic dissemination of fire blight. This was simply an improper challenge by Japan of the Panel's fact-finding, which could have properly been attacked only as a violation of DSU, Article 11, which Japan has not done. A Member's "discretion" does not prevent a Panel from determining that "a Member's judgment is unsupported by scientific evidence." Nor, according to the United States, was the burden on the United States to prove that mature, symptomless apples *cannot* serve as a pathway for transmission of fire blight; the SPS Agreement does not require a Member to prove a negative, or disprove all speculation on "hypothetical risks."[287]

The United States also contests Japan's analysis of the Article 2.2 requirement that a measure not be maintained "without sufficient scientific evidence." This does not mean that all uncertainty will be eradicated, because uncertainty is always present in science. Japan's indication that "apple fruit *may have been* the means by which trans-oceanic dissemination of fire blight occurred in the past" that the bacterium "*may* be present in physiologically mature apples" is speculative.[288]

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286. *Id*. ¶ 24.

287. *Id.* ¶ 58.

288. *Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 59 (quoting United States' appellee's submission, ¶ 24) (emphasis added).

b. SPS Agreement, Article 5.7

Japan argued that the Panel took an overly "narrow" approach to Article 5.7 when it concluded that this was not a "case where relevant scientific evidence is insufficient" as required by Article 5.7. This language does not necessarily exclude a situation where there is scientific evidence "in general" but not such evidence that relates to a particular situation or a particular risk. The Panel was also in error when it based its conclusion on "scientific studies as well as practical experience [that] have accumulated for the past 200 years,"[289] because the United States did not raise such an objection (although one of the experts did). Japan believed that there was "unresolved uncertainty" regarding the transmission of fire blight by infected fruit, which is covered by Article 5.7 along with "new uncertainty." The Panel was wrong in distinguishing between the two, particularly when the experts expressed a need for caution with regard to such unresolved uncertainty. It is up to the Member, in this case Japan, not the Panel, to determine how much uncertainty it will accept in determining its appropriate level of protection.

Australia took a different view of Article 5.7 while generally supporting Japan. Australia indicated its belief that the Panel erred in shifting the burden of proof on Japan, rather than on the United States, as the Complaining Party, in showing that Japan's reliance on the provisional measures language of Article 5.7 was improper. The EU agrees, and further contends that Article 5.7 creates an "autonomous right" to provisional measures, even when there was insufficient evidence on a "specific issue" essential to defining the nature of the risk.

The United States contends that the existence of some uncertainty does not justify the conclusion that relevant scientific evidence is insufficient, so as to permit adoption of provisional measures under Article 5.7. The issue is not "unresolved uncertainty." Rather, Japan has simply not sought the additional information that would be required for a more objective assessment of risk, and has effectively "disregarded" evidence that shows the "lack of susceptibility of mature apples to fire blight infection and bacterial presence."[290] Brazil essentially agrees.

c. SPS Agreement, Article 5.1

Japan contended that the Panel's interpretation of the risk assessment requirements of Article 5.1 was flawed. First, it was wrong for the Panel to conclude that the risk assessment had to be specific; even if the risk is specific, the assessment may be general without being inconsistent with Article 5.1. Thus, it was proper for Japan, and within Japan's discretion under Article 4.1, to conduct its pest risk assessment by considering "all importation of plants and fruits which could be

289. *Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 173 (quoting *Japan – Apples* Panel Report, *supra* note 272, ¶¶ 8.219, 97).

290. *Id*. ¶ 66.

potential vectors of the bacteria [of fire blight]."[291] Secondly, Japan was not required to consider alternatives to the existing protection measures; again, this is an issue of methodology. Third, the Panel erred by considering information relevant to risk assessment that was not available to Japan at the time its own risk assessment was made.

Japan also faulted the Panel for imposing the requirement of a "full" risk assessment. This was unreasonable because it deprived Japan of the discretion to decide if recent information warranted a new risk assessment, and effectively required a *formal* risk assessment process. Japan was not required to conduct a new, formal assessment every time a new piece of evidence became available. Australia agreed, arguing that once a risk assessment meets the required conditions the validity of the risk assessment is not subject to ongoing review.

The United States defended the Panel's operation of the "specificity" requirement when evaluating Japan's risk assessment under Article 5.1 of the SPS Agreement. Japan's risk assessment, as the Panel concluded, "related to several hosts but did not sufficiently consider the risks specifically associated with the commodity at issue; US apple fruit exported to Japan."[292] Also, where Annex A, para. 4, refers to "SPS measures which might be applied," this means it was the obligation of the importing Member (Japan), to consider alternative measures to the ones actually applied. Nor was Japan's "informal" risk assessment relating to mature, symptomless apples sufficient to justify retaining the current (restrictive) measure. The United States would have gone further than the Panel, and concluded that "the relationship between the measure and the risk assessment lacks the 'rational' basis required [under Article 5.1] in order for the former to be 'based on' the latter."[293]

d. Dispute Settlement Understanding (DSU), Article 11, and "Objective Assessment"

Japan faulted the Panel's analysis regarding whether the pathway for transmitting fire blight could have been completed from "infected" apples shipped to Japan, and considers that this analysis constituted a failure, in applying SPS Agreement, Art. 2.2, to make the "objective assessment of the facts" required of the Panel under DSU, Article 11. In particular, the Panel failed to explain how evidence from the United States and the experts relating only to mature, symptomless fruit applied to the issue of infected apples. The Panel also erred when it concluded that "discarded [infected] applies have not led to any visible contamination, *even when ooze was reported to exist*."[294] This occurred even though the Panel realized that the risk from infected apples was "real" and, by implication, that the pathway from imported infected apples to the Japanese apple industry could be completed.

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291. *Id*. ¶ 41 (quoting Japan's appellant submission, ¶ 128).
292. *Id*. ¶ 69 (quoting United States' appellee's submission, ¶ 51).
293. *Id*. ¶¶ 70-71.
294. *Id*. ¶ 48 (quoting Japan's appellant's submission ¶ 138) (emphasis added by Japan).

Moreover, the Panel failed to properly take into account the "precautionary principle," in not giving "greater weight" to risks of dissemination of the disease.

Similarly, according to Japan, in its analysis of Article 5.1 of the SPS Agreement, the panel acted inconsistently with its Article 11 obligations by rejecting Japan's risk assessment because it allegedly insufficiently analyzed both "probability" and "pathways" when it considered "the likelihood of entry, establishment or spread of fire blight."[295]

The United States agreed with Japan that the conclusions of the Panel report should not be read to apply to "infected" apple fruit, but for different reasons. According to the United States, the Panel had no authority to make findings on "immature apples" because the United States' claims and evidence were limited to "mature, symptomless apples." Japan's critique of the Panel with regard to factual errors is misplaced, because ooze appears only in "immature, infected" apples. With regard to the precautionary principle, the United States noted that neither the SPS Agreement, nor the precautionary principle "compels a panel to find that a pathway for transmission of a disease exists where none of the scientific evidence on the record supports that conclusion."[296] This conclusion, according to the United States, is further confirmed by the Appellate Body's decision in *EC – Hormones.*[297]

Procedurally, the United States contends that it is impermissible for the Appellate Body to determine whether the Panel's findings under SPS Agreement, Article 5.1 were inconsistent with the Panel's responsibilities for an "objective assessment" under Article 11 of the DSU, because Japan did not identify this Article 11 claim in its Notice of Appeal.

e. Questioning the "Authority" of the Panel

The United States, in its only issue as appellant, faulted the Panel for considering anything other than "Japan's restrictions on mature, symptomless apples are consistent with the SPS Agreement, and not whether Japan could maintain restrictions on any other product."[298] The United States exported *only* mature symptomless apples to Japan, and has laws to prevent the export of other apples, and thus made no *prima facie* case or claim for other apples. Under such circumstances, the Panel erred when it examined issues relating to "control procedures" and export requirements; in other words, it should not have considered all apple fruit. This was particularly true in light of the absence of evidence presented by Japan evidencing that U.S. export procedures would fail to prevent the export of other than mature, symptomless apples, and because Japan's measure does not relate to possible failures in export control procedures. The fact that the United States in its DSU action referred to "apples" rather than to "mature, symptomless apples" should not have

295. *Id*. ¶ 52.
296. *Id*. ¶ 76.
297. *Id.*
298. *Id*. ¶ 83 (quoting United States' other appellant's submission, ¶ 6).

been controlling, and did not, as the Panel determined, define positively the scope of the proceeding. New Zealand agreed with the United States.

Japan defended the Panel's decision to address [immature] infected apple fruit as well as mature, symptomless apples, since in Japan's view all apple fruit was part of the United States' *prima facie* case. The terms of reference for the proceeding were determined by the request for establishment of a panel; here, the request mentioned "US apples." Where the Panel erred was in shifting the burden of proof to Japan in establishing the risk that the pathway for infection by fire blight through importation of infected apples.

The EC agreed with the United States that the Panel should have made no findings on immature apples, nor on shifting the burden of proof to Japan (under Articles 2.2 or 5.7), and criticized the Panel for effectively having made the case for the United States. There was no *prima facie* case except for mature, symptomless apples, and the United States failed to prove that it was importing only such apples. In this respect, therefore, the Panel erred in finding the measures inconsistent with the SPS Agreement.

Holdings and Rationale

1. Procedural Issue: Sufficiency of the Notice of Appeal[299]

The Appellate Body, in this instance at least, took a rather strict approach to the requirements for appeal. It notes that the Working Procedures[300] indicate the "information" the "Notice of Appeal shall include the following information . . . (d) a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel."[301] The Appellate Body, in *US – Countervailing Measures on Certain EC Products*, noted:

> . . . the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defense effectively.[302]

Here, the balance tipped against Japan, as in *US – Countervailing Measures*, because of Japan's failure to mention Article 11 of the DSU in its Notice of Appeal.[303] This, in the view of the Appellate Body, was more than just a minor

299. *Id*. ¶¶ 120-128.

300. Working Procedures, *supra* note 16, art. 20(2).

301. *Id*.

302. *US - Countervailing Measures* Appellate Body Report, *supra* note 130, ¶ 62.

303. Ironically, in *US - Countervailing Measures*, it was the United States that had failed to identify specifically its intention to raise the Article 11 claim! *Id*.

oversight: ". . . claims on appeal under Article 11 of the DSU are unique when compared with other claims of legal error committed by a panel . . . ."[304] Nor, as Japan argued, was mention of Article 11 simply a "legal argument." Article 11 (requiring panels to make an "objective assessment") is likely to be raised only on appeal; thus, if "appellants intend to argue that issue on appeal, they must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet."[305] Japan mentioned Article 11 in reference to its SPS Agreement Article 2.2 claim, but not in its Article 5.1 claim. Therefore, because of this "conspicuous absence," the Appellate Body declined to rule on the issue.

2. Authority of the Panel to Consider Immature Apples[306]

The Appellate Body first noted that the panel "sought to evaluate the risk that apple fruit exported by the United States would serve as a pathway for the entry, establishment and spread of fire blight in Japan." Despite the U.S. claim that it exported only mature, symptomless apples, the panel:

> also considered the risk associated with apples other than mature, symptomless apples . . . because Japan had argued that apples other than mature, symptomless apples could be imported as a result of human or technical error, or illegal actions, and the Panel thought that such risks could be 'legitimately considered' by Japan.[307]

The rationale offered by the United States, that it had advanced no claim regarding the other apples, was rejected by the Panel.

The Appellate Body essentially noted that the United States brought the problem upon itself, because the United States was not very specific in its terms of reference to the Panel. First, it referred to "measures restricting the importation of US apples in connection with fire blight . . . ." Second, the reference is to "US apples, an expression that . . . is broader than mature, symptomless apples."[308] Moreover, the Panel's consideration of other apples was *relevant* to the concerns "legitimately" raised by Japan. The United States cannot properly "curtail the right of other parties to pursue strategies of their own; nor . . . impose a straightjacket on a panel."[309] Thus, in considering such apples, according to the Appellate Body, the Panel acted within the limits of its authority. The Appellate Body also suggested, as one of the experts had opined, that "in plant quarantine, inspections are rarely 100%

304. *Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 123.

305. *Id*. (quoting *US-Countervailing Measures* Appellate Body Report, *supra* note 112, ¶ 74).

306. *Id*. ¶¶ 131-142.

307. *Id*. ¶ 131.

308. *Id.* ¶ 133.

309. *Id*. ¶ 136.

efficient."

3. SPS Agreement, Article 2.2 – "Based on Scientific Principles"[310]

The Panel, the Appellate Body noted, had specifically found that mature, symptomless apples are unlikely to be infected with fire blight or populations of bacteria; the presence of such bacteria in such apples is "very rare;" immature fruit *can* be infested with fire blight and harbor bacteria which could serve the various stages of handling, shipping and transport, but fire blight is not likely to survive on crates; and even if infected apples were exported to Japan, the transmission of fire blight from the imported apples to a host plant is deemed unlikely.[311] The risk, therefore, according to the panel, was "negligible."

Article 2.2 of the SPS Agreement provides:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of article 5 [which permits provisional measures where the relevant scientific evidence is insufficient].

The Panel had concluded that "a measure is maintained 'without sufficient scientific evidence' within the meaning of Article 2.2 of the SPS Agreement if there is no 'rational or objective relationship' between the measure and the relevant scientific evidence."[312] Japan had objected on grounds that the United States had not made a *prima facie* case that infected apples could not be carriers of fire blight. The United States, it will be recalled, had confined its arguments to mature, symptomless apples. Under these circumstances, according to Japan, the Panel had erred by failing to afford Japan a "certain degree of discretion" in its treatment of scientific evidence.

The Appellate Body again disagreed. While under *EC – Hormones* the complaining party has the initial burden of establishing a *prima facie* case of inconsistency under the SPS Agreement, this "does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement."[313] If the responding party asserts a fact in its response, it must prove those facts; here, facts supporting Japan's assertions regarding failures in the export control systems – that mature, symptomless apples could be infected and infected

310. *Id*. ¶¶ 143-168.

311. *Id*. ¶ 145 (summarizing Panel report).

312. *Id*. ¶ 146 (quoting *Japan – Apples* Panel Report, *supra* note 272, ¶¶ 8.101-8.103, 8.180).

313. *Id*. ¶ 154.

apples could serve as a pathway to plant hosts in Japan. Japan did not do so to the satisfaction of the Panel.

In the absence of Japanese proof, according to the Appellate Body, the Panel's conclusion on apples other than mature, symptomless apples was appropriate. The risk of other fruit being exported to Japan by human or technical error or illegal actions were considered small, which was reasonable in light of the absence of evidence on the record that any apples other than mature, symptomless apples had ever been exported from the United States to Japan. Under these circumstances, the Panel was justified in determining that the United States had established a *prima facie* case that the Japanese measure was inconsistent with Article 2.2.

With regard to mature, symptomless apples, the Panel had relied on *Japan -- Agricultural Products II,*[314] in opining that the term "sufficient" implied a "rational or objective relationship" to be determined on a case-by-case basis. In this instance the Panel's conclusion that the Japanese measure was "clearly disproportionate to the risk identified" based on available scientific evidence was supported by facts showing that apples would not likely serve as a pathway for fire blight from the United States to Japan.[315] Also, the Panel, in determining whether the United States had made a *prima facie* case, was entitled to consider the views of the experts; this was within the Panel's discretion in assessing the weight and value of the evidence. According to the Appellate Body, the Panel properly concluded that the measure was maintained "without sufficient scientific evidence" under Article 2.2.

4. SPS Agreement, Article 5.7 – Provisional Measures[316]

Article 5.7 provides an exception to the stringent requirements of Article 2.2.:

> In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information . . . . In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

314. *Japan – Agricultural Products II* , *supra* note 255.
315. *Japan – Apples* Appellate Body Report, *supra* note 272, ¶163.
316. *Id*. ¶¶ 169-188.

Applying this provision, the Panel had found that Japan's measure was not a provisional measure, because it wasn't imposed in a situation where "relevant scientific evidence is insufficient." This conclusion was reached in light of evidence of scientific studies of fire blight going back for 200 years, which gave the experts "strong and increasing confidence in this evidence." The evidence was both general and specific regarding the questions raised by Japan.[317]

The Appellate Body observed that the requirements for provisional measures under Article 5.7 were set out in *Japan – Agricultural Products II.* The four cumulative requirements include a situation where "relevant scientific evidence is insufficient;" the measure is adopted "on the basis of available pertinent information;" the Member "seek[s] to obtain additional information necessary for a more objective assessment of risk;" and the Member "review[s] the . . . measure accordingly within a reasonable period of time."[318] Since the Panel found that Japan failed to meet the first criterion, it did not examine the other three.

Japan erred, in the Appellate Body's view, by failing to realize that "relevant scientific evidence" is "insufficient" under Article 5.7 means a situation where the body of scientific evidence available does not allow the performance of an adequate assessment of risks under Article 5.1, as defined in Annex A of the SPS Agreement. The issue was not whether the evidence is general or specific, but whether it suffices to "permit the evaluation of the likelihood of entry, establishment or spread of, in this case, fire blight in Japan."[319] In fact, the Panel found that the evidence indicating the risk of transmission was negligible and *was* sufficient, both in qualitative and quantitative terms, and the Appellate Body agreed.

Japan had also argued that Article 5.7 was not limited to cases where little or no reliable evidence was available. In Japan's view, a situation where there was "unresolved uncertainty" (i.e., a good deal of old evidence) was covered, as well as one of "new uncertainty," where a new risk is discovered. Not so, said the Appellate Body. Article 5.7 is "triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence."[320]

Nor was it error for the Panel to rely on the "history of 200 year[s] of studies and practical experience." This reliance, according to the Appellate Body, was relevant to interpretation of Article 5.7 and based on evidence before the Panel. It did not matter whether this "history" was advanced by the United States or by the experts.

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317. *Id.* ¶ 173; *Japan – Apples* Panel Report, *supra* note 272, ¶¶ 8.219, 8.216, 8.220.
318. *Japan – Agricultural Products II* Appellate Body report, *supra* note 255, ¶ 89.
319. *Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 179.
320. *Id.* ¶ 184.

5. SPS Agreement, Article 5.1 – Risk Assessment[321]

The Panel and Appellate Body's consideration of Article 5.1 concerned several related issues arising under Article 5.1. Procedurally, Japan had objected to the Panel's consideration of information before the Panel available subsequent to Japan's risk assessment, known at the "1999 PRA" (for "preliminary risk assessment"). Substantively before the Panel, the United States had charged that Japan's risk assessment failed to "sufficiently evaluate the likelihood of entry, establishment or spread of fire blight, and (ii) this evaluation was not performed 'according to the SPS measures which might be applied.'"[322] The Panel had found the risk assessment to be insufficiently specific, because it did not "purport to relate exclusively to the introduction of the disease through apple fruit, but rather more generally, apparently, through any susceptible host/vector."[323] The risk assessment was also faulted for evaluating the probability of the spread of fire blight through the entry of apple fruit, and because it considered only the Japanese measure in place rather than other measures that "might" be applied.[324]

Article 5.1 – Assessment of Risk and Determination of the Appropriate Level of Protection – provides:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

"Risk assessment" is defined in the SPS Agreement, paragraph 4 of Annex A, as:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or Phytosanitary measures which might be applied, and of the associated biological and economic consequences . . . .

Based on this definition, the Appellate Body noted that in *Australia – Salmon*,[325] it had stated that a risk assessment under Article 5.1 must: 1) identify the relevant diseases; 2) "evaluate the likelihood of entry, establishment or spread of these diseases;" and 3) "evaluate the likelihood of entry . . . *according to the SPS measures*

321. *Id*. ¶¶ 189-216.

322. *Id*. ¶ 190.

323. *Japan – Apples* Panel Report, *supra* note 272, ¶ 8.271.

324. *Id.* ¶ 8.283.

325. WTO Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon*, WTO Doc. WT/DS18/AB/R (adopted Nov. 6, 1998).

which might be applied."[326]

Because identification was not at issue, the discussion centered on the second and third elements of this test, with the Panel having concluded that the 1999 PRA did not constitute a "risk assessment" because it satisfied neither of these elements. In regard to whether the evaluation is specific, *EC – Hormones* was relevant, since in that case the Appellate Body concluded that the EC's risk assessment was not sufficiently specific because it showed only the existence of a general risk of cancer, without addressing the "particular kind of risk [t]here at stake . . . "[327]

Similar logic was applicable here. "[T]he obligation to conduct an assessment of 'risk' is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of the Phytosanitary measure." The Panel had determined that the risk varied significantly depending on the specific host plant being evaluated. Thus, the Panel properly concluded that the 1999 PRA was not sufficiently specific. This result, the Appellate Body observed, would not dictate any particular methodology of risk assessment. Members are free, according to the Appellate Body, "to consider in their risk analysis multiple agents in relation to one disease, provided that the risk assessment attribute a likelihood of entry, establishment, or spread of the disease to each agent specifically."[328]

In terms of the requirement that the risk assessment consider a range of relevant measures (item 3, above), the Appellate Body agreed with the Panel that the phrase "which might be applied" should be understood to require more than the examination of the measure already in place. "[T]he evaluation contemplated in paragraph 4 of Annex A to the SPS Agreement should not be distorted by preconceived views on the nature and the content of the measure to be taken . . . ."[329] Because Japan in the 1999 PA had made no effort to assess the "relative effectiveness" of the various individual elements of the measure, but instead had treated them in combination, it is evident that Japan had conducted its analysis "in such a manner that *no* phytosanitary policy other than the regulatory scheme *already in place* was considered."[330] Under such circumstances, the Panel was correct in finding that Japan had not made a proper evaluation of the likelihood of entry "according to the SPS measures that might be applied."

Japan also lost on the question of subsequent evidence. Why? Because Japan couldn't identify any scientific evidence relied upon by the Panel published after the issuance of the 1999 risk assessment. Instead, the Panel focused primarily on the risk assessment itself. Under these circumstances, the Appellate Body considered that it need not decide this "hypothetical claim;" that is, whether it would have been proper for the Panel to rely on subsequent information. Thus, the Panel's

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326. *Id.* ¶ 121 (quoting *Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 196.

327. *Japan – Apples* Appellate Body, *supra* note 272, ¶ 199 (citing *EC - Hormones*, *supra* note 35, ¶ 200).

328. *Id.* ¶ 204.

329. *Id.* ¶ 208.

330. *Id.* ¶ 209.

conclusion that the Japanese measure is not "based on" a risk assessment, as required by Article 5.1, was affirmed.

6. Article 11, DSU – "Objective Assessment of the Matter[331]

Having rejected Japan's Article 11 challenge to the Panel's analysis under Article 5.1 because it was improperly pleaded, the Appellate Body considered Japan's Article 11 challenge as it related to the Panel's analysis under Article 2.2 ("sufficient scientific evidence") of the completion of the "pathway;" that is, whether fire blight could be transmitted from imported apples to plants in Japan. Japan had argued, *inter alia*, that the Panel made factual errors; concentrated on mature, symptomless apples; failed to properly take into account the precautionary principle; and ignored the fact that the risk as viewed by the experts was not simply theoretical.

Article 11 of the DSU requires the Panel to ". . . make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . ." The Appellate Body noted that in the first challenge to Panel fact-finding, *EC – Hormones*, the Appellate Body had identified the "duty to make an objective assessment of the facts [as], among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence."[332] In that case the Appellate Body also indicated that the panel, as trier of facts, had discretion regarding the "credibility and weight properly to be ascribed to . . . a given piece of evidence . . . ." This approach, the Appellate Body emphasized, has been followed consistently in subsequent cases. The Appellate Body reiterated that it did not second-guess the panel in its analysis of the evidence, and, in a characterization reminiscent of *Chevron*[333] (although applied here to appellate rather than to agency review), would not "base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached."[334]

The Appellate Body reviewed the relevant evidence, and essentially determined that the Panel's first challenged conclusion, that even the presence of infected or infested apples "would require the completion of an additional sequence of events which is considered unlikely,"[335] is within the Panel's "margin of discretion" in evaluating the relevant evidence. The Appellate Body reached a similar conclusion with regard to the Panel's apparent concentration on mature, symptomless apples (rather than infected apples), but chided the Panel for not being explicit: "Specifically, it might have been helpful had the Panel been more precise

331. *Id.* ¶¶ 217-22.

332. *EC-Hormones* Appellate Body Report, *supra* note 35, ¶ 133, *quoted in Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 221.

333. Chevron v. Natural Resources Defense Council, 468 U.S. 1227 (1984).

334. *EC – Asbestos* Appellate Body Report, ¶ 159, (quoting *U.S. – Wheat Gluten* Appellate Body Report, *supra* note 173, ¶ 151).

335. *Japan – Apples* Panel Report, *supra* note 272, ¶ 8.171(d).

about the scope of its factual analysis"[336] as well as regarding the respective responsibilities of Parties for providing proof of facts. The Panel was correct in assigning the burden of proving its allegation that "fire blight could be transmitted from an infected apple to the host plant" which Japan failed to do, providing evidence that was "essentially circumstantial or deemed unconvincing by the experts."[337]

Nor was it improper of the Panel to discount the expert's expression of caution. *EC – Hormones*, according to the Appellate Body, determined that the precautionary principle "had not yet attained 'authoritative formulation' outside the field of international environmental law"[338] despite its "relevance" to the SPS Agreement. The precautionary principle does not, however, "release Members from their WTO obligations and, as such, did not 'override the provisions of Articles 5.1 and 5.2 of the SPS Agreement.'"[339] In the instant case, the experts relied on by Japan – which the Panel did not ignore – had articulated concerns over the possible removal of all or most controls over imports. They did not speak to whether "the pathway for transmission of fire blight could be completed." Ultimately, this was a situation where Japan disagrees with the Panel's weighing of the evidence; however, according to the Appellate Body, the Panel did not exceed the bounds of its discretion.

Japan also had faulted the Panel for implicitly recognizing that imported apples could constitute a "real" risk for the transmission of fire blight by rejecting the United States' contentions that the risk was only "theoretical," while at the same time faulting Japan for failing to submit "sufficient scientific evidence" that the pathway could be completed, and concluding that the risk was negligible. No, said the Appellate Body. Article 5.1, according to the Appellate Body in *EC – Hormones*, Article 5.1 "does not address theoretical uncertainty, that is to say, 'uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects."[340] Scientific prudence on the part of the experts focused not on the negligible risk of transmission of fire blight through apples, but on "hypothetical" future changes in the Japanese regulatory environment. Therefore, the Panel acted consistently with its obligations under Article 11.

Commentary

While *Japan – Apples* didn't really break any new ground, it makes important statements regarding several procedural/pleading issues, and with regard to interpretation of the SPS Agreement, the Appellate Body reaffirmed its intention to afford the panels discretion in the weighing of evidence.

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336. *Japan – Apples* Appellate Body Report, *supra* note 272, ¶ 227.

337. *Id.* ¶ 213 (quoting *Japan – Apples* Panel Report, *supra* note 272, ¶ 8.167).

338. *Japan – Appellate Body Report, supra* note 272, ¶ 233 (quoting *EC-Hormones*, *supra* note 35, ¶ 123).

339. *Id.* ¶¶ 233, 125.

340. *Japan – Apples* Appellate Body Report, supra note 272, ¶ 241 (*quoting EC - Hormones*, *supra* note 35, ¶ 186).

1. Initial Pleadings Must be Precise at the Panel Level

While it is clear that the DSU contemplated notice pleading rather than requiring a lengthy and detailed statement of the issues raised, precision is important. Here, the United States challenged Japanese import measures on "apples," but became unhappy when the Panel essentially said "apples means all apples, not just mature, symptomless apples." The Appellate Body agreed. In this particular case, the lack of precision did not harm U.S. interests; the United States prevailed on all substantive issues. However, the risks of the Panel affirming the restrictive Japanese measure as it applied to immature, possibly infected and/or "oozing" apples was obviously higher. On the other hand, it seems unlikely that the proceeding would have been completed without Japan – or one of the experts – raising the issue of immature apples, particularly in light of the possibility, however remote, that immature apples, through accident or deliberate violation of U.S. export regulations, might end up in the export chain to Japan. Ultimately, the United States benefits from a decision that rejects the Japanese measures not only where applied to mature apples, but even where applied to immature apples.

2. Initial Pleadings Must be Precise at the Appellate Body Level

The Appellate Body's Working Procedures require that the Notice of Appeal include, *inter alia*, "the allegations of errors in the issues of law covered in the panel report . . . ."[341] There is a necessary balance, according to the Appellate Body, between the right to appeal and the right of appellees to receive due notice, particularly where the appellant is challenging whether under Article 11 of the DSU the Panel made an "objective assessment." The appellee is not required to infer from the Notice of Appeal that an Article 11 challenge – unique to the appellate process – is being lodged. In other words, if a Member wishes to challenge a panel decision, not only on substantive grounds under the specific provisions of the GATT or one of the other WTO agreements, but under Article 11, it should explicitly say that the challenge to the substantive provision also encompasses a challenge to Article 11, in the Notice of Appeal. In this instance, it seems likely that the Appellate Body would have rejected Japan's Article 11 argument as it applied to Article 5.1, just as the challenge was rejected under Article 2.2.

3. Trade Restrictive Measures under the SPS Agreement Will Continue to Receive Strict Scrutiny

Members' obligations under the delicate balance established in the SPS Agreement between the need for health and safety measures, and avoiding their use for protectionist purposes, are to be construed strictly. Sanitary and phytosanitary measures must be "based on scientific principles and . . . not maintained without

341. *Working Procedures*, *supra* note 16, art. 20(2)

sufficient scientific evidence." The evidence, to satisfy Article 2.2, should be good and solid, particularly where the information available to the Panel indicates that the risk of transmission of fire blight through imported apples is small. Similarly, provisional adoption of measures (Article 5.7) will only be permitted "where relevant scientific evidence is insufficient." "Insufficient" does not mean that the existing scientific evidence fails to demonstrate 100% certainty, since science almost never meets that standard. It means that little or no reliable evidence is available. Provisional measures are not justified, particularly in a case where there is two centuries' worth of research on fire blight, and the weight of that evidence indicates a negligible risk of transmission.

Under Article 5.1, there must be an assessment of risk before sanitary or phytosanitary measures can be imposed. That assessment may not be general but must be specific to the risk under consideration, in this instance transmission of fire blight through imported apples. It must consider not only the measures actually in place, but others that might be applied. The standard is high, and does not leave the Member with broad discretion as to the manner in which it accomplishes its risk assessment.

4. *Chevron*[342] is Not Without Influence on the Appellate Body

With very minor exceptions, the Appellate Body has approved the Panel's meticulous analysis, based on the information provided by the parties and by several experts. It has also reaffirmed the significant level of discretion afforded to the panels in determining the credibility and weight to be given to particular pieces of evidence. Whatever the shortcomings of Article 11 of the DSU as a standard of review may be, the Appellate Body here, as in *EC – Asbestos* is thinking, at least in part within the *Chevron* framework. The fact that the Appellate Body might have reached a different conclusion if weighing the evidence itself is not in itself grounds for finding an inconsistency with Article 11. Of course, this does not deal with the level of deference, or lack thereof, afforded by the panels under Article 11 to the Members' actions, particularly the expert administering authorities.

342. *Chevron*, *supra* note 333, 468 U.S. at 1227. *Chevron* stands generally for the proposition that a reviewing court (in the United States) should afford a high degree of deference to expert administrative agencies when reviewing their decisions, and avoid reversing such determinations where the determination is in accordance with law even if the reviewing court might have decided the issue differently if it had been undertaking a *de novo* review.